

**NEW AMERICAN COMMERCIAL
POLICY.**

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As Evidenced by Section 317 of GIPE-PUNE-007865
Tariff Act of 1922

BY

WALLACE McCLURE

Member of the Bar of Knoxville

" our commercial policy should hold an equal and impartial
hand; neither seeking nor granting exclusive favors or preferences
. . . ."
WASHINGTON, *Farewell Address*

SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS
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BY

WALLACE McCLURE

TO

MY FATHER

FROM WHOSE LIPS I LEARNED MY FIRST LESSONS IN DEMOCRACY

I DEDICATE

THIS APPLICATION OF ITS PRINCIPLES TO WORLD

AFFAIRS, BELIEVING THAT IDEALS

WHICH HE LEFT UNEXPRESSED

HERE FIND UTTERANCE

PREFATORY NOTE

The policy by which a country defines its attitude toward international trade is a subject too broad for monographic treatment. It includes the complex questions of high or low customs tariffs and of the operation of the mercantile marine, both of which are, in the United States, the subjects of widespread public controversy and constitute major planks in political party platforms. Its full consideration would involve inquiries into these matters, into the matter of shipping and harbor dues and into certain phases of internal taxation. The possible existence of direct or indirect bounties upon production or of differential railroad rates would be among the other circumstances included because of their effect upon business relations between countries.

There is one element in the aggregate national commercial policy which attracts comparatively little public notice but which, because it primarily and with especial directness affects the comity of international relationships, may without substantial inaccuracy be thought of as *the* external commercial policy of the country which maintains it. Its essential characteristic is the treatment accorded to the commerce of one outside country *in comparison with* the treatment which is accorded to others; it has its bases in agreements between countries as well as in statutes which they severally enact. The term "commercial policy" is used in this restricted sense in the present monograph, the object of which is both to describe such policy as it appears to exist in the United States at present and to make certain suggestions relating to future developments.

Many of the details of fact used in the following pages are subject to very frequent change. The years since the World War have witnessed an unprecedented array of alterations in tariff laws and commercial treaties, a process which still continues. Effort will be made until the latest practicable date before publication to take account of such changes as affect essential portions of the present study. Much of the illustrative material, however, has been taken from sources now a year or more old and which it is not feasible to bring up to date.

The writer welcomes this opportunity to express his very earnest thanks to the several kind friends who have labored unselfishly to combat the errors and inadequacies that so persistently cling to efforts like the present one.

KNOXVILLE, TENNESSEE, SEPTEMBER 1, 1923.

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¹ The literature of the special topic treated in the present monograph is very scanty.

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INTRODUCTION

The Tariff Act of 1922, effective September 22, sets forth certain principles and provides for certain practices that seem definitely to constitute a new commercial policy for the United States. This does not mean that the new act undertakes any sudden departure from tradition or that it points to a development that is not reasonably and naturally the result of the new environment in which old principles and old practices now find themselves. It does mean, however, that the existence of a new environment is definitely recognized and that the United States has entered upon the task of adapting the national policy to a consistent following out of old ideals through new instruments. Without a new engine the old train of development could not proceed farther.

The American political motto "Equal rights for all and special privileges for none" expresses the general policy that the United States has pursued toward international commerce. This country has generally accorded equal tariff treatment to the products of other nations and has usually sought no more and no less than a substantial equality for its products in all the markets of the world. Present-day opinion appears to proceed straightforward from the foundation of the past. In the course of an extended address to the Senate soon after the opening of the four months' debate on the Fordney tariff bill, Mr. Reed Smoot, of Utah, said:

In short, Senators, we would base the commercial policy of the United States upon the twin ideas of granting equal treat-

ment to all nations in the market of the United States, and of exacting equal treatment for the commerce of the United States in foreign markets. We do not believe that the United States should pursue a general policy of special bargains and special reciprocity treaties.

. . . . We stand for a simple, straightforward, friendly policy of equal treatment for all, with no discriminations against any country except as that country has first discriminated against us.¹

These statements had special reference to what has become Section 317 of the Tariff Act of 1922, the purpose of which is to empower the President to defend the American exporter² against discriminations in the markets of other countries. The means to be employed is the levy of what may most appropriately be called *defensive duties*, authorized by Presidential proclamation, upon products from countries that discriminate against this country's products. Such duties would be additional to the duties normally paid upon the commodities affected and would constitute a resort to the offensive as the most practicable means of defending the national position.

Obviously the most ordinary sense of consistency would require that a very strict observance of the rule against favoritism must guide the United States in its laws affecting the rights of other countries to enter the American market. The United States cannot present perfectly clean hands in this respect either historically or with regard to current practice. The record shows that there exist in the aggregate numerous instances of discriminations both in tariff laws and in the interpretation of treaties and that at times definite

¹ *Congressional Record*, vol. 62, pt. vi, 67th Congress, 2d Session, p. 5881, April 24, 1922.

² The American importer may be defended against foreign discriminatory export duties; but this may be regarded as a secondary purpose.

policies, looking to the adoption of systems of treaties based upon reciprocal favors or concessions that discriminated against third countries, have guided American commercial policy. The acid test of the new policy, in respect both to its novelty and to its genuineness, will be found in the attitude of the country toward dispensing with every relic of special privilege or concession in international commerce, even though the particular instance is, in itself, advantageous to the commerce of the United States.

Section 317 of the Tariff Act of 1922 at least lays the foundation for a policy of equality, of a more perfect and more unadulterated and hence a *new* equality, as compared with the practice of the past. But unless the building proceeds according to a plumb-line held true by a national sense of consistency and a national willingness to sacrifice lesser for greater advantages, even when cutting off the lesser ones hurts, the finished edifice will be lacking in real distinction.

PART ONE
THE PROVISION FOR DEFENSIVE DUTIES
IN THE TARIFF ACT OF 1922

CHAPTER I

ANALYSIS OF SECTION 317

I. TEXT AND SUMMARY

The full text of Section 317 of the Tariff Act of 1922 is as follows:

(a) That the President when he finds that the public interest will be served thereby shall by proclamation specify and declare new or additional duties as hereinafter provided upon articles wholly or in part the growth or product of any foreign country whenever he shall find as a fact that such country—

Imposes, directly or indirectly, upon the disposition in or transportation in transit through or reexportation from such country of any article wholly or in part the growth or product of the United States any unreasonable charge, exaction, regulation, or limitation which is not equally enforced upon the like articles of every foreign country;

Discriminates in fact against the commerce of the United States, directly or indirectly, by law or administrative regulation or practice, by or in respect to any customs, tonnage, or port duty, fee, charge, exaction, classification, regulation, condition, restriction, or prohibition, in such manner as to place the commerce of the United States at a disadvantage compared with the commerce of any foreign country.

(b) If at any time the President shall find it to be a fact that any foreign country has not only discriminated against the commerce of the United States, as aforesaid, but has, after the issuance of a proclamation as authorized in subdivision (a) of this section, maintained or increased its said discriminations against the commerce of the United States, the Presid-

ent is hereby authorized, if he deems it consistent with the interests of the United States, to issue a further proclamation directing that such articles of said country as he shall deem the public interests may require shall be excluded from importation into the United States.

(c) That any proclamation issued by the President under the authority of this section shall, if he deems it consistent with the interests of the United States, extend to the whole of any foreign country or may be confined to any subdivision or subdivisions thereof; and the President shall, whenever he deems the public interests require, suspend, revoke, supplement, or amend any such proclamation.

(d) Whenever the President shall find as a fact that any foreign country places any burdens upon the commerce of the United States by any of the unequal impositions or discriminations aforesaid, he shall, when he finds that the public interest will be served thereby, by proclamation specify and declare such new or additional rate or rates of duty as he shall determine will offset such burdens, not to exceed 50 per centum ad valorem or its equivalent, and on and after thirty days after the date of such proclamation there shall be levied, collected, and paid upon the articles enumerated in such proclamation when imported into the United States from such foreign country such new or additional rate or rates of duty; or, in case of articles declared subject to exclusion from importation into the United States under the provisions of subdivision (b) of this section, such articles shall be excluded from importation.

(e) Whenever the President shall find as a fact that any foreign country imposes any unequal imposition or discrimination as aforesaid upon the commerce of the United States, or that any benefits accrue or are likely to accrue to any industry in any foreign country by reason of any such imposition or discrimination imposed by any foreign country other than the foreign country in which such industry is located, and whenever the President shall determine that any new or additional

rate or rates of duty or any prohibition hereinbefore provided for do not effectively remove such imposition or discrimination and that any benefits from any such imposition or discrimination accrue or are likely to accrue to any industry in any foreign country, he shall, when he finds that the public interest will be served thereby, by proclamation specify and declare such new or additional rate or rates of duty upon the articles wholly or in part the growth or product of any such industry as he shall determine will offset such benefits, not to exceed 50 per centum ad valorem or its equivalent, upon importation from any foreign country into the United States of such articles and on and after thirty days after the date of any such proclamation such new or additional rate or rates of duty so specified and declared in such proclamation shall be levied, collected, and paid upon such articles.

(f) All articles imported contrary to the provisions of this section shall be forfeited to the United States and shall be liable to be seized, prosecuted, and condemned in like manner and under the same regulations, restrictions, and provisions as may from time to time be established for the recovery, collection, distribution, and remission of forfeitures to the United States by the several revenue laws. Whenever the provisions of this Act shall be applicable to importations into the United States of articles wholly or in part the growth or product of any foreign country, they shall be applicable thereto whether such articles are imported directly or indirectly.

(g) It shall be the duty of the United States Tariff Commission to ascertain and at all times to be informed whether any of the discriminations against the commerce of the United States enumerated in subdivisions (a), (b), and (e) of this section are practiced by any country; and if and when such discriminatory acts are disclosed, it shall be the duty of the commission to bring the matter to the attention of the President, together with recommendations.

(h) The Secretary of the Treasury with the approval of the President shall make such rules and regulations as are

necessary for the execution of such proclamations as the President may issue in accordance with the provisions of this section.

(i) That when used in this section the term "foreign country" shall mean any empire, country, dominion, colony, or protectorate, or any subdivision or subdivisions thereof (other than the United States and its possessions), within which separate tariff rates or separate regulations of commerce are enforced.¹

In briefer form the salient features of Section 317 may be thus summarized:

Whenever the President finds *as a fact* that any country—

(1) Imposes upon the disposition in, transportation through or re-exportation from its territory any unreasonable exaction upon any product of the United States which is not equally enforced upon similar products of every foreign country; or

(2) Discriminates against the commerce of the United States by law or administration with respect to import, export or other duties, regulations or restrictions in such a way as to place the commerce of the United States at a disadvantage compared with the commerce of any foreign country;—

and when he finds that the public interest will be served thereby; *he is directed* to proclaim new or additional duties, calculated to offset the unequal imposition upon American commerce, but not exceeding fifty per centum ad valorem, upon the importation of any or all of the products of the discriminating foreign country. If this procedure proves ineffective he may proclaim absolute prohibitions.

If an industry in a third country receives benefit as a

¹*Statutes of the United States of America Passed at the Second Session of the Sixty-seventh Congress, 1921-22, pt. i, ch. 356, pp. 858 et seq.; sec. 317, pp. 944 et seq.*

result of discriminations practiced by any country against the United States, the products of that industry are, moreover, liable to be subjected to additional import duties.

"Foreign country" is defined to mean: "Any empire, country, dominion, colony, or protectorate, or any subdivision . . . thereof . . ., within which separate tariff rates or separate regulations of commerce are enforced."

Even the most careful reading of Section 317, followed by a brief summarizing statement of its essential provisions, is not likely to make evident the full purport of its meaning. A survey that shall refer to related legislation, as well as to many facts of the existing commercial world, immediately appears to be an indispensable supplement to textual study. Questions in regard to the methods to be used in administering the section, to the definitions to be placed on expressions like "the public interest", "discrimination" and "in fact", when used in its text, and to the relation between Section 317 and other portions of the Act of which it is a part, are among those that come forward promptly, each seeking an answer. The following paragraphs represent an effort to discover the correct explanations.

2. THE AGENCY OF ADMINISTRATION

Turning back to the text of Section 317, it is noted that by subdivision (g) the duty is placed upon the United States Tariff Commission "to ascertain and at all times to be informed whether any of the discriminations against the commerce of the United States" referred to in the section, "are practiced by any country". In case discriminatory acts are disclosed it is the duty of the Commission "to bring the matter to the attention of the President, together with recommendations."

The Revenue Act of 1916, under which the Tariff Commission was created, provides—

That the commission shall have power to investigate the tariff relations between the United States and foreign countries, commercial treaties, preferential provisions, economic alliances, the effect of export bounties and preferential transportation rates, the volume of importations compared with domestic production and consumption, and conditions, causes, and effects relating to competition of foreign industries with those of the United States, including dumping and cost of production.¹

In response to this enumeration of investigatory functions the Tariff Commission had, prior to the passage of the Tariff Act of 1922, collected a large quantity of data upon the subject of discriminatory customs practices, much of which material it had published in voluminous handbooks for the use of Congress and the public. Since the Act became effective these investigations have been continued and directed to the specific problem of Section 317. A questionnaire was prepared and sent to more than a thousand American business men engaged in the export trade, the text of which was, in part, as follows:

. . . . have you reason to believe that any foreign country discriminates in any way, directly or indirectly, against American products in such a manner as to place your export trade in these products at a disadvantage in competition with similar or competing articles from other foreign countries? Describe fully the discrimination of which you complain.

Describe fully the effects of the discrimination. Does it exclude your American products, or only restrict their sales in the foreign market? In either case to what extent might you reasonably expect to extend your sales of the articles in question in that particular market if the discrimination were removed? State the facts showing the reasonableness of your estimate, basing it, if possible, on sales of your articles under

¹ *An Act to increase revenue, and for other purposes*, approved Sept. 8, 1916, sec. 704. The laws relating to the Commission were published by it in a separate pamphlet in 1922.

similar conditions in countries where there are no such discriminations against them.

State any other facts which in your opinion should be considered by the Commission as affecting equal treatment of American trade in foreign countries.

Information of a similar character has also been collected through agents in every country in the world¹ and indicates, as might have been expected, a prevailing equality of treatment; but it also contains evidence of numerous unequal impositions upon the commerce of the United States. These inequalities result not only from highly-developed national and imperial policies, but from a variety of incidental or even accidental practices. They are in some cases overt, in others more or less concealed by the letter or language of statutes and administrative decrees. Upon the Tariff Commission devolved the task of digesting available data upon the subject and of making appropriate recommendations to the President. During 1923 the Commission submitted reports covering discriminations in France, Finland and certain other countries.²

By Section 318 of the Tariff Act of 1922 the powers and functions of the Tariff Commission are enlarged with a view to the administration of the provisions of the act which set forth the Flexible Tariff Policy, of which policy Section 317, although distinct in itself, is a component part; no specific mention is made, however, of the finding of discriminations against American commerce. On October 7, 1922, the President signed the following Executive Order:

It is ordered, that all requests, applications, or petitions for action or relief under the provisions of Sections 315, 316, and 317 of Title III of the Tariff Act approved September 21,

¹ This information is available in the Foreign Tariff Files of the Department of Commerce.

² *The Journal of Commerce* (New York), Oct. 11, 1923.

1922, shall be filed with or referred to the United States Tariff Commission for consideration and for such investigation as shall be in accordance with law and the public interest, under rules and regulations to be prescribed by such Commission.¹

3. WHAT IS A "DISCRIMINATION"?

In a carefully prepared address upon the administrative features of the pending tariff bill, Senator Smoot explained at length the proposed Flexible Tariff Policy, reaching the conclusion that "the elastic tariff provisions provided effective protection against discriminations for American overseas commerce."²

The Tariff Commission, in formulating its policy and making its recommendations under Section 317, may be presumed to have laid down full and clear definitions of the expressions, contained in the law, which limit the application of the authorized defensive duties. Perhaps the most important problem arising in this connection, and certainly the immediately obvious one, is concerned with the meaning of the phrases "unreasonable charge, exaction, regulation, or limitation which is not equally enforced upon the like articles of every foreign country" and "discriminates in fact against the commerce of the United States . . . in such manner as to place the commerce of the United States at a disadvantage compared with the commerce of any foreign country." In other words, the definition of "discrimination", within the meaning of Section 317, is an essential question—and one not without difficulties. Experience has shown that an extensive margin exists between practices that are clearly consistent with strict equality of treatment and practices that are clearly discriminatory.

¹Executive Order (No. 3746) as officially published. In regard to the rules of procedure issued by the Tariff Commission, see *infra*, subdivision 10, following (b).

²*Congressional Record*, vol. 62, pt. vi, 67th Congress, 2d Session, p. 5879, April 24, 1922.

In the statement made by the House Managers to accompany the report of the Conference Committee on the tariff bills of the House and the Senate, occurs the following:

. . . . The Senate amendment inserts a new section giving the President discretionary powers to impose additional duties or prohibition upon imports from any country discriminating against the overseas commerce of the United States.

This section follows the precedent established by a maximum and minimum provision of the Payne-Aldrich Act, which had for its purpose the obtaining of equality of treatment for American overseas commerce. The Senate amendment, however, is more flexible than the provision of the Payne-Aldrich Act and is *designed to reach every form of discrimination, direct or indirect, whereby American commerce is placed at a disadvantage as compared with the commerce of any foreign country.*³

Attention is called particularly to the statement that the language employed "is designed to reach every form of discrimination, direct or indirect." It was evidently expected that a very broad and inclusive definition of "discrimination" would be used by the administrative officers of the Government in interpreting and enforcing the law.

This impression is confirmed by an examination of the text of the Act. In subdivision (a) the additional duties are made applicable when another country imposes any unreasonable charge on a product of this country *which is not equally enforced* upon the like articles of every foreign country; and also when another country *discriminates in fact* against the commerce of the United States.

Such language seems to indicate that legalistic distinctions of all kinds are to be ignored and that the defensive

³ Italics not in original. *Congressional Record*, vol. 62, pt. xii, p. 12490, 67th Congress, 2d Session. The use of the word "overseas" is evidently accidental as the section applies to all commerce with other countries.

duties are to be applicable whenever a different and larger burden is placed on American as compared with any other external commerce. "In fact" doubtless possesses, however, its familiar connotation of "material", "real" or "actual", as distinguished from "theoretical" or "as a matter of law". The use of the words suggests the intention of the framers of the Section to confine its application to the service of practical utility, that is, to obtain for American exporters substantial equality of treatment, omitting action in regard to practices that, though discriminatory on paper, do not interfere with the practical flow of trade. Somewhat similar is the purpose of stipulating that a discriminatory practice is not to be actionable unless it is "unreasonable".¹ There are certain practices which, though clearly discriminatory, are commonly accepted as justifiable because of the existence of peculiar or unusual circumstances. A good example in point is the freedom of trade until recently permitted between the corner of Switzerland in which Geneva is located and the adjoining districts of France. The arrangement for this overleaping of political frontiers originated in the time of Napoleon and, in eliminating the arbitrary political boundaries that divide a single economic area, appears to have proved very acceptable to both French and Swiss² inhabitants. No one would contend that, because of it, Switzerland and France have unreasonably discriminated against the United States in favor of each other.³

¹In the Payne-Aldrich Act occurred the similar qualifying word "unduly" (sec. 2).

²A proposal to terminate this arrangement, insisted upon by France, received an emphatic negative in a recent Swiss referendum. However, it was, in fact terminated by France, giving rise to a serious dispute that may be submitted to arbitration.

³As will be shown in ch. xi, border trade is commonly excepted from the application of the most-favored-nation clause in European commercial treaties.

Inequalities that would otherwise be unreasonable may be considered permissible for reasons such as the requirements of sanitation or public safety.

The expression "unequal imposition or discrimination" occurs several times in Section 317, however, obviously with intent ordinarily to use the terms synonymously and to make any "unequal imposition" a "discrimination". That an exact interpretation of "discrimination" is the intention of the Section is suggested, moreover, by the abandonment in its favor of provisions contained in the original House Bill authorizing practices which would themselves have been discriminatory in operation. The House Managers, continuing the passage quoted above, said:

Sections 301 and 303 of the House bill provide for special negotiations whereby exclusive concessions may be given in the American tariff in return for special concessions from foreign countries. Section 302 of the House bill places in the hands of the President power to penalize the commerce of any foreign country which imposes on its imports, including those coming from the United States, duties which he deems to be "higher and reciprocally unequal and unreasonable." Under the Senate amendment, however, the United States offers, under its tariff, equality of treatment to all nations, and at the same time insists that foreign nations grant to our external commerce equality of treatment; and the House recedes with an amendment rewriting subdivisions (e) and (f) and making further clerical changes.¹

Finally the breadth of meaning of *discrimination* is established by the definition of "foreign country" as "any empire, country, dominion, colony, or protectorate, or any subdivision . . . thereof . . . , within which separate tariff rates

¹ *Congressional Record*, vol. 62, pt. xii, p. 12490, 67th Congress, 2d Session. The sections of the House Bill referred to are discussed in subdivision 18(e). Text, Appendix 7.

or separate regulations of commerce are enforced." The language of this definition seems to leave no doubt that an *unequal imposition* upon the commerce of the United States when compared with impositions upon the commerce of a country's own colonies, if such colonies possess separate tariff laws or regulations of commerce, is a discrimination within the terms of Section 317.

4. EXAMPLES OF DISCRIMINATORY PRACTICES AND POLICIES

An examination of the present world commercial situation reveals numerous and varied discriminations, many of which seriously interfere with the commerce of the United States.

First, there is the existence, just referred to, of preferences between parts of an Empire. For instance, Canada accords to Great Britain and Great Britain accords to Canada treatment in respect to import duties that is more favorable than the corresponding treatment which either gives to the United States. Each of these two countries has its wholly separate customs laws and, although they are the best customers of the United States and the United States is one of the best customers of each of them, each imposes upon imports from the United States duties that are unequal to and heavier than the duties which it places upon similar goods imported from the other. As already indicated, such treatment constitutes a discrimination against the United States. The same is true in the case of the preferential export duties which certain colonies grant to the mother country.¹

Second, there are countries, notably France, which have enacted double-column schedules of import duties. The lower schedule commonly represents the rates which the tariff policy and budgetary needs of the country really require. The higher schedule is commonly expected to be

¹ See ch. vii for further discussion of the subjects of this and the two following paragraphs.

used for bargaining purposes and as a defense or threat against countries which do not grant their lowest rates. Such is the case with France, which, notwithstanding the fact that its products receive equality of treatment in the American market, imposes maximum rates upon numerous products from this country. There is no question as to the liability of France to the imposition of additional duties under Section 317. Countries having this so-called maximum-minimum tariff system commonly bind themselves by treaty to accord all or portions of their minimum rates.

Third, there are countries, notably Switzerland and pre-war Germany,¹ which have developed double-schedule tariff systems upon a plan substantially different from that just described. Their tariff laws as enacted by their legislatures contain one uniform schedule of rates; but, by entering into treaties providing on the one hand for lower rates and on the other hand for most-favored-nation treatment, they have gradually constructed what is in effect a system not dissimilar, with reference to the present discussion, to the maximum-minimum arrangement. The "general-conventional" system may be just as discriminatory under the terms of Section 317 as is the French practice. In either case the lowest duties could be granted to another country either freely or in return for reciprocal favors or concessions. There appears to be nothing in the language of Section 317 which forms the basis of any distinction as to its application between free favors and favors accorded for a consideration. Presumably, therefore, its defensive duties are applicable to discriminations against the United States resulting from either sort of preference to third countries.²

¹ Neither the German nor Swiss system discriminates against the United States. The situation in certain countries which came into existence as a result of the World War could, however, be appropriately examined in this connection.

² In this connection the debate in the Senate on Section 317 should,

Fourth, there are countries which have entered into one or more reciprocity treaties with other countries for the exchange of favors or concessions which are not generalized, that is, are not accorded to countries other than the two between which the particular reciprocity treaty is in force. An interesting example is Haiti, which has a single reciprocity treaty—with France—under the terms of which, in return for French minimum duties for certain of its products, it accords substantial special reductions to numerous goods of French origin and heavy reductions to French liquors.¹ American goods which compete with those of France in the market of Haiti are undoubtedly placed at a disadvantage by the existence of this arrangement, which must be assumed to constitute a discrimination against the United States and so to render Haiti liable to the enforcement of the defensive duty provision of Section 317.

be carefully read. See *infra*, ch. ii. While not unthinkable, it appears hardly possible under the language of the Act that an exchange of exclusive favors under a reciprocity treaty could be regarded as a not *unreasonable* discrimination. Such an interpretation would be largely nullifying. But the traditional policy of the United States has been to regard exclusive favors granted in exchange for reciprocal concessions as in a different category from such favors when granted freely. This subject and its bearing upon the policy expressed in Section 317 are treated in ch. v. See, however, ch. viii.

An editorial entitled "Tariff Folly" in the *New York Journal of Commerce*, June 29, 1923, contains the following paragraph:

"Outgivings from Washington continue to dwell at length upon the question of alleged tariff discrimination against this country. It will be recalled that the framers of the present Tariff act, probably anticipating that that measure would stimulate retaliatory action on the part of foreign countries, inserted provisions to the effect that if any country granted a third nation more favorable tariff treatment than it does us our rates on the products of such country should be greatly enhanced. Apparently the fact never occurred to these tariff-mad solons that such an offending nation might be receiving much more favorable treatment from another country than from this."

¹ Convention of January 30, 1907. Text: *British and Foreign State Papers*, vol. 100, pp. 911 *et seq.* In regard to the Haitian preference for American rope, see *infra*, subdivision 47.

Finally, it is necessary to consider a large number of minor provisions of law and incidental practices that result in unequal burdens to American commerce. From time to time many little ways of favoritism crop out, often not even intimated by the text of the law. A thing so intangible as an unofficial act of a customs officer which would result in the delay of goods from a particular country, while hastening the passage through the customs house of the goods of a rival country, might conceivably be of genuine importance where competition is close or the market insufficient for two cargoes.¹ Under such circumstances every little advantage counts in making sales. Some instances of concealed and other miscellaneous inequalities may appropriately be examined:

(a) Referring to the discriminations against American commerce which Section 317 was designed to combat, Mr. Smoot, in his above-quoted address to the Senate, mentioned the practice of certain countries,

giving a separate classification to and levying a higher rate upon cottonseed oil than upon olive, palm, or other competing oils, or . . . so adjusting their automobile duties that those types of cars which we export are subject to the highest rates.²

This practice is one of long standing. It was the cause of

¹ In one of the territories administered under mandate of the League of Nations local merchants are said to have complained that whenever an invoice covering goods from the mandatory country was presented the declared valuation was almost always accepted, but that when invoices covering foreign, especially American, goods were presented the valuation was almost invariably questioned. Even when the valuation was not increased, the *delay* caused the importer was often sufficient to permit his competitor importing goods from the mandatory country to have outsold him; moreover, that while the customs officials granted every facility to the importers of goods from the mandatory country, they placed every possible hindrance in the way of the importer of American goods.

² *Congressional Record*, vol. 62, pt. vi, 67th Congress, 2d Session, p. 5879.

much diplomatic correspondence when, following the enactment of the maximum-minimum provision of the Tariff Act of 1909, serious effort was made to obtain for cottonseed oil, a distinctively American product, a parity of treatment with edible oils ordinarily originating in other countries. Italy at the present time, notwithstanding its treaty assurance of most-favored-nation treatment to American products,¹ imposes a higher duty upon cottonseed oil than upon other oils which are used for identical purposes, but which are not important exports of the United States. It is probable that the resulting unequal burden upon the American product is a discrimination within the meaning of Section 317. In other words, the competitive use to which a product is put, rather than its name and extractive source, would seem, within narrow limits and in perfectly clear cases, to be the decisive factor in respect to the operation of the defensive duties. Otherwise, ingenious refinements in tariff nomenclature might entirely defeat the purpose of the Section.

(b) A more debatable case is found in the practice of levying especially high duties upon products that are more important exports from the United States than from other countries but which do not compete with other products of a similar variety commonly originating elsewhere than in the United States. A case in point was furnished when Italy, in 1921, increased its import duty upon typewriters from seventy-five to four hundred lire gold per quintal. Reverting to the preceding paragraph, an intermediate example would result if, instead of differentiating between cottonseed and similar oils, all such oils were highly taxed and oil-bearing seeds and nuts were admitted freely or at low rates of duty. The invocation of Section 317 with respect to these practices seems improbable, though the one is and the other would be, in a sense, discriminatory against the commerce of the United States.

¹Treaty of Feb. 26, 1871, arts. vi and xxiv.

(c) Still another variation of what seems to be the common principle of the preceding examples is found where a product of the United States is dutiable at higher rates than the same product of another country differing slightly in process of manufacture or in constituent elements. The butter content of condensed milk manufactured in the United States and sold abroad is normally seven and eight-tenths per centum. The British Guiana Customs Duties Ordinance, 1922, inaugurated a drastic increase in the duty on condensed milk containing less than ten per centum of butter fat. Italy levies a tax of sixteen lire gold per quintal upon natural vaseline and thirty lire gold upon vaseline containing paraffine—a distinction which appears to affect adversely the importation of vaseline from the United States. Recent reports from another country have given account of a change in classification, as a result of which a certain brand of American-made hats appears to be subject to higher duties than similar hats of different makes, from whatever place originating. Whether or not these unequal burdens are discriminations within the meaning of Section 317 probably depends on whether they are *bona fide* regulations for the promotion of health, the avoidance of adulteration and the correction of erroneous classifications on the one hand or, on the other hand, instances of disguised favoritism. The determination of this question will obviously be difficult in many cases.

(d) It is a common practice among commercial nations to include, for the purpose of making assessments for *ad-valorem* duties, the cost of transportation. This practice results in unequal impositions upon the commerce of more remote as compared with nearby countries. Similarly, the packing in which goods are contained is commonly dutiable and long-distance shipments, which require heavier packing, are consequently subjected to added burdens. The compara-

tively isolated location of the United States renders its commerce peculiarly vulnerable to these inequalities. This country itself levies duties upon packing, however, and the inclusion in valuation of such items as freight is a long-accepted practice which is recognized in at least one international convention—the final act of the Conference of Berlin as amended at Brussels in 1890. Moreover, the official valuations for the Chinese tariff have been fixed by the international commission, upon which the United States was represented, on the basis of the values of goods delivered at Shanghai. These two examples of unequal burdens could hardly be considered unreasonable discriminations by the American Government. It is interesting to note, however, that Switzerland, which is able to import automobiles brought in by their own power from France and Italy, was recently induced to lower its duties upon the heavy crating necessary for automobiles shipped overseas from the United States.¹

(e) Specific duties are collected by La Luz and Las Palmas, Canary Islands, on all merchandise entering their ports, at rates varying according to zones of origin. The first zone consists of Spain and its possessions; the second of the remaining ports of Europe, the Mediterranean Sea and part of the Atlantic coast of Africa; the third of the remainder of the world. The products of the United States thus pay the highest rates: whether they are discriminated against within the meaning of Section 317 forms a nice question with the chances of decision apparently favoring the negative.

(f) The parcel-post regulations of Venezuela require the collection of a fee of five cents for handling each package brought in from foreign countries except the United States,

¹This was before the enactment of Section 317.

with respect to which the corresponding duty is thirty cents. This appears to be a palpable discrimination against the latter country.

(g) In certain countries—particularly in Central Europe—the emergencies of the war and reconstruction periods have developed regulations forbidding the importation or exportation, except under license, of the commodities named in extensive lists. Agreements to license the exchange of fixed quotas or “contingents” of specified commodities have been concluded between countries. Where goods cannot cross the frontier except under license, the grant of which may be left to the discretion of administrative officials, opportunities for favoritism are obviously many. Other such opportunities may arise in the determination of limited quotas of goods for competing states. There is evidence that American commerce has suffered some detriment in this way, but such cases are difficult to prove. They seem undoubtedly discriminatory.

(h) The *Comisión Exportadora de Yucatán* is an official branch of the socialist government of that state, which has a complete monopoly of the production and marketing of Mexican sisal (henequen). A recent report to the *Comisión*, presented by its attorney, contained this statement:

Since it is our aim to develop the consumption of our sisal hemp, our institution has undertaken to facilitate all the operations carried through in Europe, one of the many facilities afforded being that of assigning a lower price than the one quoted in the United States, taking into consideration the greater cost of transportation of the merchandise, there being no doubt that if, to the price obtainable in the United States, we should add the excess rate of freight for transportation to Europe, we would be placed in an unfavorable position in competing with the other fibers sent there.¹

¹Translated from pamphlet: *Informe presentado ante el H. Consejo*

In view of the recent immense progress of state socialism in certain important countries, the question whether a practice of the sort described is a discrimination, within the meaning of Section 317, seems of great potential moment.

5. THE TERM "FOREIGN COUNTRY"

Brief reference has already been made to the definition of "foreign country" contained in subdivision (i) of Section 317, and its connection with existing systems of intra-imperial preference has been pointed out. As the possible basis of an attack upon these systems its importance can hardly be over-estimated. As a statement clearly pointing out the political groups and geographical areas that may be adjudged to "discriminate" within the meaning of Section 317, it forms a necessary part of the law. According to this definition any areas "within which separate tariff rates or separate regulations of commerce are enforced" is a *country*, foreign to every other, within the meaning of subdivision (a) and other portions of Section 317. Political sovereignty and political dependence are alike ruled out of consideration and two or more sovereign states united into a customs union would become a single country so far as Section 317 is concerned. Such would seem inevitably to be the implication of defining "foreign country" as "any empire, country, dominion, colony, or protectorate" where there are rates or regulations not shared with other areas. "The United States and its possessions" are specifically excepted from the definition, thus emphasizing its application to every other portion of the world. If, therefore, any such area discriminates against the products of the United States, the additional duties provided for by Section 317 become applicable to its products entering the United States.

Directivo de la Comisión Exportadora de Yucatán por Tomas Castellanos Acevedo, como apoderado de dicha Institución y con motivo de la terminación del primer año de la existencia de ésta. Imp. y Lit. Gamboa Guzmán 58-503. Mérida, Yuc. Méx., 1922.

The Philippines, Guam, American Samoa and the Virgin Islands of the United States, each having its own customs laws, are separate and distinct countries within the meaning of "country" which the Congress has accepted for use in connection with the policy of the United States pursuant to Section 317.¹ The fact that American possessions are expressly excepted out of the definition of foreign country, and so exempted from the possible application of the additional duties of Section 317, does not alter this fact.

The immediate purpose of the inclusive definition of foreign country was, as has already been intimated, to render the provisions of Section 317 available against the comprehensive systems of colonial or, more broadly, intra-imperial preferences that have developed not only in the British Empire, but, to greater or less extent, among most of the colonial powers of the world. The United States itself, so far as its few colonies are concerned, is an extreme example. France, Italy, Japan, Spain and Portugal all present instances of favoritism. Not only between colony and the mother country, but between colony and colony, preferences have grown up, sometimes by mutual consent or by free gift on the part of the enacting parliaments, sometimes as a result of formal agreement between contracting portions of the empire.

The practice is condemned by many publicists as out of accord with modern conceptions of fairness, as expressed in the ideal of equal rights for all under the operation of any given tariff law. Tariff autonomy, they argue, should carry with it the full implications and responsibilities of tariff sovereignty. Other commentators are equally ardent in their defense of a system which maintains equality against all outside nations, but are ready to justify any practice

¹For further discussion of American colonial tariffs, see ch. vi.

within an empire that is satisfactory to the empire itself, holding it to be of no concern to the rest of the world.

The Congress of the United States has, in the enactment of subdivision (i), placed the seal of its approval upon the former contention.¹

6. SCOPE OF PRESIDENTIAL POWERS

The wide range of action accorded to the President under Section 317 is noteworthy. He may take a certain kind of goods coming from a discriminating country off the free list and subject it to a fifty per centum ad valorem duty and, if the discrimination is persisted in, he may exclude such goods from entry into the United States. This is not only true of any one tariff item but it is true of all classes of commodities. If he finds a ten per centum duty, or any other duty not exceeding fifty per centum, to be sufficient for his purpose, he may proclaim such duty and make it effective in addition to any duty that may already be imposed by law. He may levy different additional duties upon the various commodities from the offending country. He may, under certain circumstances, confine these additional duties to products of a part of a country. Thus, if one of the States of Brazil should levy a discriminating export duty on coffee going to the United States, the defensive duty could be confined to coffee or other products coming from that state and need not apply to exports from the whole of Brazil. Or, if Prussia, under a régime such as obtained before the lines were taken over by the Reich,² should impose a discriminating freight rate on American goods in transit over its state railways, the President could make the defensive duty applicable to one or more Prussian products and permit like products from the remainder of Germany to come in as before.

¹The Congress has not, however, repealed the statutes providing for American intra-imperial preferences.

²See *Commerce Reports*, March 3, 1924, p. 596.

The President must, however, before imposing an additional duty, ascertain as a fact that an unreasonable discrimination exists, he must find that the public interest will be served by the added duty, he must undertake to measure the amount of additional duty necessary to offset the burden of the discrimination and he must give thirty days' notice before making the additional duty effective. Excepting the last, these limitations upon the exercise of the functions of the President, made mandatory by the terms of Section 317, are such as really to enlarge his powers. They dissolve the command of the Congress into an authorization to impose defensive duties; for such indefinite terms as "unreasonable" and "public interest" simply make the administration of the Section a matter of Presidential discretion.

7. ADDITIONAL DUTIES AND THE PUBLIC INTEREST

The question as to whether, in the event of a particular discrimination against American commerce, "the public interest will be served" by the imposition of the additional duties is one that involves several considerations. An additional duty would not only discourage such trade as may have existed with the offending country, with consequent loss to American exporters, but it would be likely also, if the discriminating country was an important source of supply, to increase the cost of the commodities affected to the American consumer. Changes in tariff rates inevitably disturb business conditions; the laudable purpose of defending the nation against foreign discriminations would not alter this fact. Moreover the country against which the defensive duties were directed would almost certainly consider them unjustifiable; their use would consequently complicate international relations. In some instances, indeed, their imposition might violate treaties.¹ It is, of course, unthink-

¹For further discussion see ch. iii.

able that any honorable person could deem as in the public interest an act in violation of a solemn national agreement, and the possibility of such a result brings into strong relief the importance of the requirement that the defensive duties, when levied at all, must be in the public interest.

On the other hand the considerations just adverted to ought not to be allowed to obscure the interest of the entire country in obtaining equality of treatment for exports of American products.

8. PROHIBITIONS AND THE PUBLIC INTEREST

An exceedingly nice question, and one closely connected with the general interests of the United States, seems likely to arise in the event of a prohibition of importations under Section 317. Exclusion, it must be remembered, is not to take place unless the imposition of additional duties fails to bring about the removal of the discrimination at which it is aimed. A duty of fifty per centum is a high duty. It might easily be prohibitive in itself. But unless imposed upon articles on the free list, it would be a high duty added to a duty already presumably considered protective.¹ There would seem to be, therefore, no great opportunity for the invocation of absolute prohibition. However, it is possible that a discriminating country may produce so cheaply a commodity which is of importance in its export trade to the United States as to be able to sell it at a profit notwithstanding a fifty per centum additional duty.² A country having a monopoly in the production of such an article would, of course, irrespective of cost of production, be in a

¹The Tariff Act of 1922 is, as everyone knows, framed to achieve a policy of high protection. Of course there may be isolated instances of non-protective duties.

²The anti-dumping provisions of Title II of the Emergency Tariff Act of May 27, 1921 (not repealed by Tariff Act of 1922—see Sec. 643) would probably cover most such cases.

favorable position from this point of view; but, if the article were of importance to the United States, there would be doubt whether its exclusion would be consistent with this country's interests.

A discriminating country against which an additional duty or prohibition is proclaimed may, of course, retaliate with a still more flagrant discrimination. A tariff war of greater or less seriousness would then be in existence. Such "wars" are destructive of commerce and business interests generally and seldom result in any compensating advantage to either country. Moreover the issue is usually uncertain; a country can not look with assurance upon its general superiority in economic strength as a guarantee of victory. Extensive use of the authority of Section 317 to prohibit the importation of goods from other countries does not, on the whole, seem probable.

9. DISCRIMINATIONS THAT BENEFIT INDUSTRIES OF A THIRD COUNTRY

If the Federated Malay States produce so large a proportion of the world's supply of first-class tin ore as to have a partial monopoly, and if their government imposes a differential export duty upon that product, levying a higher duty on tin ore exported to the United States than, say, to Great Britain or Australia, the industries of the latter countries which use tin ore as a raw material would have, or would be likely to have, an advantage over similar industries in the United States.

The authors of Section 317 undertook to provide, in subdivision (e), a remedy for such discriminatory practices. By the terms of subdivision (e) the President, whenever he finds that "any new or additional . . . rates of duty or any prohibition" already provided for in the Section, "do not effectively remove such imposition or discrimination", is directed, "when he finds that the public interest will be

served thereby", to levy new or additional duties, sufficient to offset the benefits, upon articles wholly or in part the product of the benefited industry in the preferred third country. To follow the illustration, the President could levy additional duties upon the entry into the United States of articles manufactured in Great Britain or Australia out of tin ore imported from the Federated Malay States. The limitation of fifty per centum, and the other limitations upon the imposition of the defensive duties in general, are continued in subdivision (e). Its enforcement would be analogous to the imposition of a countervailing duty in order to equalize the special advantage of the particular foreign industry. American protective tariff laws have for a long time provided that offsetting duties shall be added to the regular import duties upon goods the exportation of which is stimulated by bounty or grant.¹ The application of subdivision (e), while having the similar purpose of defending American industries,² would usually have also the larger purpose of attempting to obtain for the United States a portion of the world's limited supply of essential raw materials on equal terms with any other country.

Another example of discrimination that would be likely to accrue to the advantage of an industry in a third country might be found in the event that a country, through which a raw product of a fourth country must pass to reach a sea-

¹Tariff Act of 1922, sec. 303; Tariff Act of 1913, sec. iv, E; Tariff Act of 1909, sec. vi. The 1922 act specifies manufacture and production bounties; the former acts referred to export bounties only. See also Sections 203 and 204 of the Act of May 27, 1921, in the Anti-dumping Act portion of the emergency tariff law.

²As industries which are already in existence are getting raw materials from some source, domestic or foreign, the levy, under subdivision (e), of new or additional duties upon competing manufactured products from other countries might result in unwarranted protection in the home market. Such incidental results are to be expected, of course, in any application of Section 317.

port, should charge higher transit dues, or higher freight rates on state-owned railways, upon such product when destined for the United States than when destined for some other foreign country.¹

Differential import duties may also, apparently, become an element of advantage accruing to industries located in third countries. The fact that France imposes a lower duty upon canned salmon from Canada than upon the same article from the United States is certainly beneficial to the canned salmon industry of Canada. The preference largely eliminates competition by American canners in the French market. However, it is difficult to see how this competitive advantage in the French market would be lessened by imposing additional duties upon the Canadian product entering the American market. Hence the logical possibility of placing additional duties upon the products of countries that enjoy preferential advantages in the markets of third countries seems of little practical importance.²

A somewhat different situation, however, is presented by a second example: Country A imports from the United States raw material, say crude dyestuffs, for manufacture into intermediates and re-exportation to the United States for conversion into finished products. It likewise imports crudes from Country B, which also receives back the intermediates for completion into finished dyes. If Country A makes the importation of crude dyestuffs from the United States dutiable and remits or reduces the duty on such dyestuffs from Country B, the producers of the finished product in Country B would be likely to obtain their intermediates at lower prices than their competitors in the United States. It is conceivable that this advantage might enable them to

¹ Bolivia, one of the chief tin-producing countries, has no seaport.

² There is a broad field for speculation here, but to traverse it would seem more tedious than useful.

undersell American producers even in the American market. The imposition by the United States of additional duties upon finished dyestuffs from Country B would be consistent with a policy of protecting home industry. The probability that such a step would result in a larger market for American crude dyestuffs is remote; but possibly there might follow a reduction of demand for Country A's intermediates sufficient to induce that country to abolish the discriminating duty.¹ One of the problems here, as in the instance of the differential export duties, is that of obtaining unfinished materials at prices that will enable American manufacturers to compete successfully in third countries with their rivals in the countries which are accorded preferential duties.

It is very improbable that the additional duties of subdivision (e) could be legally levied upon products of the industries of countries with which the United States has entered into treaties containing a most-favored-nation clause governing imports.

10. SECTION 317 AS A FACTOR IN THE FLEXIBLE-TARIFF POLICY

No analysis of Section 317 should fail to mention its setting in connection with sections 315 and 316 of the tariff law. The three sections, each one of which incorporates a separate policy, with a definite historical background, together constitute the principal new and distinctive feature of the Tariff Act, of 1922.² In them President Harding achieved the *Flexible Tariff* which he so earnestly sought in his address to the Congress on December 6, 1921, and so emphatically commended in these remarks on the occasion of the signing of the Act: ". . . if we succeed in making

¹This possibility involves too many details for discussion here. It seems exceedingly unlikely that such a case will arise in practice.

²The policy expressed in Sec. 317 may likewise be distinguished from the connected policies expressed in the other two.

effective the elastic provisions of the measure it will make the greatest contribution to tariff-making in the nation's history."¹

(a) *Section 315*

The essential portion of Section 315 is found in subdivision (a), as follows:

That in order to regulate the foreign commerce of the United States and to put into force and effect the policy of the Congress by this Act intended, whenever the President, upon investigation of the differences in costs of production of articles wholly or in part the growth or product of the United States and of like or similar articles wholly or in part the growth or product of competing foreign countries, shall find it thereby shown that the duties fixed in this Act do not equalize the said differences in costs of production in the United States and the principal competing country he shall, by such investigation, ascertain said differences and determine and proclaim the changes in classifications or increases or decreases in any rate of duty provided in this Act shown by said ascertained differences in such costs of production necessary to equalize the same.²

The alterations in duties provided for by Section 315 are not applicable to articles included in the free list and are not based, as in Section 317, upon the value of the article. The total increase or decrease must "not exceed 50 per centum of the rates specified" in the act. Thirty days' notice is to be given before bringing changes into effect.

If the President finds that the provisions of subdivision (a) are inadequate "to regulate the foreign commerce of the United States and to put into force and effect the policy

¹As quoted in a special dispatch to the *New York Times*, published Sept. 22, 1922, p. 1, column 1.

²*Statutes of the United States of America Passed at the Second Session of the Sixty-seventh Congress, 1921-1922*, pt. 1, pp. 941 *et seq.* The full text of Section 315 is given in Appendix 8.

of the Congress" set forth in the act, he must make such finding public. The ad valorem duty upon the article shall, when his proclamation becomes effective,¹ be based no longer upon its ordinary invoice value but upon its "American selling price".² The rate based upon the American selling price must be fixed by the President and must be just sufficient to equalize the differences in cost of production at home and abroad, subject to the limitation that it shall not be greater than the rate specified in the Act, nor less than such rate by more than fifty per centum thereof. This is an interesting survival of the principle of American Valuation, the general application of which to articles subject to ad valorem duties was provided for in the tariff bill as it passed the House.³

¹Fifteen days' notice is provided for.

²The American selling price of any article manufactured or produced in the United States shall be the price, including the cost of all containers and coverings of whatever nature and all other costs, charges, and expenses incident to placing the merchandise in condition packed ready for delivery, at which such article is freely offered for sale to all purchasers in the principal market of the United States, in the ordinary course of trade and in the usual wholesale quantities in such market, or the price that the manufacturer, producer, or owner would have received or was willing to receive for such merchandise when sold in the ordinary course of trade and in the usual wholesale quantities, at the time of exportation of the imported article.—Sec. 402, subdiv. (f); *op. cit.*, p. 950.

³In case there is no similar or competitive article produced in the United States the American selling price could not be determined. In that event the value for the calculation of the ad valorem duty remains the "foreign value" or the "export value", which ever is higher. If neither of these can be ascertained satisfactorily, then the value for such calculation is the "United States value", and if this cannot be satisfactorily ascertained, then the "cost of production".—Sec. 402 (a).

"Foreign value" is the price at which articles are freely offered for sale in the principal markets of the country of origin at the time of export.—Sec. 402 (b).

"Export value" is the price at which such articles are freely offered for sale for export to the United States.—Sec. 402 (c).

"United States value" is the price at which such articles imported from

In ascertaining differences in cost of production consideration is to be given, if practicable, to the differences in such elements as wages and cost of materials, to the differences in wholesale selling prices of domestic and foreign articles in the United States, to such governmental or other advantages, as may be granted to foreign producers and to any other advantages or disadvantages in competition. Investigations must be made by the United States Tariff Commission, and there may be no changes in duties except on the basis of such investigation. Reasonable opportunity to be heard must be granted to all interested parties. When the conditions which produce the altered duty have passed, the original duty may be revived or an appropriate modification proclaimed. Whenever in the schedules of tariff rates it is provided that a duty shall not exceed a specified ad valorem rate, no rate determined under Section 315 shall be greater than the maximum so specified.

(b) Section 316

In an address before the American Manufacturers Export Association delivered October 26, 1922, Dr. W. S. Culbertson, who is Vice Chairman of the United States Tariff Commission, said, in regard to Section 316 of the Tariff Act of 1922:

The second of these new provisions . . . aims to protect American industry against unfair methods and unfair acts in the importation of goods. Under this section additional duties

abroad are freely offered for sale in the principal market of the United States.—Sec. 402 (d).

The "cost of production" includes not only expenses for raw materials, fabrication and packing, but also for general expenses and limited profits.—Sec. 402 (e).

Any domestic coal-tar product mentioned in sec. 1, paragraphs 27 or 28, is to be considered similar to or competitive with any imported coal-tar product which accomplishes substantially equal results.—Sec. 315 (d).

may be imposed upon importations by any individual engaging in unfair price cutting, full-line forcing, commercial bribery, or any other type of unfair competition, and if the unfair competition is of an aggravated character, the offending person may be prohibited from importing goods into the United States. This is admittedly a difficult field, but it must be evident that in some such flexible provision as this lies the only hope of an effective protection of American industry against the variety and subtlety of the attacks which may be included under the term unfair competition.¹

By this section

unfair methods of competition and unfair acts in the importation of articles or in their sale . . . , the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States, or to prevent the establishment of such an industry, or to restrain or monopolize trade and commerce,

are declared to be unlawful. When the President, after investigation by the Tariff Commission, finds any such practice to exist, he is directed to levy upon the imported articles in question additional duties sufficient to offset the effect of the unfair practice, but not less than ten nor more than fifty per centum of their value.² If he is satisfied of the existence of extreme cases of unfair acts, he is directed to exclude from entry into the United States such articles as he shall deem the interests of the country require, when sought to be imported by persons guilty of violating these provisions.

¹From the mimeographed text released to the press. The text of Section 316 is given in Appendix 8.

²Value is defined in sec. 402. Section 316 may be considered as an important adjunct to anti-dumping legislation.

The Tariff Commission promptly issued detailed rules of procedure for the guidance of persons desiring it to make investigations under the three flexible-tariff sections.¹ In his above-quoted address to the American Manufacturers Export Association Dr. Culbertson discussed them as follows:

They set forth how applications for investigations shall be made and under what conditions and in what manner the Commission will conduct formal investigations upon which the President may change the tariff law. Anyone can apply for an investigation. The application need not be in any special form, but it must be in writing and signed by or on behalf of the applicant. It must also recite the relief sought and the reasons therefor. Obviously, the mere filing of an application does not obligate us to proceed formally. We shall not order an investigation unless the application or a preliminary investigation discloses to our satisfaction that there are good and sufficient reasons for doing so under the law.

We can order a formal investigation upon our own initiative as well as upon application and we are not confined to the issues presented in an application; we may broaden, narrow, or modify the issues to be determined.

When we finally decide to proceed formally with an investigation, we shall issue and publish a notice of its nature and scope. Any person who then can show to our satisfaction an interest in the subject matter of the investigation may enter his appearance in person or by a representative. He will be notified of public hearings and afforded opportunity to offer such testimony as we may deem necessary for a full presentation of the facts. Our hearings will usually be open to the public. Evidence submitted will be subject to verification from the books and records of the parties in interest. In conjunction with hearings we shall conduct field investigations both in the United States and in foreign countries.

¹The rules of Procedure are given in the sixth annual report of the U. S. Tariff Commission (1922), pp. 64 *et seq.*

In the case of formal investigations our procedure will be judicial in character. Our rules provide for the attendance and examination of witnesses, the production of documentary evidence, the issuance of subpoenas, and the taking of depositions. The commissioner or investigator in charge of any investigation will summarize the hearings and the information obtained by field investigation and will prepare a report. Parties of record will be permitted, before they file their briefs, to examine this report, as well as the record, except such portions as relate to trade secrets and processes.

Final hearings will, of course, be before the Commission. Parties of record may file briefs and in some cases present oral arguments. Our findings will be in writing, and will be transmitted with the record to the President for his action.¹

During the first year of the operation of the Tariff Act of 1922 the Tariff Commission conducted numerous investigations and some public hearings;² the first exercise of the rate-making powers conferred by the flexible-tariff provisions occurred, however, on March 7, 1924, when the President, under authority of Section 315, proclaimed:

An increase in . . . duty on wheat from 30 cents per bushel of sixty pounds to 42 cents per bushel of sixty pounds;

An increase in . . . duty on wheat flour, semolina, crushed or cracked wheat, and similar wheat products not specially provided for from 78 cents per hundred pounds to \$1.04 per hundred pounds;

A decrease in . . . duty on bran, shorts, and by-product feeds obtained in milling wheat (within the limit of total decrease provided for in said Act) from 15 per centum ad valorem to 7½ per centum ad valorem.

Such is the Flexible Tariff as launched into American

¹From mimeographed press release. See also Culbertson, "The Making of Tariffs," *Yale Review*, Jan., 1923.

²See current issues of *Commerce Reports* and press statements.

tariff history by the act of 1922. For Section 315 the claim is made that it lays the foundation of that "scientific tariff" of which those who believe in a protective tariff have dreamed for half a century. Section 316 undertakes to inject into international relations the principles upon which the Federal Trade Commission works for fairness and decency in domestic business. Section 317 inaugurates a revised version of equality as a principle in international commerce. All three depend for their motive power upon a shifting of import duty rates, supplemented, in the case of the latter two, by prohibitions, the initiation and amount of which is to be determined, within statutory limits, by administrative authorities of the government acting in a quasi-judicial capacity. The Congress lays down a principle—that protection should just equal the difference between cost of production at home and abroad. The administration is charged with the duty of making the principle effective. Tariff rate-making would seem in a measure to be removed from "politics"—from the policy-determining branch of the government—and to have become a recognized administrative function.

While the present study is concerned with Section 317 alone, the relation between it and the other "flexible" sections must not be lost sight of. An underlying unity of purpose in the three sections is indicated by the following passage from a letter which President Harding addressed to Representative Mondell shortly after the passage of the law:

In a time when wide differences in producing costs and a well-nigh universal tendency to erect barriers against international trade were menacing our commerce and industry, we have passed tariff legislation which first protects our own producers, and second, through its provisions for administrative adjustment of duties to changing conditions, makes it possible

to adapt them to shifting economic relations and enables us to encourage foreign trade. In the present disturbed condition of money, exchanges and world trade, I believe that by inaugurating this policy of flexibility and elasticity we have set an example which the commercial world will accept as a truly constructive foundation on which to rest our commercial policy. The first duty is to protect our national interests, but in many ways real protection comes from cooperation with other nations. The best intelligence of the day recognizes the need to encourage intimacy and understanding in the social, economic and political family of nations; and it recognizes that, in thus inaugurating a plan which looks to intimate consideration of the facts, we are offering a means of true unification and solidarity among the interests which make up our industrial civilization, and we are taking a step toward the solution of some of the most perplexing economic problems which confront the nations. The last thing in our thoughts is aloofness from the rest of the world. We wish to be helpful, neighborly, useful. To protect ourselves first, and then to use the strength, accruing through that policy, for the general welfare of mankind, is our sincere purpose.¹

With this the consideration of Sections 315 and 316 ends, except for an added word in regard to the ascertainment for rate-making purposes of relative costs of production at home and abroad. Dr. Culbertson strongly contends that the thing is practicable and that results will be sufficiently accurate for the purpose.² On the other hand, Professor F

¹Quoted by Dr. Culbertson in the address referred to above.

²In his address just adverted to, Dr. Culbertson said:

"The criticism is occasionally heard that costs of production cannot be found and that if they could be, they would not form a sound basis for tariff making. . . . It is true that costs of production are often difficult to find, but every business man knows that the finding of them is the basis of successful business. Costs are no more uncertain nor do they vary more than industrial life as a whole. Variety and difference are inherent in the problem. Cost accounting is an attempt to measure scientifically the un-

W. Taussig, first chairman of the Tariff Commission, asserts in no uncertain terms that the proposition is not only unsound in theory but almost impossible of accomplishment.¹ Happily there exists no such divergence of authori-

certainty and change in industrial life. To reject it would be to abandon the most effective means of measuring actual and potential competition. Considering the purpose for which Congress has laid down the rule, the term 'cost of production' will undoubtedly be broadly construed. In determining these costs we shall take into consideration all conditions of production including wages and other cost items, wholesale selling prices, and advantages and disadvantages in competition. This method will disclose, as no other can, the competitive strength of industries in the United States and competing foreign countries, and will thus provide a sufficiently accurate basis for tariff making."

¹In *The Tariff History of the United States* (7th edition, revised and enlarged; New York, 1923), pp. 480-481, Prof. Taussig says:

"The notion of equalizing costs of production had become a sort of fetish among the protectionists. I say nothing here of its weakness from the point of view of economic principle, having indicated elsewhere that it seems to me fatally unsound as a matter of tenable or consistent theory. It is the question of practicability in administration that was now raised by its being set up in the tariff law. The rule was proclaimed, and an endeavor was made to apply it, quite without regard to the most obvious realities. It is difficult enough to ascertain costs of production in the United States. True, with compulsory adoption of uniform methods of cost accounting by American establishments; with a large staff of accountants to examine books and check returns from a considerable number in each branch of industry; with some careful procedure for arriving at a mean between the high cost and the low cost producers—representative figures can be secured for American articles of a standardized sort. But can it be imagined that any officials in the United States could do this sort of thing for foreign products? that foreign producers would permit such a control of their accounts and figures as alone would make it possible to ascertain trustworthy comparable figures for the competitive articles in foreign countries? These difficulties, great enough in case of standardized articles, obviously become immensely greater with specialties, and perhaps most difficult of all with goods produced at joint cost ('by-products'). These classes include many of the contested items for which resort to the flexible powers was likely to be sought. A biased or subservient Tariff Commission might make a pretence of having found accurate figures. A basis of well-ascertained fact is almost impossible to find, or if found, to keep up to date. Those who advocated

tative opinion concerning either the underlying conception or the practical advantage of Section 317.

this as a 'scientific' solution of the tariff question were obsessed by formula and surprisingly unable to face the realities."

In regard to the immediate conditions of the enactment of the 1922 tariff law and the character of the debates in the Senate and the House, Prof. Taussig (*ibid.*, p. 487), says:

"Perhaps most noteworthy in the debates was the constant insistence by the sponsors of the act on the principle of equalizing costs of production. As I have already remarked, it was embodied for the first time in statutory language,—declared by Congress to be the principle on which the tariff system is founded. Talk of this sort was more to the fore than at any previous time. And not only this; it was pushed to further extremes than ever before, both in the rates themselves and in their advocacy or justification. There were not wanting Senators who expressed their willingness to impose a duty of 500 per cent. or 1000 per cent. if such rates were necessary for the sacred purpose of equalizing costs of production."

CHAPTER II

HISTORICAL DEVELOPMENT OF THE PRINCIPLE UNDERLYING SECTION 317

II. EARLY FORERUNNERS

The provision for defensive duties in the Tariff Act of 1922 is, as has already been intimated, an heir in the direct line to certain provisions in the Payne-Aldrich Tariff Act of 1909. The development of principles, and even the enactment of specific measures, that bear a relation to the policy of Section 317 can be traced far back in American tariff history. Stated reversely, the same principle is found in a little act approved March 3, 1815, the complete text of which is as follows:

So much of the several acts imposing duties on the tonnage of ships and vessels, and on goods, wares, and merchandise, imported into the United States, as imposes a discriminating duty of tonnage, between foreign vessels and vessels of the United States, and between goods imported into the United States in foreign vessels and vessels of the United States, be, and the same are hereby repealed, so far as the same respects the produce or manufacture of the nation to which such foreign ships or vessels may belong. Such repeal to take effect in favour of any foreign nation, whenever the President of the United States shall be satisfied that the discriminating or countervailing duties of such foreign nation, so far as they operate to the disadvantage of the United States, have been abolished.¹

¹ *Tariff Acts*, p. 56. The Act of 1815 may be said to have constituted
271] 61

In the meat-inspection act of August 30, 1890, occurs a provision:

That whenever the President shall be satisfied that unjust

the first clear and comprehensive legislation defining the American shipping policy which has ever since been operative. Like the policy of Section 317 of the Tariff Act of 1922, its policy was defensive: it permitted discriminations where American ships were discriminated against; but its purpose was to obtain equality. Even the discriminating duties which by earlier laws were placed upon all foreign ships, as necessary to protect American shipping at a time when discriminations were the universal practice among maritime countries, do not appear to have been intended as voicing approval of a discriminatory policy. In 1828 an act was passed providing that the ships of all foreign countries that would grant a similar privilege to the ships of the United States should be allowed participation in all indirect as well as direct trade with this country. The shipping policy thus developed has been looked upon as one of the contributions of American statesmen to the commercial system of the world as it exists today. See Moore, John Bassett, *The Principles of American Diplomacy* (New York, 1918), p. 172; Johnson, Emory R. and others, *History of Domestic and Foreign Commerce of the United States* (Washington, D. C., 1915), vol. ii, pp. 297 *et seq.*

The policy just described is called "national treatment"; that is to say, the ships of other countries are accorded the same treatment as vessels under a country's own flag. While technically different from "most-favored-nation treatment," or equal treatment to all foreign countries, it is really an application of the same general principle. With respect to goods, most-favored-nation treatment is sufficient to assure equality because a country's own goods are not imported through its customs houses and do not compete with shipments from other countries in the same way as the latter compete with each other. But a country's vessels enter into and depart from its ports in the same manner as, and in direct competition with, the vessels of other countries. The American policy of national treatment of shipping is, therefore, consistent with the policy of unconditional most-favored-nation treatment recommended (*infra*, subdivisions 24 and 25) as appropriate for giving effect to the policy expressed in Section 317.

. There is at present a strong movement on foot in the United States to overthrow the policy of national treatment of shipping (see *infra*, subdivision 34, giving, in a footnote, the text of Section 34 of the Merchant Marine Act, 1920). The success of this movement would be inconsistent with the development of policies of equality and would seriously conflict with the commercial policy of Section 317.

discriminations are made by or under the authority of any foreign state against the importation to or sale in such foreign state of any product of the United States, he may direct that such products of such foreign states so discriminating against any product of the United States as he may deem proper shall be excluded from importation to the United States; and in such case he shall make proclamation of his direction in the premises, and therein name the time when such direction against importation shall take effect, and after such date the importation of the articles named in such proclamation shall be unlawful. The President may at any time revoke, modify, terminate, or renew any such direction as, in his opinion, the public interest may require.¹

The general revenue act of 1916 contained the following:

That whenever, during the existence of a war in which the United States is not engaged, the President shall be satisfied that there is reasonable ground to believe that under the laws, regulations, or practices of any belligerent country or Government, American ships or American citizens are not accorded any of the facilities of commerce which the vessels or citizens of that belligerent country enjoy in the United States or its possessions, or *are not accorded by such belligerent equal privileges or facilities of trade with vessels or citizens of any nationality other than that of such belligerent*, the President is hereby authorized and empowered to withhold clearance from one or more vessels of such belligerent country until such belligerent shall restore to such American vessels and American citizens reciprocal liberty of commerce and equal facilities of trade; or the President may direct that similar privileges and facilities, if any, enjoyed, by vessels or citizens of such belligerent in the United States or its possessions be refused to vessels or citizens of such belligerent.²

¹ *The Statutes at Large of the United States*, vol. xxvi, pp. 415-416. (Sec. 5.)

² Act of Sept. 8, 1916, sec. 806; text as officially published. Italics not in original.

Such examples could probably be multiplied, but for present purposes it seems sufficient to examine the efforts of the tariff-makers of 1909 to defend the commerce of the United States against discrimination by other countries. In connection with the alternative proposals before the Congress in 1921 and 1922, however, some account of other previous acts may appropriately be included.

12. THE ACT OF AUGUST 5, 1909

The Payne-Aldrich Act was the product of a Congress controlled by the same political party that passed the Act of 1922. The party platform of 1908 proposed

the establishment of maximum and minimum rates to be administered by the President under limitations fixed in the law, the maximum to be available to meet discriminations by foreign countries against American goods entering their markets, and the minimum to represent the normal measure of protection at home. . . .¹

Mr. Sereno E. Payne, who as Chairman of the Committee on Ways and Means gave his name to the Act, is quoted as saying in his speech accepting nomination for Congress in 1908:

Our rivals in trade, Germany and France, have adopted a maximum and a minimum tariff, and under our existing law we are unable to obtain their minimum rate without too great a sacrifice to American industry. We can only meet them on their own ground with a maximum and minimum tariff.²

During the months following the election of 1908 there appears to have been some discussion of the proposition in business circles. In more than 8000 pages of hearings on

¹*Republican Campaign Text-Book*, 1908, p. 462.

²Quoted in *Tariff Hearings, 1908-1909*, vol. ii, p. 1883 (60th Congress, 2d Session, House Doc., no. 1505).

the tariff bill, however, scarcely twenty are devoted to the subject of the maximum-minimum or "dual tariff" system. The only really serious discussion that appears in the *Hearings* is that of Mr. N. I. Stone, Tariff Expert, Department of Commerce and Labor, who addressed a closely-reasoned argument to the Ways and Means Committee, concluding with the advocacy of

a maximum and minimum tariff on the lines laid down in section 3 of the Dingley Act, but with the minimum rates to cover the greater part of the tariff instead of the few articles of wines, spirits, and paintings to which that section now applies. This section gives the Executive the power to negotiate reciprocity treaties on the basis of the minimum rates authorized by Congress without requiring the submission of the treaties to the Senate for ratification. The system combines the advantage of securing to the legislative branch complete control over the tariff rates, both maximum and minimum, insuring flexibility in leaving to the discretion of the Executive the determination of what is an equivalent concession on the other side and inspiring confidence in the foreign nations that the treaty once negotiated will be actually put into force. Finally, it has the advantage of having stood the test of practical experience, since, in spite of its circumscribed scope, it has been the instrument for securing to the United States the enjoyment of minimum rates in most of the countries of Europe.¹

President Taft promptly convoked the Congress in extraordinary session and a general tariff bill was presented to the House of Representatives on March 17, 1909. After providing for dutiable and free lists in Sections 1 and 2,

¹ *Ibid.*, p. 8418. Section 3 (text, Appendix 9) of the Tariff Act of 1897 will be described in the latter part of this chapter. It is framed on a theory different from that of the provisions of the Act of 1909 as finally adopted.

this bill set forth, in Section 3, a second schedule, consisting of a lengthy enumeration of articles with specified rates of duty. In the case of articles that were included on the free list, Section 3 imposed ad valorem duties of twenty per centum. In the case of articles that were dutiable under Section 1, Section 3 provided for rates exceeding the rates of Section 1 by twenty per centum on some articles, on others by twenty-five per centum, and on still others by forty per centum ad valorem.

The bill then went on to state, in Section 4, that the tariff treatment provided for in Sections 1 and 2 should apply to imports from countries that did not discriminate against American products. If, however, any country failed to accord to any article imported from the United States treatment as favorable as it accorded to any similar article imported from any other country, the maximum schedule, as provided in Section 3, should be applied to that country's products coming into the United States. The determination of the question whether the treatment accorded American products was as favorable as that accorded any others was left by the terms of the bill to the Treasury Department, subject to the right of appeal to the courts. "The purpose of the provisions," says the United States Tariff Commission, "was not the securing of special tariff favors from other countries, but, on the contrary, the removal of discriminations against American products."¹

¹ *Reciprocity and Commercial Treaties*, p. 266. Debate on the bill in the House of Representatives did not fail to allege an inconsistency between the practice of according special concessions to Cuba, receiving special favors in return, and the undertaking, according to the terms of the bill, to penalize the same kind of practice if engaged in by other countries to American disadvantage. On the other hand, there was some defense of the legitimacy of special arrangements between countries based on contiguity or other special circumstances. For fuller information as to source, see table of principal sources at the beginning of this monograph.

The Senate Finance Committee reported the bill with the maximum-minimum features stricken out. A little later, however, the chairman introduced a provision offering an amendment—in the form of a simplified substitute—which, after further alteration, became Section 2 of the enacted law. Reversing the order of the House provision, it made the maximum tariff schedule applicable to imports generally. The minimum rates were to be paid by those countries which the President should find to impose no restrictions that were *unduly* discriminatory against the United States or “any agricultural, manufactured or other product” thereof. The maximum rates were simply the rates prescribed by the act with the addition, in each case, of a rate of twenty-five per centum ad valorem. The free list was not altered in the maximum tariff. The minimum tariff consisted of the schedules as they stood without the addition of the twenty-five per centum. A special clause was added to the effect that nothing in the maximum-minimum provisions should be construed as impairing the reciprocity treaty with Cuba.¹

¹Sec. 3. The text of sec. 2 is as follows: “That from and after the thirty-first day of March, nineteen hundred and ten, except as otherwise specially provided for in this section, there shall be levied, collected, and paid on all articles when imported from any foreign country into the United States, or into any of its possessions (except the Philippine Islands and the islands of Guam and Tutuila), the rates of duty prescribed by the schedules and paragraphs of the dutiable list of section one of this Act, and in addition thereto twenty-five per centum ad valorem; which rates shall constitute the maximum tariff of the United States: PROVIDED, That whenever, after the thirty-first day of March, nineteen hundred and ten, and so long thereafter as the President shall be satisfied, in view of the character of the concessions granted by the minimum tariff of the United States, that the government of any foreign country imposes no terms or restrictions, either in the way of tariff rates or provisions, trade, or other regulations, charges, exactions, or in any other manner, directly or indirectly, upon the importation into or the sale in such foreign country of any agricultural, manufactured, or other product of the United States, which unduly discriminate against the United States or the products thereof, and that such foreign country pays no export bounty or imposes

In his message to the Congress at the beginning of the regular session, December, 1909, the President expressed the hope that there would never be occasion to apply the maximum schedules. His expectation was that their potential application would enable him, by means of friendly negotiations, to obtain from such nations as discriminated unduly against American commerce agreements to the effect that their discriminatory practices would cease. The President's wishes were gratified in this respect. Prior to the

no export duty or prohibition upon the exportation of any article to the United States which unduly discriminates against the United States or the products thereof, and that such foreign country accords to the agricultural, manufactured, or other products of the United States treatment which is reciprocal and equivalent, thereupon and thereafter, upon proclamation to this effect by the President of the United States, all articles when imported into the United States, or any of its possessions (except the Philippine Islands and the islands of Guam and Tutuila), from such foreign country shall, except as otherwise herein provided, be admitted under the terms of the minimum tariff of the United States as prescribed by section one of this Act. The proclamation issued by the President under the authority hereby conferred and the application of the minimum tariff thereupon may, in accordance with the facts as found by the President, extend to the whole of any foreign country, or may be confined to or exclude from its effect any dependency, colony, or other political subdivision having authority to adopt and enforce tariff legislation, or to impose restrictions or regulations, or to grant concessions upon the exportation or importation of articles which are, or may be, imported into the United States. Whenever the President shall be satisfied that the conditions which led to the issuance of the proclamation hereinbefore authorized no longer exist, he shall issue a proclamation to this effect, and ninety days thereafter the provisions of the maximum tariff shall be applied to the importation of articles from such country. Whenever the provisions of the maximum tariff of the United States shall be applicable to articles imported from any foreign country they shall be applicable to the products of such country, whether imported directly from the country of production or otherwise. To secure information to assist the President in the discharge of the duties imposed upon him by this section, and the officers of the Government in the administration of the customs laws, the President is hereby authorized to employ such persons as may be required." (*Tariff Acts*, pp. 771-772. See table of principal sources at the beginning of this monograph.)

time when the maximum schedule was to become effective, he issued one hundred and thirty-four proclamations, granting the more favorable rates to the entire commercial world. In no case was the maximum schedule at any time imposed. In his next annual message to the Congress, the President reported the satisfactory operation of the maximum-minimum provision.

Though possibly not *unduly* discriminatory against the United States, certain practices that did seriously discriminate against the commerce of this country continued in force. The maximum-minimum provision was not adequate—perhaps because of its lack of elasticity—to the task of obtaining their elimination. Mr. Smoot, while addressing the Senate in 1922, referred to Section 2 of the Act of 1909 as “unwieldy” and “entirely too rigid”. “There was,” he added, “only one penalty, and therefore it was not feasible to apply the statute in every case, just as it would not be feasible to use a rock-crusher for cracking nuts.”¹

13. AMENDMENT PROPOSED BY SECRETARY KNOX

In his message to the Congress dated December 6, 1910, the President acknowledged the insufficiency just referred to. A year later the Secretary of State discussed it in a letter to the Chairman of the Ways and Means Committee, stating, however, that “the more flagrant instances of discrimination” had been removed or compensated for and that the remarkable growth of the country’s export trade since the passage of the Act of 1909 was evidence of enlarged markets resulting from the equalized opportunity effected under the bargaining provision. After setting forth a number of instances in which they had, nevertheless, failed, Mr. Knox continued:

¹ *Congressional Record*, vol. 63, pt. vi, 67th Congress, 2d Session, p. 5879. In other words, the punishment did not always fit the crime.

The Department feels that . . . provision should be made for varying rates of tariff to be added to the minimum rates—not less than five per centum ad valorem and not exceeding twenty-five per centum, applicable by proclamation when, through the investigations made at the instance of the President, he shall have become satisfied that another nation's laws or practices as relating either to tariffs or commercial methods having governmental sanction are inimical to that equal opportunity in trade and commerce to which American enterprise is fairly entitled.

With respect to the logical course of the United States when foreign methods bar our national progress in seeking equality of opportunity abroad, the Department feels that only by a practicable means of effectively offsetting adverse action of other nations can injustice to our foreign commerce be overcome. It is convinced that equal opportunity for enjoying the minimum tariff of the United States and the abundance of commercial opportunity thus vouchsafed should not be conceded to such nations as deny to American citizens rights and privileges granted to others. It is realized that the gravity of the offence should be met by a suitable remedy—one that may be graduated to meet the degree of embarrassment sought to be corrected. This might call for the imposition of additional duties of from five to twenty-five per centum upon a few commodities or it might require that all of a nation's exports to the United States should be made subject to rates of duty higher than the existing minimum. Instances might arise where to subject commodities now upon the free list to the payment of duties would be found to be the only measure of relief for offensive treatment; or the prohibition of imports in aggravated cases might be necessary.¹

¹Archives, Dept. of State, letter dated Dec. 13, 1911. In order to provide for the needed elasticity or *flexibility*, the Secretary enclosed with his letter the draft of an amendment to Section 2 of the act of 1909, of which the pertinent passage is as follows:

“ . . . whenever the President of the United States shall be satisfied that the conditions, with respect to any country, which led to the appli-

Had the proposals of the State Department been enacted into law the President could doubtless have sought out

cation of the minimum tariff hereinbefore authorized, no longer exist, or that the Government of any foreign State, by repressive, discriminatory, or confiscatory measures, either of legislation or of administration, jeopardizes, impairs, or destroys the capital of citizens of the United States legitimately invested in such foreign State; or whenever the President shall be satisfied that undue discriminations are made or that relative treatment not equivalently favorable is given by or under the authority of any foreign State adversely affecting the importation into or sale in such foreign State of any product of the United States; or that the Government of such foreign State, whether by law or by administrative measures, imposes exactions, regulations, or limitations restrictive of or harmful or amounting to relative treatment not equivalently favorable to the commerce of the United States with such foreign State with respect to the imports into or exports from such State; or if a foreign State, with respect to its exports to other foreign or neutral markets, seeks, by law or by administrative measures, to provide for the payment of bounties, rebates of duties or allowances upon exports in such a manner as to affect adversely the commerce of the United States established with foreign or neutral markets, he shall direct that such increased ad valorem rates of duty as he shall determine are equivalent to the injury inflicted upon American capital or commerce shall be imposed upon imports of all or such dutiable products of such foreign State as he may deem proper, provided that in no case shall the additional duty so imposed be less than five per centum nor more than twenty-five per centum ad valorem; or he may direct that the like ad valorem rates of duty shall be imposed upon importations of all or such duty-free products of such foreign State as he may deem proper or upon both dutiable and duty-free importations; or, in what the President shall be satisfied are extreme cases of undue discrimination and unjust treatment of the commercial or financial interests of citizens of the United States on the part of such foreign State, he may direct that such products of such foreign State as he may deem proper shall be excluded from importation to the United States; . . . ”

This proposed enactment, it should be noted, makes its additional duties applicable in the event of “repressive” or “confiscatory” as well as “discriminatory” measures. It is, accordingly, more inclusive than Section 317 of the Tariff Act of 1922. However, like the latter, it would have enabled the President “to penalize any offending country by imposing new or additional duties upon those particular products” upon which such imposition would have been “least burdensome to American consumers and most detrimental to the foreign producers or manufacturers” (Senator Smoot, *op. cit.*).

minor and isolated cases of discrimination and dealt with them without endangering important interests by firing a broadside at the commerce of another country. The political complexion of the House of Representatives had, however, changed and nothing resulted from Secretary Knox's letter.

The general tariff act which in 1913 succeeded the Payne-Aldrich law omitted the maximum and minimum schedule provisions. Aside from a very indefinite authorization to the President to negotiate reciprocal arrangements,¹ the new act was silent on the subject of general international commercial policy and no conventions were concluded under it. Under the soothing influence of the moderate rates of the 1913 tariff, however, some of the arrangements entered into on the basis of the Payne-Aldrich law continued to exist, so far as the treatment received by the United States was concerned; and a few vestiges still remain in operation.

14. DISCUSSION OF COMMERCIAL POLICY, 1921-1922

When the question of a new general revision of the tariff came before the Congress in 1921, the subject of the commercial policy to be authorized was given earnest consideration by the United States Tariff Commission and by officials of the Departments of State and Commerce. The Tariff Commission's exhaustive study of the question, entitled *Reciprocity and Commercial Treaties*, had pointed to the conclusion that the reciprocity agreements of the past, based on special concessions, were of little practical advantage to American commerce; and had emphatically recommended a policy having

for its object, on the one hand, the prevention of discrimination and the securing of equality of treatment for American

¹Act of Oct. 3, 1913, sec. iv, A. Text, *infra*, subdivision 18 (d). The authorization added nothing to the powers already possessed by the President.

commerce and for American citizens, and, on the other hand, the frank offer of the same equality of treatment to all countries that reciprocate in the same spirit and to the same effect.¹

The bill which in July passed the House of Representatives followed, however, the lines of the Dingley Act; it was characterized by the authorization of special reciprocity agreements.

A short time before the President delivered his address at the beginning of the regular session of the Congress in December, 1921, he received from Dr. W. S. Culbertson² a comprehensive memorandum suggesting that the President should be authorized,

upon facts found by the Tariff Commission, to proclaim additional or penalty duties on the whole or any part of the imports into the United States from any country which treats its imports from the United States less favorably than its imports from any third country.³

Upon this and upon accompanying suggestions that foreshadowed the future Sections 315 and 316 of the Tariff Act of 1922, Mr. Harding based his celebrated request for a *flexible tariff*:

Doubtless we are justified in seeking a more flexible policy than we have provided heretofore. I hope a way will be found to make for flexibility and elasticity, so that rates may be adjusted to meet unusual and changing conditions which can not be accurately anticipated. There are problems incident to unfair practices, and to exchanges which madness in money has made almost unsolvable. I know of no manner in which to effect this flexibility other than the extension of the powers

¹ P. 15 (1910).

² Vice Chairman of the Tariff Commission.

³ By courtesy of Dr. Culbertson.

of the Tariff Commission, so that it can adapt itself to a scientific and wholly just administration of the law.¹

The President did not specifically refer to the problem of defending against discrimination, and the fact is noteworthy that, in the printed *Hearings* upon the tariff bill, there apparently occurs no mention of the policy that is embodied in Section 317. Overshadowed by the conflict of opinion in regard to such subjects as "American Valuation", the proper tariff policy for a creditor nation and the protection of the dyestuffs industry, and also, perhaps, in regard to the general question of the "Flexible Tariff", the specific matter of Section 317 appears to have received little attention from either Congress or the public. The final discussion of the section in the Senate, when it was called up late one evening for adoption or rejection, did not reveal an adequate appreciation, on the part of most of the Senators, of its actual potentialities and purpose. An interesting sidelight is thrown upon this situation by a remark made by Senator Smoot during the course of the debate:

I want to say to the Senator that this is a discriminatory section written by the Tariff Commission and explained to the committee by the Tariff Commission, who requested that it be made a part of this tariff bill.²

¹*Address of the President of the United States to the Congress, Dec. 6, 1921, as officially printed, p. 7.* This language shows the influence of Dr. Culbertson's memorandum, especially his recommendation "To introduce flexibility and elasticity into the new tariff law so that rates can be adjusted to meet unusual and changing conditions which can not now be accurately anticipated."

²*Congressional Record, vol. 62, pt. xi, p. 11246, 67th Congress, 2d Session (Aug. 11, 1922).* It would doubtless be more accurate to say that the section was written and explained by individual members of the Tariff Commission and its staff.

15. THE FIRST APPEARANCE OF SECTION 317

Section 317 began its legislative career on January 12 (legislative day January 10), 1922, as Section 4¹ of a comprehensive amendment introduced by Senator Smoot to the tariff bill as it had been passed by the House and then stood in the hands of the Finance Committee of the Senate. The Finance Committee accepted this section with one important change: instead of making its operation optional at the discretion of the President, as in the original draft of the amendment, the Committee made the additional duties mandatory when a country should be found as a fact to be discriminating against the United States. The reservation that the additional duties are to be imposed only when the President finds "that the public interest will be served thereby" was not inserted until Section 317 was reached by the Conference Committee.²

The tariff bill, with proposed amendments, was reported to the Senate on April 11, 1922.

16. DISCUSSION AND ADOPTION OF SECTION 317 BY THE UNITED STATES SENATE

Just four months after the tariff bill was reported out of committee, that is on August 11, 1922, the Senate, sitting as committee of the whole for the consideration of amendments, after having amended and adopted the other flexible-tariff sections, reached Section 317. These three sections had been carefully explained and had received both endorsement and adverse comment in the course of the early discussions of the bill. The final discussion, including the complete text of Section 317 as adopted, is spread over about five pages of the *Congressional Record*. The remarks of

¹ For text, see Appendix 1.

² The reservation is, however, used in other connections in the bill as reported to the Senate.

the Senators may be classified roughly under five headings: (a) the object of the section; (b) its constitutionality; (c) its relation to reciprocity treaties and the most-favored-nation clause; (d) its meaning with respect to intra-imperial preferences, and (e) the amendments proposed and adopted.¹

¹ The following text is Section 317 as reported to the Senate by the Finance Committee, printed here with lines and pages indicated as in the copies of the bill prepared to facilitate discussion in Congress:

(Page 10 Sec. 317. (a) That from and after the passage of this
280) 11 Act, subject to the provisions of this section, all products,
12 when imported into the United States from any foreign
13 country, shall be admitted under the provisions of Titles I
14 and II and sections 315 and 316 of this Act.

15 (b) That the President shall by proclamation specify
16 and declare new or additional duties as hereinafter provided
17 upon the products of any foreign country whenever he shall
18 find as a fact that such country—

19 Imposes, directly or indirectly, upon the disposition in or
20 transportation in transit through or reexportation from such
21 country of any product of the United States any unreasonable
22 charge, exaction, regulation, or limitation which is not equally
23 enforced upon the like products of any foreign country;

24 Imposes, directly or indirectly, upon the importation
25 from the United States of any article not the product of the
26 United States any customs, tonnage, or port duty or any
(Page 1 other charge, exaction, regulation, or limitation whatever
281) 2 which is not equally enforced upon importation from every
3 foreign country of the like article not being the product of
4 the country whence it is directly imported;

5 Imposes upon any product upon its exportation to the
6 United States any duty, charge, restriction, or prohibition
7 whatever which is not equally enforced upon the exportation
8 of such products to every foreign country;

9 Discriminates against the commerce of the United States,
10 directly or indirectly, by law or administrative regulation or
11 practice, by or in respect to any duty, fee, charge, exaction,
12 classification, regulation, condition, restriction, or prohibition,
13 in such manner as to place the commerce of the United States
14 at a disadvantage compared with the commerce of any foreign
15 country, or fails to accord to the commerce of the United

(a) The Object of Section 317

Mr. Walsh of Montana opened the debate upon Section 317 with the remark that he wanted the Senators to under-

16 States treatment equal and equivalent to that accorded to the
17 commerce of any foreign country.

18 (c) If at any time the President shall find it to be a
19 fact that any foreign country has not only discriminated
20 against the commerce of the United States, as aforesaid, but
21 has, after the issuance of a proclamation as authorized in
22 subsection (b) hereof, maintained or increased its said dis-
23 criminations against the commerce of the United States, the
24 President is hereby authorized, if he deems it consistent with
25 the interests of the United States, to issue a further procla-
26 mation directing that such products of said country as he shall
(Page 1 deem the public interests may require shall be excluded from
28a) 2 importation into the United States.

3 (d) That any proclamation issued by the President
4 under the authority of this section shall, if he deems it con-
5 sistent with the interests of the United States, extend to the
6 whole of any foreign country or may be confined to any
7 subdivision or subdivisions thereof; and the President shall,
8 whenever he deems the public interests require, suspend,
9 revoke, supplement, or amend any such proclamation.

10 (e) The President shall find as a fact the burdens
11 placed on the commerce of the United States by the discrimi-
12 nations aforesaid, and when issuing any such proclamation
13 shall declare therein the new or additional customs duties de-
14 termined by him as aforesaid to be equivalent to such burdens,
15 not to exceed 50 per centum ad valorem or its equivalent, and
16 shall specify the date upon which such proclamation and
17 any new or additional customs duties declared therein shall
18 take effect, and from and after such date there shall be levied,
19 collected, and paid on the products enumerated in such proc-
20 lamation when imported into the United States such new
21 or additional customs duties; or in case of products declared
22 subject to exclusion from importation into the United States
23 under the provisions of subsection (c) hereof, such products
24 shall be excluded from importation.

25 (f) That whenever the President shall find as a fact
26 that any foreign country enforces upon the exportation of
(Page 1 any product any export duty, restriction, or prohibition, or
283) 2 grants any bounty on production or exportation, any rebate

stand what they were about to vote upon; he thereupon read

3 of duties or any preferential allowance upon exports which
4 unduly or unfairly discriminates against the United States,
5 any products thereof, or consumers therein, he shall by procla-
6 mation specify and declare new or additional duties as pro-
7 vided in subsections (b), (d), and (e) upon importation
8 from any foreign country into the United States of the
9 products of any industry which receives any benefit from any
10 such discriminatory provisions aforesaid; and said new or
11 additional duties shall be levied, collected, and paid as pro-
12 vided in such proclamation.

13 (g) All articles of merchandise imported contrary to
14 the provisions of this section shall be forfeited to the United
15 States and shall be liable to be seized, prosecuted, and con-
16 demned in like manner and under the same regulations,
17 restrictions, and provisions as may from time to time be
18 established for the recovery, collection, distribution, and re-
19 mission of forfeitures to the United States by the several
20 revenue laws. Whenever the provisions of this Act shall be
21 applicable to importations into the United States of the
22 products of any foreign country, they shall be applicable
23 thereto whether such products are imported directly or in-
24 directly.

25 (h) It shall be the duty of such department or inde-
26 pendent establishment of the Government, as the President
(Page 1 may direct, to ascertain and at all times to be informed
284) 2 whether any of the discriminations against the commerce of
3 the United States enumerated in subsections (b), (c), and
4 (f) of this section are practiced by any country; and if
5 and when such discriminatory acts are disclosed, it shall be
6 the duty of such department or independent establishment to
7 bring the matter to the attention of the President, together
8 with recommendations.

9 (i) The Secretary of the Treasury with the approval
10 of the President shall make such rules and regulations as are
11 necessary for the execution of such proclamations as the
12 President may issue in accordance with the provisions of
13 this Act.

14 (j) That when used in this section the term "foreign
15 country" shall mean any empire, country, dominion, colony,
16 or protectorate, or any subdivision or subdivisions thereof
17 (other than the United States and its possessions), within
18 which separate tariff rates or separate regulations of com-

a brief summary of the section, which he had prepared some time before, and went on to say:

. . . . My curiosity is aroused, and I hope it will be satisfied by some member of the committee as to the particular country against which these provisions are aimed. What country is it? We are now at peace and happily likely to be at peace with all the world for a long time to come. God grant it! Why should we put it in a statute that we are afraid that some country is going to discriminate against us, the United States, this great, powerful, wealthy Nation; that some country is going to discriminate against us and in favor of some other country, our rivals in trade. I wonder what country it is against which these provisions are aimed?¹

Senator Walsh, as his next remark showed, was laboring under the impression that commercial treaties containing "the ordinary favored-nation clause" existed between the United States and "practically every nation on earth," which treaties, we should expect, would be held inviolate by the other parties. "I had supposed," he added, "that after the horrible war through which we have passed we were going to try to cultivate amicable relations with our neighbors and friends and not go around carrying a chip on our shoulders constantly." Suggesting the possibility that the section was aimed at Germany, he called attention to the fact that the treaty of peace between the United States and that country had incorporated the provisions of the Treaty of Versailles under which Germany was bound to accord most-favored-nation treatment to the allied and associated

19 merce are enforced.—(67th Congress, 2d Session, Calendar No. 591. H. R. 7456. In Senate of U. S., July 22, 1921. Reported by Mr. McCumber, with amendments, April 10, Calendar day April 11, 1922.)

¹ *Congressional Record*, vol. 62, pt. 11, p. 11244, Aug. 11, 1922.

states. These provisions, he thought, were sufficient safeguard against discriminations by Germany and he asked the Chairman of the Committee on Finance to explain why one should vote for Section 317.

(b) *The Constitutionality of Section 317*

In reply, Chairman McCumber did not attempt to point out any particular discrimination or discriminating country at which the provisions of Section 317 were aimed. He said, however, that for many years the statute books had contained laws relating to discrimination, the "broadest" of which he found to be contained in sections 804 and 805 of the Revenue Act of 1916.¹

¹The essential portions of these sections of the Act of Sept. 8, 1916, provide:

"That whenever any country, dependency, or colony shall prohibit the importation of any article the product of the soil or industry of the United States and not injurious to health or morals, the President shall have power to prohibit, during the period such prohibition is in force, the importation into the United States of similar articles, or in case the United States does not import similar articles from that country, then other articles, the products of such country, dependency, or colony.

* * * * *

"That whenever during the existence of a war in which the United States is not engaged, the President shall be satisfied that there is reasonable ground to believe that under the laws, regulations, or practices of any country, colony, or dependency contrary to the law and practice of nations, the importation into their own or any other country, dependency, or colony of any article the product of the soil or industry of the United States and not injurious to health or morals is prevented or restricted the President is authorized and empowered to prohibit or restrict during the period such prohibition or restriction is in force, the importation into the United States of similar or other articles, products of such country, dependency, or colony as in his opinion the public interest may require."

These interesting passages, it must be noted, are not directed against discrimination. The point with respect to constitutionality would doubtless be the same, but the Senator would have found a happier example in section 806, the text of which is quoted *supra*, subdivision 11.

The debate at this point launched into the question of the constitutionality of Section 317.¹ Mr. McCumber referred in support thereof to a provision of the Tariff Act of 1890,² the validity of which had been upheld by the Supreme Court of the United States in the case of *Field versus Clark*.³ This provision, as will be seen, did not involve discriminations against, but "reciprocally unequal and unreasonable" treatment of, the commerce of the United States. So far as the question of constitutionality is concerned, however, the Chairman's illustrations were doubtless perfectly sound. May or may not the Executive, within limits set by the Congress, find certain facts and on the basis of those facts proclaim certain specified alterations in the rates of import duty to be levied upon goods entering this country? May he be authorized to extend such prerogative, in extreme cases, to the actual prohibition of imports? Mr. McCumber's remarks were directed toward the maintenance of the affirmative of these questions. He was willing to say, however, that he thought that in the case of Section 317, the Congress was "pressing closer to the 'twilight zone' of uncertainty as to the constitutionality of the provision," than in the case of any other section of the pending bill.

The debate then took another turn.

¹ The constitutionality of Sections 315, 316 and 317 was discussed at length in earlier debates; by Senator Smoot on April 24 and by Senator Walsh of Montana and others on May 8. *Congressional Record*, vol. 62, pt. vi, 67th Congress, 2d Session, pp. 5874 and 6493 *et seq.*

² Text, *infra*, subdivision 18 (b).

³ 143 U. S., 692 (1891). The question involved is that of the delegation of legislative power.

(c) *The Relation of Section 317 to Reciprocity Treaties
and the Most-favored-nation Clause*

Senator Lenroot of Wisconsin made the following illuminating remarks:

I think this section, quite aside from any constitutional question which may exist—and I think, as stated by the chairman of the committee, it involves the gravest constitutional questions of any of the sections which we have been considering—presents a most dangerous situation for the United States, because if the United States is to enter upon this policy no man can tell where the end will be. For instance, the paragraph beginning at the bottom of page 280 provides that the President shall increase duties—he must increase duties—if any other country enters into a reciprocity arrangement with a third country whereby the goods of such country shall be admitted at a lower rate than the general customs tariff rate in return for the other country admitting the goods of the second country at a lower rate. That is a right upon which the United States has insisted in times past. Such provisions have been found in former Republican tariff bills. But this provision says if any country in the world shall enter into such an arrangement in the future the President of the United States must increase the duties fixed in this bill upon imports from such country.¹

Attention was called in this connection to the existing reciprocity treaty between the United States and Cuba, under which each country accords to products of the other reductions from its regular tariff rates.

At this point Mr. Walsh of Montana inquired whether the Committee on Foreign Relations had given attention to the provision under discussion. Mr. Lodge stated that the

¹ *Congressional Record*, *op. cit.*, p. 11245. For the paragraph "beginning at the bottom of page 280", see *supra*, p. 76, note, beginning at line 24.

Committee had not considered Section 317 and that the section had not had his personal attention. Thereupon Mr. Walsh read the portions of the Section contained between line 15, page 280, and line 8 on page 281, both inclusive, of the text as printed for Congressional use, which required the President to proclaim additional duties in the event of impositions on American Commerce "not equally enforced" in like circumstances on the commerce of other countries.

Mr. Lodge interpreted the requirement of the passage to be that the President should proclaim the additional duties upon the products of those countries which failed to grant to the products of the United States most-favored-nation treatment, by which he meant customs treatment as favorable as that granted *freely* to the products of any other country.¹ As will be shown at length hereafter,² the United States has, almost without exception, either expressly or constructively, included in its most-favored-nation covenants the condition of the return of equivalent concessions, notwithstanding the fact that most of the leading commercial nations have made their favored-nation pledges unconditional. Mr. Lodge, therefore, thinking in terms of American treaty arrangements, concluded that a discrimination made in return for reciprocal concessions, such as those

¹ A typical treaty clause by which the contracting states mutually guarantee to each other such treatment is found in the treaty of February 21, 1911, between the United States and Japan,—

" . . . the High Contracting Parties agree that, in all that concerns commerce and navigation, any privilege, favor or immunity which either Contracting Party has actually granted, or may hereafter grant, to the citizens or subjects of any other State shall be extended to the citizens or subjects of the other Contracting Party gratuitously, if the concession in favor of that other State shall have been gratuitous, and on the same or equivalent conditions, if the concession shall have been conditional."—Charles, *Treaties*, p. 81; Malloy, *Treaties*, p. 2716. See table of principal sources at the beginning of this monograph.

²Ch. v.

granted to the United States by Cuba, would not come within the terms of Section 317.

That this view was not justified by the text of the statute has been suggested in the preceding chapter. There seems to be nothing in the language of the bill as it was then under discussion to make such an interpretation more justifiable. The insertion by the Conference Committee, however, of the words "in fact" after "discriminates", in the passage reproduced by line 9, page 281, of the bill, may possibly have been intended to deprive the word "discriminates" of any *legal* connotation that might cling to it because of the American interpretation of most-favored-nation treatment. The following colloquy ensued among the Senators:

Mr. WALSH of Montana. . . . Suppose that Germany and Poland make some reciprocal arrangement for reciprocal trade. There is, as I understand, a customs regulation, or is about to be a customs regulation, among the Balkan States. If Yugoslavia, for instance, should admit goods from Czechoslovakia at a less rate than she does from all the rest of the world, including the United States, she would make herself subject to these provisions, would she not?

Mr. LODGE. No; because I think this affects only nations which come under the favored-nation clause.

Mr. WALSH of Montana. Of course, if we have a treaty with a country, and have the favored-nation clause, that treaty obligates her not to give any nation treatment favored over us, and she would violate that treaty if she did it; but this assumes that she is going either to violate the treaty or else that she has not such a treaty with us.

Mr. LODGE. The favored-nation clause is, of course, disposed of if it is a reciprocal treaty between two countries, because the country with which we make the treaty gives us better terms.

Mr. WALSH of Montana. Exactly; so that she would not

violate the favored-nation clause, but she would violate this provision.

Mr. LODGE. I am not sure of that.

Mr. WALSH of Montana. That is the question that I thought perhaps ought to receive the consideration of the Committee on Foreign Relations.

Mr. LODGE. I see, by looking at it, that this applies to every foreign country. It does not interfere with reciprocity treaties, and of course we can not interfere with the treaty-making power.

Mr. WALSH of Montana. It applies to every country that discriminates against us—that is to say, that gives to any nation a more favorable rate of duty than it does to us. Then that country becomes subject to the conditions of this statute.¹

Mr. Walsh would appear to be entirely correct in this interpretation. The Chairman of the Finance Committee was not, however, prepared to accept such a conclusion:

Mr. McCUMBER. Will the Senator from Montana allow me to suggest that it has always been held that a reciprocal arrangement made between two countries, whereby one for due consideration receives special favors from another and pays for them in granting special favors, is not in conflict with the favored-nation clauses of the treaty?

Mr. LODGE. Yes; that is what I said.

Mr. McCUMBER. And therefore, where reciprocity treaties have been made between nations it would not be a discrimination against the United States for the reason that just and proper consideration is supposed to pass between the countries in making those reciprocal arrangements.

Mr. LENROOT. Exactly. Under the other paragraphs that relate to discrimination what the chairman of the committee says is true; but under the paragraph that I am discussing there is not a word about discrimination. Discrimination is

¹ *Congressional Record, op. cit.*, p. 11246.

not an element. It is merely the fact of whether one country, through reciprocal arrangements, gives to another country lower duties than it gives to us. If it does so, these higher duties must be applied.

* * * * *

Mr. WALSH of Montana. I want to add that I am in entire accord with the Senator. The ordinary reciprocal arrangements do not violate the most-favored-nation clause. That is all right; but here comes in a provision, a law of the United States, that if they do that they become subject to this penalty.

Mr. McCUMBER. If it is not a discrimination, of course, then it will not come under the rule which we lay down.

Mr. LENROOT. Where does the Senator find in that paragraph anything about discrimination?

Mr. LODGE. Which paragraph is the Senator now speaking of?

Mr. LENROOT. The paragraph at the bottom of page 280 and at the top of page 281. There are other paragraphs that relate to discrimination, and I quite agree with the Senator that in most cases they would not apply; but in this the flat declaration is made, not if it discriminates but if one country gives to another a lower rate of duty than it gives to us, irrespective of whether it be discriminatory in the law, that the President must raise these duties. There is no escape from that conclusion.¹

Thus Mr. Lenroot and Mr. Walsh seemed to accept the theory that "discriminations" would not include concessions made for reciprocal concessions. In respect to those provisions where the word *discriminate* occurred they held that the additional duties of section 317 could not apply to the products of countries that favored third countries more than the United States in return for an equivalent favor or concession. Therefore, without inconsistency growing out

¹*Ibid.*

of its reciprocity arrangement with Cuba, the United States could accept and utilize such portions of the bill. But the paragraphs beginning at lines 19 and 24 of page 280 and line 5 of page 281¹ clearly specified that the imposition of any duty with respect to products imported from or exported to the United States, which duty was *not equally enforced* with respect to *every other country*, would render the imposing country liable to the additional duties provided for. Mr. Lodge finally came to the conclusion that the clauses in question, as worded, "would include a reciprocity treaty". That, he was sure, could not be the intention.

Mr. Walsh then invited attention to the language of another clause which he believed to be open to the same objection as existed to the clauses containing the words "not equally enforced". Referring to the clause beginning with the word "discriminates" (page 281, line 9) he pointed out that a country *failing to accord equality of treatment* would be subject to additional duties just as a discriminating country (lines 15-17).

(d) *The Meaning of Section 317 with respect to Intra-imperial Preferences*

In the course of the discussion of the application of the additional duties provided for in Section 317 to countries discriminating against the United States in return for reciprocal concessions from the favored country, some mention was not unnaturally made of the possible application of the additional duties to discriminations resulting from preferences granted by certain portions to other portions of the same empire. The Chairmen of the Finance and Foreign Relations Committees appeared to consider the additional duties inapplicable in such cases, at least if the imperial

¹The text of Section 317, as then pending, with the lines numbered, is contained in the footnote beginning on p. 76.

preferences were reciprocal. That the mere fact of membership in the same empire with the favored commonwealth did not under the terms of the bill affect the question of discrimination against the United States was, however, maintained by other Senators. In support of this position Mr. Walsh quoted the definition of "foreign country" contained in subdivision (j); on hearing which Mr. Lenroot remarked: "I believe that settles it." No mention was made of the preferences exchanged between the United States and the Philippines; hence the inconsistency of invoking Section 317 in such cases escaped comment.

(e) Section 317 Altered and Accepted by the Senate

The Finance Committee offered amendments to alter subdivision (h) so as to specify the Tariff Commission in place of "department or independent establishment of the Government" as the agency designated to discover and report actual instances of discrimination.

In accordance with the conclusion reached in the debate on the applicability of Section 317 to discriminations resulting from reciprocal concessions, Senator Lenroot moved

to strike out, on pages 280, all of lines 24, 25, and 26, and on page 281, lines 1 to 8, inclusive. Also on line 15, page 281, to strike out the semicolon and insert a period, and to strike out the remainder of the paragraph. That will leave it applying to all discriminations against the United States.¹

Senator McCumber, fearing that the provisions remaining in the bill would be insufficient to protect from discrimination certain important commercial activities, moved to insert in line 11, page 281, after the word "any" the words "customs, tonnage, or port".

¹ *Op. cit.*, p. 11248. For line and page references see text, *supra* p. 76, note.

All of the proposed amendments were acceded to without objection and the section as a whole was adopted as an amendment to the House Bill by a vote of 38 to 19. Senator Lenroot voted in the negative. Two Democrats joined the Republicans in the affirmative vote and 38 Senators were recorded as not voting. The alterations made by the Senate in the text of the Finance Committee's draft of Section 317 raise two interesting questions:

First, was it reasonable to conclude that the word "discriminate" should be deprived of its ordinary meaning and interpreted in a special and limited way in a statute simply because the words "most-favored-nation treatment" are interpreted in a certain way when appearing in the treaties to which the United States is a party? In this connection it should be noted that the most-favored-nation clauses in treaties do not as a rule contain the word "discriminate", though of course their object is to prevent unequal treatment. It seems somewhat remarkable, moreover, that no Senator appears to have been cognizant of the fact that the American interpretation is peculiar and almost unique, and that, by the generally accepted interpretation, an agreement to grant most-favored-nation treatment would be violated by exclusive concessions to a third country even though such concessions were accorded in return for reciprocal and equivalent concessions. Without attempting to answer the question raised, it may at least be suggested that the position taken by the Senators appears a bit strained and unnatural.

Second, in view of the nature of the clauses stricken from the Finance Committee's draft, why was the second paragraph of subdivision (b)—page 280, lines 19 to 23—allowed to remain unchanged? The essential element of this passage appears to be that it places under the President's mandate to levy additional duties the imposition of charges upon American commerce that are not *equally enforced* upon

like products of any foreign country. It refers to charges upon goods in transit or goods to be re-exported. The paragraphs stricken out appear to have the same essential element but refer primarily to customs charges. It is difficult to note any difference in principle, but the fact remains that transit and re-exportation dues are seldom if ever made the subject of reciprocity treaties. Moreover, the additional duties referred to in the paragraph that was retained are authorized only if the unequal charge upon American commerce is "unreasonable". This limitation does not appear in the paragraphs that were stricken out. Neither of the considerations here noted were mentioned in the debate.

17. SECTION 317 IN THE CONFERENCE COMMITTEE.
FINAL ENACTMENT

A comparison of the text of Section 317 as it was adopted by the Senate¹ with the text as enacted into law, quoted in the opening pages of Chapter I, reveals the fact that the section was subjected by the Conference Committee of the House and Senate to a careful revision as to language but was not greatly changed as to meaning. The operation of defensive duties was made to depend upon a finding by the President that they would serve the public interest. "Discriminates" was changed to "discriminates in fact" in the statement of the circumstances which would make the defensive duties applicable. The additional duties were, by the former draft, to become effective on a date to be named in the President's proclamation; the final draft specified thirty days after the date of the proclamation. The subdivision relating to benefits accruing to industries in third countries from discriminations against the United States was considerably amplified. The report of the Conference Committee, so far as Section 317 was concerned, received

¹This text is set forth in Appendix 2.

the concurrence of both houses; the tariff act went into effect on September 22, 1922.

18. THE POLICY OF THE HOUSE BILL REPLACED BY
SECTION 317

There remains the task of contrasting Section 317 with the provisions for stimulating export trade contained in the bill as it passed the House. This suggests a summary of certain earlier developments.

(a) *Reciprocity Arrangements*

The idea of international trading for commercial concessions, commonly spoken of as "reciprocity", held an important place in the international politics of the United States during the latter half of the nineteenth and opening years of the twentieth centuries. It continues to have many advocates and to be of moment in tariff discussions. The first American commercial treaty, that concluded with France in 1778,¹ made the most-favored-nation treatment which the parties pledged to each other contingent, in case a concession should be made by either party for a price, upon the payment by the other party of a similar price, thus leaving the way open to the United States for the conclusion of reciprocity treaties with other countries without automatically incurring the liability to extend their concessions to France.

Special reciprocity treaties providing for mutual concessions were entered into with Canada in 1854, with Hawaii in 1875 and with Cuba in 1902. The first was abrogated by the United States and terminated after being in effect eleven years. The second was continued in effect until the annexation of Hawaii. The third is still in effect.² Negotiations

¹ See text of Article II, *infra*, subdivision 36.

² See *infra*, subdivision 46. The dates given are the dates of the conclusion of the treaties, not of their coming into effect.

for the adoption of reciprocity treaties were carried on with several other countries under provisions of the Tariff Acts of 1890 and 1897, and a number of reciprocal arrangements were entered into. After the rejection of reciprocity by the tariff-making Congress of 1909, the principle achieved its anti-climax in a new Canadian reciprocity project¹ (1911) and in the inept provision of the Tariff Act of 1913.²

(b) *The Tariff Act of 1890*

The Tariff Act of October 1, 1890, contained, in section 3, a provision differing in principle from the straightout conception of reciprocal concessions on the one hand and the principle of defense against discrimination on the other. It provided:

That with a view to secure reciprocal trade with countries producing the following articles, and for this purpose, on and after the first day of January, eighteen hundred and ninety-two, whenever, and so often as the President shall be satisfied that the Government of any country producing and exporting sugars, molasses, coffee, tea, and hides, raw and uncured, or any of such articles, imposes duties or other exactions upon the agricultural or other products of the United States, which in view of the free introduction of such sugar, molasses, coffee, tea, and hides into the United States he may deem to be reciprocally unequal and unreasonable, he shall have the power and it shall be his duty to suspend, by proclamation to that effect, the provisions of this act relating to the free introduction of such sugar, molasses, coffee, tea, and hides, the production of such country, for such time as he shall deem just, and in such case and during such suspension duties shall be levied, collected, and paid upon sugar, molasses, coffee, tea, and hides, the product of or exported from such designated country.³

¹ See the Act of July 26, 1911.

² Sec. IV, A.

³ *Tariff Acts*, p. 416.

There followed specified rates — on sugar, a maximum of two cents per pound; on certain molasses, four cents per gallon; on coffee, three cents per pound; on tea, ten cents per pound; on certain hides and skins, one and one-half cents per pound.

Diplomatic negotiations were promptly instituted by the Secretary of State, Mr. Blaine, and within two years ten arrangements had been made under which concessions were granted to American products in return for the continued free entry into the United States of sugar, molasses, coffee, tea, hides and skins. With the exception of Austria-Hungary and the German Empire, the countries affected were all in the Western Hemisphere. An informal arrangement was, furthermore, entered into with France and an agreement was negotiated with Costa Rica, but never became effective. Against three countries the penalty duties provided for were actually applied. Section 3, as a part of the Act of 1890, was repealed by the tariff act of 1894.¹

(c) *The Tariff Act of 1897*

The Act of 1894 contained no general provisions having as their object the alteration of duties in order to gain advantages, eliminate discriminations or reduce the tariff walls of other countries. In 1897, however, the political party which had passed the Act of 1890 was again in power and proceeded to enact three distinct propositions, comprising the most comprehensive and varied bargaining sections ever contained in an American tariff law.²

(1) For the expressed "purpose of equalizing the trade of the United States with foreign countries, and their colo-

¹ The author of the 1894 tariff act, Congressman Wm. L. Wilson, discussed the practical effect of Section 3 in an article entitled "The Republican Policy of Reciprocity," *The Forum*, Oct., 1892, p. 255.

² *Tariff Acts*, pp. 600-602. Text, Appendix 9 (Act of July 24, 1897, Sections 3-4).

nies," which produced and exported to the United States certain specified articles, the President was authorized to enter into negotiations with the governments of such countries for "commercial agreements in which reciprocal and equivalent concessions" might be obtained for "the products and manufactures of the United States." In return for such concessions substantial reductions in import duty on the articles specified were to be allowed upon argols, or crude tartar, or wine lees, crude; brandies, or other spirits manufactured or distilled from grain or other materials; champagne and all other sparkling wines; still wines, and vermouth; paintings, drawings and statuary.

The distinguishing features of this provision appear to be (a) the definite purpose to provide a means to bargain certain authorized concessions for the best returns that could be obtained for them, and (b) the authorization of agreements to become effective without being referred to the Senate for ratification or to the Congress for approval. This was the first straightout reciprocity provision to be contained in a tariff law of the United States.

(2) A second proposition authorized the President, through the adoption of commercial treaties, which must be ratified by the Senate and approved by the Congress, to reduce, in amount not exceeding twenty per centum, the duties specified in the act applicable to such articles as should be determined. Moreover, dutiable articles might be transferred to the free list and the retention of articles on the free list might be guaranteed. Such treaties were to be negotiated within two years from the passage of the act, for periods of not more than five years and "with a view to secure reciprocal trade with foreign countries."

It is noteworthy that there is no limitation placed upon the number or variety of articles to which this section is applicable. More amply than the provision described before

it, this provision embodies the genuine conception of reciprocity.

(3) Finally, the Act of 1897 re-enacted in principle the section of the Act of 1890 under which special reciprocal arrangements had been entered into as already described. "With a view to secure reciprocal trade with countries producing" certain specified articles, the President was authorized, whenever satisfied that a country (or colony) imposed "duties or other exactions upon the agricultural, manufactured, or other products of the United States," which he should deem "reciprocally unequal and unreasonable", to remove those articles, when exported by the offending country, from the free list and to make them dutiable at rates fixed by the act. The fact that these articles were free in the United States tariff was to be taken into consideration in determining whether the treatment accorded American products was "reciprocally unequal and unreasonable". Instead of the sugar, molasses, coffee, tea and hides of the Act of 1890, the Act of 1897 specified "coffee, tea, and tonquin, tonqua, or tonka beans, and vanilla beans" as the products upon which the penalty duties might be levied.

The arrangements negotiated under the provision of the act permitting reductions on argols, *et cetera*, came to be known as "argol agreements". France, Portugal, Germany and Italy accepted them and Switzerland, under unconditional most-favored-nation provisions in the existing commercial treaty with the United States, demanded and was accorded the reduction of American duties accorded to France.¹ Some years later other commercial arrangements were negotiated under the same provision and some of the old ones were renewed. All terminated, so far as the United States was concerned, upon the repeal of the Act of 1897 by the Act of 1909.²

¹Text of Swiss treaty articles: *infra*, subdivision 37 (g).

²The agreement of August 1, 1906, with Spain was, in view of certain

The provision of the Act of 1897 authorizing the negotiation of treaties reducing by not more than twenty per centum the duties upon any articles resulted in the negotiation of treaties with France, with Great Britain for specified West Indian possessions, Bermuda and British Guiana; with Denmark, for the island of St. Croix, with Dominican Republic, with Argentina, with Nicaragua and with Ecuador. All failed to obtain the consent of the Senate and the Congress.

The third provision mentioned above, that for penalty duties upon products of countries that treated American products unequally and unreasonably, lacked the motive power that the inclusion of sugar among the bargainable articles had given to the corresponding provision of the Act of 1890. No formal agreement was negotiated as a result of the 1897 provision, but its existence affected the "argol agreement" with Portugal and was the basis of a tacit understanding which induced Brazil to grant preferential treatment to certain goods imported from the United States.

(d) The Tariff Act of 1913

Only the palest reflection of former reciprocity provisions is found in the Act of 1913, the reciprocity provision of which is as follows:

That for the purpose of readjusting the present duties on importations into the United States and at the same time to encourage the export trade of this country, the President of the United States is authorized and empowered to negotiate trade agreements with foreign nations wherein mutual concessions are made looking toward freer trade relations and further reciprocal expansion of trade and commerce: *Pro-*

subsequent understandings, considered to be still in effect on November 5, 1922, when it was denounced subject to one year's notice. Before the expiration of the notice the Spanish Government prorogued the agreement for six months from November 5, 1923, with certain reservations.

vided, however, That said trade agreements before becoming operative shall be submitted to the Congress of the United States for ratification or rejection.¹

(e) Description of the Bargaining Provisions of the House Bill, 1921

When the tariff bill of 1921, which became the Act of 1922, was reported to, and when it passed, the House of Representatives, it contained the reciprocity and penalty provisions of the Act of 1897, much amplified in detail but not altered in principle.²

The first provision (Section 301) proposed to authorize the negotiation of commercial treaties "with a view to securing reciprocal trade with any foreign country" or dependency. In return for such treatment of merchandise from the United States as should be deemed to be for its interests, the President could offer the reduction or abolition of duties upon such merchandise as should be designated in the treaty, or for its retention upon the free list, when imported into the United States from such country or dependency. No limitations were placed upon the amount of the concessions or the term of their continuance; the agreements were, however, to be subject to ratification by the Senate and approval by the Congress.

The 1897 prototype of this provision, it will be remembered, limited not only the amount of the authorized reductions in American duties, but also the period within which treaties could be negotiated and the length of their duration. In this respect it resembled a second bargaining provision of the Fordney bill.

The second provision (Section 303) repeated the first one with the following essential alterations: (1) the agree-

¹Sec. IV, A.

²For text of Sections 301, 302 and 303 of the House Bill, see Appendix 7.

ments authorized to be negotiated with other countries were required to be concluded within three years from the date of the passage of the bill; (2) they were to remain operative during a specified period not exceeding five years; (3) they were limited with respect to their reduction of American tariff rates to twenty per centum ad valorem; (4) nothing was said about pledging the retention of articles on the free list, and (5) the agreements were to go into effect without being ratified by the Senate or approved by the Congress.

The corresponding provision of the Act of 1897 permitted only specified reductions on a limited list of about a dozen products, but it did not contain the time limits of Section 303.

Finally, the Fordney Bill contained a provision (Section 302), which had the purpose not only of "securing reciprocal trade", but also of "regulating the commerce of the United States" with other countries. By the terms of this provision it was made the duty of the President, under certain circumstances, to impose penalty duties upon the importation into this country of such products from other countries as he should designate. The amount of these duties was to be "equal" to "the duties or other exactions, limitations, or embargoes" imposed by such other countries (or dependencies), respectively, upon "like or similar" products of the United States, which impositions the President should deem, in view of the duties imposed upon such articles when imported into the United States, to be "higher and reciprocally unequal and unreasonable".

This section differs from the penalty-duty provisions of the Acts of 1890 and 1897 in certain important particulars: (1) it authorizes penalty duties, varying in amount according to the imposition of the other country, to be levied upon imported articles generally, while they specified additional

duties applicable only to a small and limited number of products, included in their free lists; (2) it requires the penalty duties to be levied upon the same kinds of goods as are treated unequally and unreasonably by the country to be penalized, while they specified articles that were imported into but not produced in the United States. In as much as the more important commercial exchanges between countries seldom consist of the same sorts of merchandise, the latter difference would probably have rendered the practical usefulness of Section 302 exceedingly limited.

The discussion of the Fordney Bill in the Senate indicated that the principle expressed in Section 317 of the enacted law—i. e., the defense of American exports against adversely discriminatory treatment in foreign markets—would meet the present needs of this country more fully than could a provision penalizing treatment considered unreasonable or actually unequal in rate of duty as compared with that accorded by this country. The same was true with respect to the principle involved in the other bargaining provisions adopted by the House of Representatives. Moreover, the penalty duties of Section 302 would, it appeared, if put into effect against a country to which the United States had agreed to grant most-favored-nation treatment, violate such agreement.¹ In the course of his address of April 24, 1922, Senator Smoot enumerated other reasons why he opposed the acceptance by the Senate of Section 302, among them the improbability of achieving the purpose of the section, the danger of retaliation and the impropriety of basing the rate of import duty to be imposed upon goods entering this country upon the rate imposed upon similar goods by other countries.²

¹The subject of treaty violation is discussed in subdivision 28, *infra*, in connection with the provisos to certain paragraphs in the schedules and free list of the Tariff Act of 1922.

²*Congressional Record*, vol. 62, pt. vi, 67th Congress, 2d Session, p. 5880.

During the hearings which the Senate Committee on Finance conducted, beginning July 25, 1921, upon the tariff bill as it passed the House, a discussion occurred which to some extent illustrates the progression of thought likely to mark the adoption of a provision like Section 317 in place of such a provision as the original Section 302. The witness, Mr. Bentley of San Francisco, represented the California Packing Corporation and the National Canners' Association.

Mr. Bentley. France at the present time is exacting a much higher rate of duty on canned vegetables and canned salmon which go from this country than it is proposed to levy in this country against her canned sardines, vegetables, and fruits shipped to this country, and in this she is discriminating, because she admits canned salmon from British Columbia and Canada and from Siberia, where Japan is operating, on a very much lower rate of duty than France charges the United States for canned salmon.

And we hope in this way, by indicating that unless she lowers her duty on canned salmon and canned milk and canned vegetables, which we naturally would ship to her, that we will ask our Government to raise the tariff on French canned foods to the level that she is charging against our foods.

Senator Curtis. What you want, is it not, is a provision authorizing the President, if advised that any country discriminates against our products, to increase the duty upon the products of that country?

Mr. Bentley. Products of "similar character, purpose, or use."

* * * * *

Senator McCumber. Similar articles would not mean that if France charged us a high duty on fish that we could then increase our duties on French olives, for instance.

Mr. Bentley. Well, that would be a question, of course.

Senator McCumber. That would neither be "such or similar".

Mr. Bentley. We would hope that it would apply to the general line of canned foods.

Senator McCumber. What you want to do is to make just the broad statement that we can change our tariffs on all of our canned goods to meet the prices on canned goods of all character coming from another country?

Mr. Bentley. Yes, sir.¹

Mr. Bentley was thinking in terms of the House Bill, Section 302, but his expressed need would seem to be best satisfied by such a provision as was afterwards to become Section 317 of the act.

19. THREE TYPES OF INTERNATIONAL COMMERCIAL POLICY

The foregoing discussion of bargaining and defensive provisions in our tariff laws has disclosed three general types, each having distinctive characteristics and each well calculated to aid in making effective certain clearly defined and thoroughly diverse policies in our national treatment of international trade. These provisions and their respective purposes may conveniently be described as follows:

(1) The theory of reciprocal agreements contracting for mutual concessions finds a natural setting in the field of commerce. Trade itself grows out of the fact that any given person or nation has, or probably has, capacities for production that exceed in some respects and in others are inferior to the capacities of other persons or nations. What a person or nation can well produce is produced by that person or nation in quantities beyond the personal or national needs. The surplus is exchanged for desired commodities that are produced better by some other person or nation. A nation may find itself particularly desirous of a market for a particular product in a particular country. To get an

¹*Hearings, Committee on Finance, U. S. Senate, on proposed tariff act of 1921, vol. vii, pp. 5065-5066. See table of principal sources at the beginning of this monograph.*

advantageous opening there it may be willing or, indeed, may welcome, the opportunity to grant a concession for the entry of some other product into its own market. This theory rests on a foundation of intense nationalism and is consistent with the theory of the protective tariff. It characteristically seeks to get the maximum advantage for such economic activity as, from the point of view of supposed national welfare, will be for the best upbuilding of the national economic life.

From the point of view of international comity there is something to be said in favor of the method of bargaining that operates through mutual concessions. The failure to offer a concession is certainly less irritating than the imposition of a penalty. On the other hand, it must be remembered that a special concession to one country is in effect a penalty upon the commerce of all others.

The reciprocity provisions of the Dingley Act and of the Fordney Bill were in accord with the high protectionist principles which prevailed in those measures. In a low tariff or free-trade régime there would be less to bargain with and bargaining provisions of the sort under discussion would be less likely to be found. A free-trade country may, however, in consideration of the assured continuance of such régime, induce another country to accord to it special concessions.

(2) The theory of equality of commercial opportunity may appropriately be translated into practice through the assistance of additional duties, which may by administrative act be levied against countries that discriminate against a country's commerce, especially its export trade. From the point of view of commercial advantage it forms an appropriate foundation for the policy of a country that feels able to hold its own or perhaps excel others in all markets where its goods are not discriminated against—that is to say, where

they are accorded most-favored-nation treatment. It says in effect that, under penalty, all markets must extend equal advantages to all competing nations. The most elemental consistency requires the nation proclaiming it to refrain from discriminatory practices in regard to its own market.

The realization of this theory is consonant with the practice of either protection or free trade—though, of course, the actual levy of defensive duties would form an exception to the free import of the commodities to which such duties applied. On the other hand, extremely high tariff walls, whether or not raised in the name of protection, seem out of harmony with this theory. If a country's import duties pass a certain height the fact that they fall equally upon the products of all nations ceases to be of interest: they are too high to be crossed and the market is effectively closed; the theoretical equality is practically the equality of negation. The practical object of the theory of equality of opportunity, it must not be forgotten, is the maintenance of markets. Probably many of the schedules of the Payne-Aldrich Act and the Act of 1922 may be accounted thus incongruous with the maximum-minimum provisions of the former and Section 317 of the latter. These two examples indicate that the penalty method of operation is to be expected where the object of commercial policy is to obtain equality of treatment.¹ A proposition involving mutual concessions would, of course, be inconsistent with the idea of equality unless the concessions are to be generalized. Some of the other parties to agreements concluded under the Act of 1897 accorded to the United States nothing that was not in general accorded to other foreign countries.

(3) Finally there is the theory that a country may use the provisions of its own tariff law in efforts to batter down

¹The act of 1909, though in form *conceding* minimum rates, may be regarded as actually threatening the maximum.

the tariff walls of other countries. If a nation imposes duties that are deemed by another to be *unreasonable*, that other country may undertake, by offering concessions or by imposing penalties, to persuade or force the first country to reduce its rates of duty. If it offers concessions it in effect offers reciprocity, as described above in the first example. It may, however, either from necessity or choice, undertake to bring the "unreasonable" country to terms by penalizing the latter's goods entering its market. Since the meaning of *unreasonable* is likely to vary according to the duties which its own schedules impose upon the articles in question, the exercise of penalty duties in this case proclaims its exclusive right to determine for other countries besides itself the legitimate height of import duties. Carrying the policy to its extreme, a country might assert that no other government should impose duties as high as its own. Obviously such a stand would be inconsistent, if not positively belligerent, if taken by a nation which itself imposed protectionist duties—or at least, duties higher than those which it attempted to eliminate in the schedules of other countries.¹

The policy is logically one of aggressive free trade: free trade of the militant sort that seeks to force itself upon all nations. If a nation honestly believes in free trade and wants to make a crusade for its universal adoption, it has in the theory under discussion a weapon at hand.

The Acts of 1890 and 1897 were high protection measures and the appearance in them of sections of the character under consideration seems inharmonious, to say the least. The sections were, however, consistent within themselves

¹Penalty import duties are sometimes levied in retaliation against practices of other countries bearing little or no relation to customs duties. Thus several provisions of the Tariff Act of 1922 undertake to penalize in this way certain conservation and export restrictions of other countries which affect articles imported into the United States.—See *infra*, subdivision 29.

inasmuch as the articles liable to the penalty duties were all included in the free lists.

The present thesis concerns itself solely with the second or defensive-duty theory, which contemplates most-favored-nation treatment. It finds adequate expression in Section 317 of the Tariff Act of 1922 and is the basis of probably the best, if not the only, policy consistent with international comity as most highly developed in present-day public opinion.

Should the future public opinion of the world turn definitely against protectionism and its cherishing mother, nationalism, the international ethics of that day may countenance an effort by one state to penalize another state into the abandonment of practices that, from the new point of view, would be anti-social. Under the contemplated circumstances, import duties for any purpose other than revenue would probably fall within the definition of anti-social. For the present, however, we believe very strongly that the tariff, if not, in General Hancock's phrase, a "local" issue, is a purely national affair,¹ about which, so long as it does not discriminate, no other nation should presume to do otherwise than make mild representations. While this belief persists international comity and international ethics alike must forbid us to demand as of right from other countries duties at rates of our own choosing.²

¹ That public opinion may be gradually changing in this respect is suggested in ch. xii.

² Cf. *infra*, subdivision 28.

CHAPTER III

SECTION 317 AS THE BASIS OF COMMERCIAL POLICY AND THE CHARACTER OF THE POLICY NATURALLY TO BE DERIVED FROM IT

20. ECONOMIC PURPOSE OF SECTION 317

In addressing to persons and firms engaged in exporting merchandise from the United States a circular letter and questionnaire¹ requesting their assistance in gathering data relating to discriminations against American commerce, the United States Tariff Commission called attention to the fact that "Section 317 was enacted for the special benefit of American export trade" and stated that it counted "upon the wholehearted cooperation of American exporters in securing the authentic first-hand information required" for the effective administration of the section.

The Tariff Commission stated the situation correctly, but in the larger sense Section 317 was enacted because, to a greater extent than ever before, the prosperity of the United States is dependent upon the sale of its products abroad and because, consequently, the general welfare requires, as never before, equality of opportunity in the world's markets. When it is considered that a falling-off of ten per centum in the country's business activity is sufficient to mark the difference between "prosperity" and "hard times", the importance of maintaining unimpaired the flow of American products to all markets may be readily appreciated.

¹ *Supra*, subdivision 2.

The situation into which Section 317 has been injected may well be considered, therefore, from the point of view of the economics of an expanding foreign commerce. The conclusions reached will point the way to the commercial policy that naturally grows out of the provisions of the Section.

21. INDUSTRIAL AND COMMERCIAL EXPANSION OF THE UNITED STATES, 1910-1920

The industrialization of the United States has proceeded steadily during the last half-century. Agriculture, with enormous absolute increases, has not, relatively, kept pace. Foreign commerce has advanced in lengthening strides. The economic revolutions accompanying the World War appear to have characterized the second decade of the twentieth century as a period of climax in respect to each of these developments. Any effort to measure them statistically is, however, bound to be inadequate. Too many forces have been in play and too many factors would have to be considered in the formation of an accurate estimate. What has happened may in general be thought of as a matter of common knowledge. Nevertheless, a few facts and figures may appropriately be cited by way of illustration.

In 1920, for the first time, more than fifty per centum of the population of the forty-eight states was classified as "urban" rather than "rural" in the census returns. The increase in population for the decade amounted to approximately thirteen and three-fourths millions, or about fifteen per centum.

A comparison of the quantity production of cereals in the years 1909 and 1919 discloses a net increase in the latter year of less than four per centum.¹ The average acreage in

¹The statistics used in this subdivision are taken from *Statistical Abstract of the United States, 1922*; and *Prices in the United States and Abroad, 1919-1923*, issued by the Federal Reserve Board (1924).

corn in the period 1920-1921 as compared with the period 1909-1913 showed a decrease of one and three-tenths per centum, but the increased yield per acre was such as to result in a total increased production of fifteen and seven-tenths per centum. Thus the increased production of corn appears to have paralleled the increase in population. Wheat, the great export cereal, showed definite falling off in per-acre yield, but a total increase of nineteen and four-tenths per centum in number of bushels raised.¹ Raw cotton, in value the chief single export of the United States, showed a decrease of fifteen and eight-tenths per centum in average number of bales produced in the second half as compared with the first half of the decade 1911-1920, following a long series of steady increases for five-year periods. On the whole there appears to be a steadily diminishing surplus of agricultural products for export and, indeed, an increasing demand for their importation from other countries.

It is more difficult to form reasonably accurate generalizations in regard to the production of manufactured goods. The number of persons engaged in industry, however, increased from, roughly, seven and seven-tenths millions in 1909 to eight and three-tenths millions in 1914 and ten and eight-tenths millions in 1919. In 1921 the number fell back to just below the 1914 figure. The primary horse-power employed in 1909 was nearly nineteen millions, in 1914 more than twenty-two millions, and in 1919 almost thirty millions. The capital reported as invested in manufactures in 1909 was about eighteen billion dollars; in 1914 it was about twenty-three billions and in 1919 about forty-five billions; these figures must, of course, be read in the light of the inflated dollar values of property in the immediate post-war years. On the other hand, the increases in the number

¹The Government war-time price guarantee of \$2.26 per bushel was effective until June 30, 1920.

of men and the amount of power employed may, on account of the probable introduction of labor-saving machinery and improvements in methods, fall short of indicating the actual increase in output.¹ On the whole it seems safe to suggest that the productive capacity of American manufacturing plants, as measured by actual production, may probably have been increased during the decade of the World War by thirty per centum or more.² If the greater population and, probably, greater purchasing ability of the home market may be thought of as capable of absorbing three-fourths of the output of this increased productive capacity, there would still remain a very considerable increase in potential surplus for export. One-fourth of thirty per centum of the total value of the products manufactured in the United States in 1919 would amount to nearly five billion dollars, a sum larger than the total value of all domestic exports from the United States in any year except during the period 1917-1920.

The increasing need of raw materials for use in domestic manufacturing establishments suggests the undesirability of encouraging their exportation. The sale abroad of manufactured articles is the true desideratum of American export policy. It is against manufactured goods, not agricultural produce or raw materials from the mine and forest, that other countries most often levy discriminating duties.

On the face of the statistics of external commerce the expansion of American productive capacity between 1910 and 1920 is emphatically proclaimed. In 1910³ the domestic merchandise exported from the United States was

¹ In money value the annual output of American manufactures tripled during the period 1909-1919, but fluctuations in the purchasing power of money were too great to permit of figures based on money value being of much use in the present inquiry.

² Such lines as automobiles, machine tools, electrical supplies and farm machinery amply bear out this estimate.

³ Fiscal year ending June 30.

valued at less than one and three-quarters billions. In 1920¹ it passed the eight billion mark.² In considering the latter figure, the immense advance which had occurred in commodity prices must, of course, be remembered. On the basis of 100 for 1913, these prices had advanced to 239 in 1920.³ But, on the basis of 100 in 1913, the value of domestic exports in 1920 amounted to 333; so there would seem to have been a really great increase in quantities.

The capacity to produce was not diminished after 1920, but the value of exports declined rapidly, even falling behind that of imports for certain months in 1923. On the basis of 100 in 1913, wholesale prices in 1923 amounted to 164 and the value of exports of domestic products to 168. So the export trade of the United States may be said to have resumed its pre-war volume, notwithstanding the great increase in production of which the country has shown itself capable.

In 1913, twenty-two and five-tenths per centum of the exports of American domestic products were manufactures ready for consumption; in 1920, sixteen and six-tenths per centum; in 1922, twenty-one and three-tenths per centum. But the average for the five-year period 1850-1854 was fifty-six and four-tenths per centum of the total, from which figure it declined steadily to fourteen and five-tenths per centum for 1915-1919. Meanwhile crude materials for use in manufacturing increased from six and eight-tenths per centum to forty and seven-tenths per centum of the total exports of domestic merchandise.⁴

¹ Calendar year.

² Imports of merchandise, meanwhile, increased from about one and one-half to more than five and one-quarter billions.

³ Federal Reserve Board wholesale price indexes. The corresponding Bureau of Labor Statistics index number is 226.

⁴ For interesting recent figures see *Our World Trade in 1923*, pamphlet, issued by the Foreign Commerce Department of the Chamber of Commerce of the United States, Mar., 1924.

These facts point with emphasis to the need for careful attention on the part of the Government and the public to the matter of finding markets for manufactured goods in other countries. The problem must be solved in the face not only of Europe's recovery from the war and the competition of its manufactured goods in the markets of the world, but also of an unprecedented array of hostile customs tariffs, set up during the post-war period of reaction, weakness and national jealousy.¹ If the United States cannot win back some of its foreign markets it must probably scrap a portion of its industrial plant and suffer the economic embarrassment of a permanent falling-off in its record of production.²

22. THE EFFICIENT USE OF SECTION 317

Section 317 is primarily an instrument devised by the Government of the United States for use in an effort to assist in marketing the country's surplus of manufactured products. It seeks a fair field in which American exporters can compete on equal terms. It undertakes to visit penalties upon the exporters of countries that refuse to American exporters equality of opportunity. It demands that there shall be no discriminations and no special concessions from which the commerce of the United States is excluded.

That discriminations and inequalities exist which affect adversely our export trade has already been pointed out and will be adverted to from time to time hereafter.³ The ques-

¹ *Infra*, ch. vii and ch. x.

² The intricate problems of production costs and of the effect upon them of an inflated currency, of the connection between high domestic prices and foreign trade opportunities, of the exchange value of money, of long and short term credits and of the relations between creditor and debtor nations, perhaps affect the ebb and flow of international commerce more powerfully, as a rule, than do the provisions of tariff laws. These cannot, however, be discussed here.

³ See ch. i and ch. vii.

tion of the moment is how to obtain from the potential capacities of Section 317 the maximum benefit from the point of view of the commercial and general welfare of the United States.

Is it wise and expedient that the President shall proceed promptly, and perhaps without warning, to issue proclamations levying after thirty days, as required by Section 317, the defensive duties upon the products of the discriminating countries? Or, on the other hand, should he proceed cautiously and refrain from proclaiming the defensive duties provided for until after he has given notice and ample opportunity to revoke the offending discriminations, or even until he has undertaken to negotiate treaties assuring equality of treatment in the hitherto discriminating countries? In arriving at an answer some attention must be given to the objects of attack.

The examples of discriminatory practices, which "place the commerce of the United States at a disadvantage compared with the commerce of" other foreign countries, as recorded in the first chapter, make evident the fact that these objects of attack are numerous and varied. When he is confronted with discriminations resulting from national or imperial policies, it is obvious that the President must measure the weapon of defensive duties against an entrenched adversary. The public interest would seem likely to be best served by a wise caution. Since the policies of inequality were probably not aimed at the United States in particular but were developed primarily for the supposed protection of the discriminating countries themselves, simple reasonableness would suggest warning and negotiation before the proclamation of higher tariff rates. A guarantee of equality of treatment would be the expected price for refraining from the proclamation of additional duties. Such assurance would, of course, be most effectual and, probably, most lasting, if embodied in a formal treaty.

The same considerations may often be controlling in the case of incidental and minor discriminations. Where such discriminations are accidental, abrupt action ought clearly to be avoided and effort ought to be made to obtain the removal of the discrimination without actually increasing American duties. In case, however, particular laws or practices appear to be premeditatedly discriminatory for the purpose of injuring American commerce, there would seem to be little or no reason for delay or courtesy. Action first and talk afterwards should probably be the President's guiding rule. Fortunately his action may be measured to meet the offense. Perhaps in some minor cases of discrimination the imposition of a defensive duty upon a single article would be sufficient to achieve the end in view.

There are, indeed, some students of the subject who would have the President, in certain cases of especially palpable discriminations, adopt the rule of action first even though such discriminations involve national policy. They argue that discriminating nations will be most amenable to reason when confronted with a *fait accompli* that makes its weight felt upon the national commerce and that warning and negotiation merely give opportunity for delay and for carefully planned prolongation of the discriminations to the latest possible date. Take France, for instance. The tariff thought of that country runs in terms of maximum and minimum schedules. By proclaiming increased duties against products of France and perhaps at the same time against products of certain other discriminating countries, the President could create a sort of maximum tariff for the United States. He could then propose that each country cease enforcing its maximum rates against all products of the other and that the two countries mutually accord each other their minimum schedules.

Without denying that there is force in such arguments,

it is nevertheless urged that the better course will nearly always be to waive the opportunity to strike at once and, keeping Section 317 in the clearly visible background, to undertake the negotiation of commercial treaties assuring the equality of treatment which is sought by the United States. The development of a system of such treaties would, moreover, result in benefits transcending their primary objective. Following is an amplified statement of considerations which seem to induce such conclusions:

(a) The positive application of the power granted to the President by Section 317 involves striking a palpable blow against another country. Even though justly struck in defense, a blow is a blow and is likely to be met by blows and ill-feelings, retaliation, and possibly a tariff war, in return. The admittedly very high duties levied under the Act of 1922 undoubtedly impose severe hardship upon foreign exporters. An increased rate might provoke unreasoning hostility and reprisal rather than a cessation of the discrimination against which it is aimed.

(b) The uncertainty in regard to the effect which an actual imposition of the defensive duties may bring about argues powerfully in favor of the alternative method of ending discriminations by means of mutual agreement for equality of treatment. The uncertainty of effect referred to might, indeed, become certainty of no desirable effect. This would seem, as already indicated, to be least improbable in the event that the defensive duties should be levied against a discrimination that results from the operation of important laws involving policies that governments believe to be national in scope and, perhaps, that have purposes which are political as well as economic or administrative.

An uncertainty of an entirely different kind is apparent when it is remembered that during the debate in the Senate

the constitutionality of Section 317 was questioned. However slight the probability of its invalidity may be, this matter is one that cannot be altogether disregarded.¹

(c) From the point of view of our own importers the levying of new duties, changing and enlarging the customs barrier across which business is being done, is to be avoided as long as possible. The fact that the level of duties is already exceedingly high renders this contention almost axiomatic.

(d) An increased duty would in most cases be subversive of the tariff policy, expressed in Section 315 of the Act of 1922, that rates should be just sufficient to equalize the differences in cost of production at home and abroad. Furthermore, being itself discriminatory, such an increased duty would not be desirable, even though levied in defense against discrimination. It is expensive to fight with fire even against fire. Moreover, such a method of fighting has about it a tinge of inconsistency. This objection would become especially pertinent in the event of so considerable a use of added duties as to cause the development of a maximum schedule.

(e) Finally, a régime of equality obtained by mutual consent can best be depended upon to be lasting and to result in the maximum of commercial advantage. Good will is of genuine importance in international as well as in domestic commerce.

In case the prudent and friendly policy here advocated should prove to be unsuccessful, the actual imposition of the defensive duties may, of course, still be resorted to. The considerations just set forth must not be taken to indicate

¹ The question of constitutionality involves only changes in tariff rates by executive order. No one questions the power of the Congress to enact laws increasing duties on goods from countries that discriminate against the United States.

opposition to the use of the defensive duties in any case as a last resort. If a nation discriminates against the commerce of the United States and refuses to cease doing so, or to become a party to a reasonable treaty mutually promising equality of treatment, the United States should not hesitate to strike—and strike hard—in defense of the principle of equal rights for all and special privileges for none.¹

¹At the very beginning of the national history of the United States the first Secretary of State, in his report to the Congress transmitted under date of December 16, 1793, on the subject of "The Privileges and Restrictions on the Commerce of the United States in Foreign Countries", made these comments:

"As to commerce, two methods occur. 1. By friendly arrangements with the several nations with whom these restrictions exist; Or, 2. By the separate act of our own legislatures for countervailing their effects.

"There can be no doubt but that of these two, friendly arrangements is the most eligible. Instead of embarrassing commerce under piles of regulating laws, duties, and prohibitions, could it be relieved from all its shackles in all parts of the world, could every country be employed in producing that which nature has best fitted it to produce, and each be free to exchange with others mutual surpluses for mutual wants, the greatest mass possible would then be produced of those things which contribute to human life and human happiness; the numbers of mankind would be increased, and their condition bettered.

"Would even a single nation begin with the United States this system of free commerce, it would be advisable to begin it with that nation; since it is one by one only that it can be extended to all. . . .

"But should any nation, contrary to our wishes, suppose it may better find its advantage by continuing its system of prohibitions, duties and regulations, it behooves us to protect our citizens, their commerce and navigation, by counter prohibitions, duties and regulations, also. Free commerce and navigation are not to be given in exchange for restrictions and vexations; nor are they likely to produce a relaxation of them. . . .

"It is true we must expect some inconvenience in practice from the establishment of discriminating duties. But in this, as in so many other cases, we are left to choose between two evils. These inconveniences are nothing when weighed against the loss of wealth and loss of force, which will follow our perseverance in the plan of indiscriminate. . . . It is not to the moderation and justice of others we are to

23. SECTION 317 SUGGESTS THE NEGOTIATION OF A SYSTEM OF COMMERCIAL TREATIES

The existence of Section 317 may reasonably be regarded as an argument that will, without necessarily being mentioned by American negotiators, have its appeal in negotiations for commercial treaties or for less formal arrangements.¹ More important than the existence of Section 317 as a warning, its existence as a demand for equality compels attention to the proper method not only of producing equality but of making equality secure and lasting. Among the states of the world today the appropriate instrument available for this purpose is usually a treaty.

The passage of Section 317 should be welcomed as the occasion—if not, indeed, the Congressional mandate—for undertaking the negotiation of new commercial treaties and the eventual revision of existing ones with a purpose single to the development of a consistent, unhesitant policy of giving and demanding the "Open Door" of complete equality.

Thus the essence of the commercial policy enunciated by the Congress in the enactment of Section 317 appears to be

trust for fair and equal access to market with our productions, or for our due share in the transportation of them; but to our own means of independence, and the firm will to use them. . . ."—*Writings of Thomas Jefferson*, collected and edited by Paul Leicester Ford, vol. vi, p. 470 (pp. 479, 480, 483). Ten volumes. New York, 1892-1899.

¹As an unveiled warning of the consequences of failure to negotiate, however, it must be confessed that Section 317 seems a bit halting and indirect when compared with the following decree of the Russian Central Executive Committee and the Soviet of People's Commissars:

"In regard to goods and articles imported from countries which have not concluded trade agreements with the R. S. F. S. R. or which have violated the agreements concluded, the People's Commissariat of Foreign Trade, in agreement with the People's Commissariat for Foreign Affairs, may charge 100 percent more than the existing custom duties and may subject goods exempt from duties to duties up to 50 percent of their value."—Decree of Mar. 9, 1922. Translated from *Isvestia*, no. 58, Mar. 12, 1922. See also Appendix 5.

*absolute equality to all the world and absolute equality from every country, guaranteed by solemn treaty.*¹

There remains for consideration the so-called most-favored-nation clause, by which the policy of equality is guaranteed in commercial treaties.

24. SHALL THE MOST-FAVORED-NATION CLAUSE BE CONDITIONAL OR UNCONDITIONAL?

In connection with the description heretofore² given of the Senatorial debate upon Section 317, the meaning of conditional most-favored-nation treatment was set forth. The reasons for the adoption of the conditional meaning by the courts and administrative officials of the United States will be made clear later on. The point to be emphasized here is the double meaning of the expression and the fact that to almost the entire commercial world, outside the United States, *most-favored-nation treatment* has had a different connotation from that given it in this country. Unconditional or unlimited most-favored-nation treatment implies a promise that concessions made to third countries, even though for a special consideration, will be extended to the "favored" nation as a matter of course.

Section 317 states no exception in favor of discriminatory practices simply because they happen to be committed in compensation for equivalent concessions made by a third country. The plea that, under the American interpretation of the meaning of *most-favored-nation treatment*, other countries could legitimately exchange reciprocal concessions without extending them to the United States would not, apparently, safeguard such countries from the imposition of

¹ Customs tariff equality holds the place of first importance but, it should not be forgotten, the terms of Section 317 are broad enough to cover almost any conceivable variety of discrimination.

² *Supra*, subdivision 16.

defensive duties by the American Government. There exists, accordingly, an incompatibility between the policy of equality naturally resulting from Section 317 and a policy permitting special reciprocal concessions. Evidently the spirit and purpose of language such as that used in Section 317 would be largely subverted if restrained by such a limitation.

The fact that an exclusive favor to some other country is granted in return for a reciprocal favor does not make it any less *in fact* a discrimination against the commerce of the United States. The market that favors a third country is not any the less disadvantageous or closed to American products because it receives compensation for the favor in the form of a concession for its exports which enter the third country's market. A provision of law framed in behalf of American exporters would present but a sorry case for itself if it had to start with the confession that it did not apply to the very sort of differential treatment against which protection is probably most needed.

It seems manifestly necessary, therefore, that such treaties as are made in pursuance of a policy derived from Section 317 must seek (and consequently offer) unconditional most-favored-nation treatment. The promise of conditional most-favored-nation treatment would be the promise of only a part of what Section 317 demands. The promise of unconditional most-favored-nation treatment, that is to say, the full enjoyment of all favors and concessions that any other country enjoys, would just fulfil the demands of Section 317. Such a promise would be an agreement to refrain from *all*, not merely a part, of the discriminations against which the defensive duties may be proclaimed.

The unconditional most-favored-nation clause is the keystone of the arch upon which rests the treaty policy logically growing out of Section 317.

25. THE APPROPRIATE MOST-FAVORED-NATION POLICY FOR
THE UNITED STATES

If the law of the land as laid down in Section 317 is to be adequately carried out by the executive branch of the Government the negotiation of treaties assuring unconditional most-favored-nation treatment to American goods would appear to be necessary. Such treatment must, of course, be granted in return to other countries for their goods entering the market of the United States.

Entirely apart from the necessity of an adequate administration of Section 317, there are a number of considerations which argue in favor of the adoption by the United States of the policy of unconditional most-favored-nation treatment.¹ These considerations, together with certain

¹The text of the unconditional most-favored-nation provisions of the treaty signed by the United States and Germany on December 8, 1923, is set forth *infra*, subdivision 64. The following language is that of a possible treaty article based directly upon the text of Section 317:

The High Contracting Parties mutually and unconditionally agree that within the territories under their respective customs jurisdictions they will not:

(1) *Impose, directly or indirectly, upon the disposition in or transportation in transit through or re-exportation from such territory of any article wholly or in part the growth or product of the other any unreasonable charge, exaction, regulation or limitation which is not equally enforced upon the like articles of every foreign country;*

(2) *Discriminate in fact against the commerce of the other, directly or indirectly, by law or administrative regulation or practice by or in respect to any customs, tonnage or port duty, fee, charge, exaction, classification, regulation, condition, restriction or prohibition in such manner as to place the commerce of the other at a disadvantage compared with the commerce of any foreign country.*

It is understood that the term "foreign country" when used in this Article shall mean any empire, country, dominion, colony, protectorate or mandated territory or any subdivision or subdivisions thereof within which separate tariff rates or separate regulations of commerce are enforced, regardless of whether such colony, protectorate, mandated territory or subdivisions thereof shall be under the political control, protection or

relevant and not heretofore sufficiently emphasized matters in regard to the relation between Section 317 and the most-favored-nation clause, may be summarized briefly as follows:—

(a) *The arguments in favor of the conditional type of most-favored-nation clause should first be disposed of.*

The first point in the case for the conditional type and for its retention in American treaties is the fact that the United States has consistently made use of it since the beginning of the national history.¹ In political science one may consider as axiomatic the point that changes in policy should occur only for good and sufficient reasons. The force of the maxim in the present case must, of course, vary inversely with the strength of the arguments presented in favor of the unconditional type of clause.

The second point in the case for the conditional clause is the fact that, in a treaty containing it, a country does not promise to give more than conditional treatment;—while getting the promise of less in return, the United States would itself promise less than under the unconditional clause. Apparently the only consideration of practical importance in this connection is that of freedom to enter into special reciprocity treaties with particular countries through which, by means of bartering concession for concession, a country might hope to get the best of a bargain or, at least, to obtain an advantage compensating it for the concession granted and corresponding to that accruing to the other country. Unless accompanied by a policy of active bar-

mandate of either of the High Contracting Parties or of some third country.

Each of the High Contracting Parties reserves the right to impose additional duties upon the products of any industry of the other, which industry benefits by any unequal imposition upon or discrimination against its commerce enforced by any third country.

¹ See however, *infra*, subdivisions 36 (last paragraph), 54 and 64.

gaining through reciprocity treaties, the policy of maintaining conditional most-favored-nation guarantees is likely to become ineffective and sterile so far as the promotion of trade is concerned. That the policy of the United States under Section 317 of the present tariff law cannot consistently include special reciprocity arrangements has already been pointed out. The second point in the argument in favor of the conditional type of clause is not, therefore, of much practical moment to the United States today.

(b) *The unconditional and not the conditional most-favored-nation clause is the effective weapon for securing equality in the world's markets.* Since other countries may make reciprocity treaties among themselves the United States cannot expect to keep the door to their markets fully open by agreements for most-favored-nation treatment conditioned upon equivalence of compensation. Some examples indicating the uselessness of treaties of that sort and the need for unconditional pledges will be set forth on a later page.¹ It should always be remembered that the United States normally accords the same treatment to other countries generally. Unfortunately it does not by any means invariably receive such treatment in return. The truth is, however, that other countries have not, as a rule, construed strictly the conditional most-favored-nation clauses in their treaties with the United States. Otherwise the United States might not so long have been satisfied with limited assurances.

(c) *Are offers by the United States to negotiate unconditional most-favored-nation treaties likely to be generally accepted?* The question is often raised whether the fact that this country accords equality of treatment (with the exception of special concessions to Cuba and to certain of

¹See subdivision 71.

its own dependencies) as a matter of course will not encourage other countries to consider that they do not need unconditional most-favored-nation pledges from the United States. It is queried, also, whether conditions present in the world today are favorable to the success of a program of negotiations with other countries generally for treaties containing the unconditional clause.

The fact cannot be denied that Great Britain was successful with such a program half a century ago; notwithstanding that country's low, single-schedule tariff, which seemed to offer no inducements, other nations were willing to enter into treaties—doubtless to obtain the assurance of continued equality of treatment and to guard against burdensome discriminations possible in the event of a British high-tariff regime. Richard Cobden thus describes a portion of one of his conversations with Louis Napoleon during the preliminary negotiations which led to the famous Franco-British treaty of 1860:

I explained that we could give no exclusive privileges to any nation; that we could simultaneously make reductions in our tariffs; and the alterations might be inserted in a treaty, but that our tariff must be equally applicable to all countries.¹

The opportunity to obtain assured continuance of equality in a market so valuable as that of the United States today would seem to be one that no nation could lightly let pass. The United States has, in adopting the present tariff law, accepted a policy of high protection. But it has also adopted a plan for still higher "protection"—or even prohibition—against countries that discriminate against American goods. The opportunity for successful negotiation would appear, so far, to be at least equal to that enjoyed by Great

¹ Morley, John, *The Life of Richard Cobden*, vol. ii, p. 246, London, 1881.

Britain in the period mentioned. The countries which, following Great Britain's leadership, adopted the unconditional most-favored-nation clause were in many instances protectionist in their policy. This does not seem to have prevented their advantageous use of the unconditional type of treaty pledge.

Other conditions in the world today, while differing greatly from the conditions of the latter half of the nineteenth century, do not seem to contain any clear-cut elements that are calculated to discourage a country from seeking unconditional treatment provided it is willing to accord such treatment. On the other hand the vaulting heights attained by post-war tariff walls offer additional incentive for an exporting country to make sure that it receives treatment at least as favorable as that accorded to other countries.

To the question which has been raised as to whether the United States itself might dispense with treaties, and rely solely upon the threat of the additional duties provided for in Section 317 to maintain for its products equality of treatment, the answer given above to the suggestion that other countries might not consider it worth while to bargain for treaty guaranties is pertinent. The fact that other countries have the power to adopt retaliatory policies emphasizes the fact that the better and safer plan, from every point of view, is in reasoned agreement made binding by treaty.

(d) *An anomalous situation results from the co-existence of Section 317 and the conditional most-favored-nation clauses contained in some eighteen treaties to which the United States is a party.*¹

By way of illustration let it be supposed that Country A grants to certain products of Country B special tariff re-

¹*Infra*, subdivision 36.

ductions and that B in return gives to A certain favors that are discriminatory with respect to the commerce of the United States. This country has no most-favored-nation treaty with A. If A refuses to extend the preferences it extends to B to the products of the United States there is nothing to prevent the imposition of the additional duties authorized by Section 317 upon imports from A. But between B and the United States there exists a conditional most-favored-nation treaty. B refuses to extend freely to the United States the preferences it extends to A, on the ground that they were granted for a reciprocal consideration, and additional duties are accordingly proclaimed upon imports from B into the United States. There can be no doubt that B would at once and with entire justification protest a violation of the most-favored-nation pledge. The United States, after promising B to accord all favors freely granted to other countries, would be in the indefensible position of freely granting to the world generally its regular schedule of duties and at the same time levying additional duties upon B's goods. Yet to demand full equality of treatment from A and not to do so from B would be very likely to bring charges of favoritism from the former.

In order that Section 317 may surely and honorably fulfil its purpose with regard to countries with which the United States is a party to conditional most-favored-nation treaties, the conditional clauses must be made unconditional. For B (or any other country) to withhold from the United States concessions to a third country would be in violation of an unconditional most-favored-nation agreement. The agreement being thus violated, the United States would then be able lawfully to invoke the defensive duties of Section 317.

(e) *Moreover, the language commonly employed in con-*

ditional most-favored-nation treaties lends itself to grave uncertainties. The United States, in the majority of its treaties containing the most-favored-nation clause, promises to extend to the other party any favor, exemption, privilege or immunity which may have been granted or may hereafter be granted to a third party, gratuitously if gratuitous to the third party, or in return for an equivalent compensation if the concession was conditional. An example of the possible working of this promise may be noted by assuming that the United States grants a reduction of twenty-five per centum on sugar to some third country in return for a reduction of twenty-five per centum by that country upon wheat flour coming from the United States. The other party then offers the United States an identical reduction from its own duty upon flour and demands that this country shall give it a reduction of twenty-five per centum on sugar. Would that be an equivalent compensation? Would its equivalence be affected in case economic conditions were such that the United States could not profitably market its flour in that country irrespective of import duties? Yet, if identity of compensation is not an *equivalent* compensation, what would be one? Moreover, if the American Government held it to be an equivalent compensation, would the duty on sugar from the country party to the treaty be automatically reduced by twenty-five per centum or would the fulfilment of treaty obligations be obliged to await the pleasure of Congress? These and other uncertainties now existing would not be present in a treaty system based upon the unconditional most-favored-nation clause.

(f) *Equity and compensation.* The argument has been made that it is inequitable to accord to one country freely under an unconditional most-favored-nation clause what another country obtains through *consideration* of a reci-

procuity arrangement. This argument appears to overlook the fact that an unconditional agreement has for its consideration the similar agreement of the other party to the covenant. Therefore favors or concessions accorded under it are not, except in the narrowest sense, without compensation.

(g) *Uniformity.* There is great advantage to be had not only in the prevalence of uniformity in the texts of a country's own commercial treaties (which the United States does not have at present) but also in having approximate uniformity in such treaties generally. The adoption by the United States of the unconditional clause in all of its treaties would mark a decided step toward securing these advantages and would, moreover, in all probability, enable the United States to take the lead in assuring the continuance of the ante-bellum European system of giving to all nations that return the favor equality in the markets of each country.

(h) *A change in policy should be a general change.* It follows from the preceding paragraph that a change in American most-favored-nation policy should be made general in its application. As a practical matter it could hardly become general except through acceptance in individual negotiations as opportune occasions for new and revised treaties occur. But the approval by the President and Senate of any treaty containing the unconditional most-favored-nation clause should be given with the understanding that the same clause is to be used, if possible, in future treaties and that an effort is to be made to revise existing treaties so as to include it. The advantage of having unconditional agreements with a few states might not compensate for the confusion of having a part of a country's treaties permanently conditional and the others unconditional.

(i) *Opportunity to influence European policy.* The

trend of the post-war development of European commercial-treaty policy was for a time uncertain. It now appears to be definitely in the direction of the unconditional most-favored-nation regime of ante-bellum days.¹ This revival is to the interest of American exporters provided unconditional treatment is extended to and maintained with the United States. The United States, by making unconditional agreements with European countries, can not only contribute toward the permanent and general adoption of that policy, but can also open or keep open valuable markets. The universal adoption of the unconditional most-favored-nation policy would make actual among major and fully independent states a regime of equal opportunity consonant with that which the United States has sought to establish by means of the open-door policy with respect to weak and dependent states and colonial territories. It may, indeed, be reasonably asserted that the adoption of the unconditional most-favored-nation policy with certain safeguards can be made to support an open-door policy throughout the world.

(j) *Comity.* It is apparent that an unconditional most-favored-nation policy, by emphasizing and encouraging equal treatment to all, appeals to the sense of fairness and works for good will among nations. The experience of the United States indicates that the conditional form and interpretation of the most-favored-nation clause in practice promotes the discord that is to be expected from a policy that permits discriminations. Good will, not recurring disputation, is the recognized promoter of commerce.

From the foregoing paragraphs it appears that the United States by adopting the unconditional most-favored-nation clause would change the letter of precedent and that such adoption would be incompatible with a general policy

¹ *Infra*, subdivision 63 and ch. xi.

of bargaining with other countries as to individual concessions specially applicable through reciprocity treaties. Such a policy, however, does not appear to be either desirable or practicable.

The original object of the most-favored-nation clause in our treaties was to make an opening into the restriction-guarded markets of the eighteenth century. In most countries the United States now enjoys equal treatment and its object should be to preserve it and make it universal. The conditional clause was possibly the better attuned instrument for accomplishing the purpose of early days; the unconditional clause is assuredly the better for today. Moreover, the unconditional pledge, with specified exceptions, is entirely feasible so far as this country is concerned; entirely apart from the presence of Section 317 in the tariff law, such pledge would be of definite advantage to the business interests of the country and would promote international good-will.

The new commercial policy of the United States, founded in Section 317, may be described as possessing the essential characteristic of universal equality of treatment guaranteed by a universal system of unconditional most-favored-nation treaties.¹

At the present moment such treaties seem to be desirable with a considerable number of countries. Secretary Hughes, in a recent address,¹ stated that the Government of the United States was

contemplating the negotiation of new commercial treaties with

¹ See also *infra*, subdivision 75.

² "The Centenary of the Monroe Doctrine", delivered at the meeting held under the auspices of the American Academy of Political and Social Science and the Philadelphia Forum at Philadelphia, Nov. 30, 1923, to celebrate the centenary.

Latin American countries or the modification of existing treaties in harmony with the most-favored-nation principle, . . . , substantially like those which it is sought to negotiate with European Governments.

The Department of State has announced the opening of negotiations for the conclusion of general treaties of friendship and commerce with Austria, Costa Rica, Czechoslovakia, Finland, Germany,¹ Guatemala, Honduras, Hungary, Latvia, The Netherlands, Nicaragua, El Salvador, Spain and Switzerland.

¹ Treaty signed December 8, 1923. See subdivision 64.

PART TWO
OBSTACLES TO THE DEVELOPMENT OF
THE NEW COMMERCIAL POLICY

CHAPTER IV

INCONSISTENCIES WITH SECTION 317 IN THE GENERAL CHARACTER AND PARTICULAR PROVISIONS OF THE TARIFF ACT OF 1922

In framing the Tariff Act of 1922 the Congress permitted itself to be swayed by a number of diverse policies. Both in general features and in special clauses there are to be found enactments that appear to violate the spirit and purpose of Section 317. Attached to certain schedules of duties are provisos that are so utterly inconsistent with Section 317 as to require that the United States itself engage in some of the very practices against which, when engaged in by other countries, Section 317 is aimed. The present chapter is devoted to an analysis of the obstacles to the development of the new American commercial policy which are found in the very American statute of which Section 317 is a part.

26. GENERAL CHARACTER OF THE TARIFF ACT OF 1922

The Tariff Act of 1922 is high-protectionist to the core. Admitting, as has already been done, that the provisions of Section 317 are consonant with a policy of protection, it must nevertheless be recognized that a foreign policy which seeks markets and demands the Open Door is not consistent with a domestic policy of virtual prohibition; for the professions of a country that preached equality and sought equality would be indeed hollow if the equality it practiced were the equality of negation. Moreover, the provision

empowering the President to levy fifty per centum additional duties would not be taken seriously if its application would merely increase already prohibitive rates. If the rest of the world followed suit and presented to the United States and all other countries an equally insurmountable tariff wall, there would not, it is needless to say, be any use for Section 317.

Somewhere between moderately protective rates and rates that are prohibitive is the line of demarcation between consistency and inconsistency with the policy expressed in Section 317. There can be little doubt that very many of the rates of the Act of 1922 have projected themselves above this line; and there is much to be said in support of the thesis that the first general characteristic of the present tariff law, its ultra-protective policy, is out of harmony with Section 317.

Commenting upon the act as a whole, Professor Gustav Cassel, writing in the *Svenska Dagbladet* of October 22, 1922, opens an interesting article with the following paragraph:

After a long conflict the United States now has a new tariff. This tariff is the expression of a protectionist undercurrent in American politics which has greatly increased in strength during the past months. The aggressive character in these new rules is less evident in the tariff itself than in the additions to it in the way of regulatory powers. The President has the right to change the classification of merchandise and to increase or decrease the prescribed rates of duty up to 50 per cent in case he finds that these rates of duty do not *even out the difference* between the cost of production of American made goods or partly American made goods and the cost of production of similar goods manufactured in the foremost competing foreign country. Furthermore the President has the right under certain conditions to disregard the general rule

that these duties shall be calculated upon the value of the goods in their country of origin and impose a new regulation basing the amount of such duties on the selling price of similar goods made in the United States. Thus far the Fordney Bill's demands for "American valuation" have been acceded to. *This means that the President practically has the right to close the American market to every unwelcome competitor.*¹

Whatever view may be taken in regard to this partial analysis of the flexible-tariff policy, no one can deny that in studying a policy that is bound up with international relations, the opinions of citizens of other countries must be considered whether they are strictly accurate or not. It is natural for a European to emphasize the power of the President to increase duties and to disregard his duty to reduce them. This emphasis may conceivably tend to decrease the usefulness of Section 317 by making other countries *believe* that the policy of the United States is insincere. Professor Cassel continues:

The most remarkable part of it would seem to be the economic theory upon which it is built. It is explained quite frankly that the intention is to even out the difference of the cost of production between the United States and other countries. If we take it for granted that all other countries do the same, then there would be created a series of tariff walls that would make international commerce impossible.²

The criticism here voiced by Professor Cassel may be read as an answer to the discussion of the tariff question by the American President in his address to the Congress, December 6, 1921: "We cannot go far wrong," the latter said, "when we base our tariffs on the policy of preserving the productive activities which enhance employment and

¹ Italics of last sentence not in original.

² *Ibid.*

add to our national prosperity," meaning thereby a protective tariff. In justifying his policy he made use of this statement: "It is not an unworthy selfishness to seek to save ourselves, when the processes of that salvation are not only not denied to others, but commended to them." To commend to others a practice of high protection seems a strange element in the commercial policy of a country with a provision such as Section 317, which has as its chief practical purpose the advancement of export trade.¹ This practical purpose is, however, dependent upon the method of action employed for its achievement and the method provided in Section 317 undertakes to seek equality of treatment but not low tariff rates.

Under the title "The American Stone Wall", a Norwegian paper that has always been considered friendly toward the United States, and things American, has remarked editorially:

The full text of the American tariff is now available. It is a trade political stone wall of such height that foreign goods can climb it only after great difficulties. After seeing this proof of the strength of American protectionism we must be prepared for the worse for our shipping as well. This evidence of the desire on the part of Americans to be sufficient unto themselves is in itself unpleasant and has appeared at an

¹As Professor Cassel says:

"Commerce between different countries rests upon the condition that the cost of production is different in different countries, and the idea of international commerce is to take advantage of this difference to bring about a rational division of work among various countries and thereby make production more profitable, that is to say, establish a better means of support for the entire mankind.

"Protectionism as demonstrated in the American tariff means a denial of the advantages of this development, a proclaiming of the belief that a country, and therefore all countries, are better off when fully shut off from the world and organized for self-sufficiency. The absurdity of this view should be evident enough to eliminate the possibility of legislation willing to support it."—*Ibid.*

inopportune time. Nevertheless, in the long run the world will take care to find ways of living its own life without the United States of America.¹

After discussing the probable effect of the United States tariff on exchange, this paper concludes:

Retaliation against the American tariff will not be necessary. The abnormal dollar exchange, artificially produced will work more effectively than any other means which might be used.

The President himself confessed in the above-quoted address that "we recognize the necessity of buying wherever we sell, and the permanency of trade lies in its acceptable exchanges."

A point of view differing somewhat from the Scandinavian is expressed in the December 1, 1922, number of the monthly review issued by the Royal Bank of Canada:

It is not the intention of this article to offer advice or criticism relative to measures which should quite properly be dictated only by the interests within the United States, but one is forced to the conclusion that the view which seems to be quite generally held, namely, that the Fordney-McCumber Tariff is, and will continue to be, detrimental to the best interests of other countries, as against those of the United States, is not well founded. If the present protection is continued for a considerable length of time, business will adjust itself accordingly, but if—and this seems probable—the increased duties will, within the next few years, be reduced or done away with, it would seem that the effects of the bill will have operated distinctly against the business interests of the United States, and correspondingly, to the advantage of other countries. A return to the tariff which was in operation before the Emergency Bill was enacted, would mean that

¹*Norges Handels og Sjøfartstidende* (Norwegian Mercantile and Shipping Gazette) Oct. 9, 1922. Translation.

other countries will resume trade in the United States on the same basis as formerly, and in the meantime will have obtained substantial, and probably permanent, benefits, in competition with the United States, in other markets.¹

A former Australian Commissioner in the United States, after a trip around the world, is reported to have said:

The protectionist influence of the Farmers' party in America had produced activity in home markets, but was severely curtailing her foreign markets. America was receding from the pre-eminent position she had held in trade and commerce immediately after the armistice. Inflated war figures had made her appear to be in a more stable condition than she was in fact, and exports were falling off, partly for this reason and partly because of the high tariff.²

The *New York Journal of Commerce* referred to

the fact that foreign countries, with practically one accord, regard the tariff as an instrument designed to damage them and certain to cripple their trade with the United States. The Germans are loud in their expressions of belief that only disaster can come from it. British and French authorities have expressed themselves to much the same effect. There is a general feeling throughout the world that our duties are selfish and unfair.³

The debates in the Congress, preceding the enactment of the Fordney-McCumber bill, did not fail seriously to reflect the adverse opinions of the commercial world. In a lighter vein, one opposition Senator, quoting classical historians in regard to the "troglydites — cavemen, persons who seek exclusion, isolation, and separation from others"

¹ Foreign Tariff Files, Dept. of Commerce, Despatch from American Consulate General, Montreal, Dec. 7, 1922.

² Melbourne *Argus*, Mar. 29, 1923, quoting Sir Mark Sheldon. Editorial, "The Executive and the Tariff", Dec. 12, 1922.

—felt moved to aver that the bill declared a “troglodytian policy” and that we were “to become a nation of troglodytes”.¹

If the foregoing statements, taken as a whole, represent a reasonably accurate estimate of the general character of the Tariff Act of 1922—and additional evidence indicates that there is much truth in it—Section 317 is faced with an enemy in the very law that created it that may go far toward nullifying its effect not only as respects its practical purpose of selling more American goods abroad, but also with reference to the possibility of eliminating discriminations against American commerce. Such acts and policies of the United States as create in other countries an impression of commercial aloofness and desire on the part of this country to take undue advantage of its pre-eminent economic strength, at the expense of the rest of the world, will impede the success of the new American commercial policy.

27. PARTICULAR CLAUSES OF THE TARIFF ACT OF 1922

The most obvious of the inconsistencies between Section 317 and other portions of the Tariff Act of 1922 are contained in eleven clauses the effect of which is to make the duty to be levied upon imports entering the United States dependent upon laws or regulations of other nations, which laws or regulations need not be discriminatory. These clauses resemble the penalty-duty provisions of the Acts of 1890 and 1897² in so far as they undertake to penalize other countries for levying import duties that are higher than the United States sees fit to approve. They differ from the predecessors named in certain other respects:

¹ *Congressional Record*, vol. 62, pt. vi, 67th Congress, 2d Session, pp. 6121, 6368.

² *Supra*, ch. ii.

(a) four of them provide for penalty duties upon articles that are not on the free list;¹ (b) the object at which two of them are aimed is not import, but non-discriminatory export duties (or restrictions); (c) when the penalty is directed against a foreign import duty the American import duty is to become equal to the foreign;² (d) nine of the clauses are automatic and mandatory in their operation; the operation of the other two is merely permissive, and then only after the failure of negotiations which the President is authorized to institute for the purpose of removing the displeasing foreign duty. Analogous clauses are found in the Tariff Act of 1890 and in every general tariff law since that date. An attempt was made to generalize the principle involved when the House of Representatives adopted Section 302 of the original Fordney Bill.

The same inconsistency with the principle expressed in Section 317 is found in every case: the United States seeks from countries which impose certain burdens upon commerce duties lower than they charge upon the commerce of third countries and threatens to impose discriminating duties upon countries which do not discriminate against American commerce. More serious than the inconsistency is the violation of solemn promises to certain countries contained in treaties to which the United States is a party.

28. THE INCONSISTENT PROVISOS AND THE TREATY OBLIGATIONS OF THE UNITED STATES

While discussing Section 302 and certain of the above-mentioned clauses as they appeared in the then pending Fordney Bill, Senator Smoot remarked:

¹A fifth, paragraph 401, nominally offers a concession to a dutiable article, but really imposes a penalty upon an article normally free.

²Subject in two instances to a maximum of fifty per centum ad valorem.

Our lowest rates are to be given to certain countries without their making any concessions and are to be extended to other countries only if the latter reduce their rates, either to us or generally by varying amounts. The enactment of these provisions would therefore be followed immediately by protests from foreign countries. These protests would be armed with precedents from the history not alone of European States but of the United States as well, for the United States has hitherto maintained that such clauses in our treaties prohibited foreign countries from levying, as the result of general legislation, diverse rates of duties—except, of course, as the lowest rates were applied to American products and American ships. The State Department has not changed its views and considers the provisions under discussion clearly contrary to the most-favored-nation clause of our commercial treaties.¹

Senator Smoot appears to have had excellent reasons for his assertions. The United States is party to a score of treaties² which contain the mutual promise of most-favored-nation treatment. According to the conditional interpretation of most-favored-nation treatment, reciprocal concessions to third countries, while not accruing automatically to the other party, must be extended to such party upon the tender of equivalent compensation. If the concessions are made freely, that is, without the receipt of concessions in return, the other party to the treaty has the right to have them extended freely to its commerce. In the absence of concessions granted for compensation, conditional no less than unconditional most-favored-nation treatment connotes equality of treatment.³

¹ *Congressional Record*, vol. 62, part 6, 67th Congress, 2d Session, p. 5880. April 24, 1922. It should be remembered that the Senate Finance Committee struck out Sec. 302; also several provisos.

² See *infra*, subdivision 36 and Appendix 3.

³ The language in the several treaties varies considerably; the above

Of the clauses of the Tariff Act of 1922 under discussion, a typical one imposes a duty of twenty-five per centum ad valorem upon automobiles, but provides for higher duties upon automobiles imported from countries that impose import duties in excess of twenty-five per centum upon automobiles from the United States. No question of reciprocal concessions appearing, it would seem obvious that any statutory provision which would result¹

general statement is made subject to exceptions in individual cases. A typical most-favored-nation clause is found in the Treaty of Friendship, Commerce and Navigation concluded July 27, 1853, with Argentina:

ARTICLE III.

The two high contracting parties agree that any favor, exemption, privilege or immunity whatever, in matters of commerce or navigation, which either of them has actually granted, or may hereafter grant, to the citizens or subjects of any other government, nation or state, shall extend, in identity of cases and circumstances, to the citizens of the other contracting party, gratuitously, if the concession in favor of that other government, nation or state, shall have been gratuitous; or, in return for an equivalent compensation, if the concession shall have been conditional.

ARTICLE IV.

No higher or other duties shall be imposed on the importation into the territories of either of the two contracting parties of any article of the growth, produce or manufacture of the territories of the other contracting party, than are, or shall be, payable on the like article of any other foreign country; nor shall any other or higher duties or charges be imposed in the territories of either of the contracting parties, on the exportation of any article to the territories of the other, than such as are, or shall be, payable on the exportation of the like article to any other foreign country; nor shall any prohibition be imposed upon the importation or exportation of any article of the growth, produce or manufacture of the territories of either of the contracting parties, to or from the territories of the other, which shall not equally extend to the like article of any other foreign country.—Malloy, *Treaties*, p. 21. For other examples see ch. v.

¹ Under the decisions of the Supreme Court of the United States statutes and treaties are, by the Constitution, equally the law of the land and the later in date prevails so far as the enforcement by the

in the imposition, on articles the produce or manufacture of a country with which the United States is a party to a treaty containing a most-favored-nation pledge, of higher or other duties than are imposed on like articles imported from any other country would violate the terms of that treaty. If a rate of duty on a given commodity imported from a treaty country into the United States should be raised above the general rate fixed by law, in order to conform to a higher rate imposed by such country on a similar commodity exported from the United States, the treaty provisions would evidently be violated whenever the general rate remained in force with respect to such commodity shipped from any other country to the United States.¹

The simple and natural conclusion just presented has not, however, been invariably accepted by the United States Government. The question was brought to an issue by the first instance of an American tariff rate the levy of

courts of private rights is concerned. Hence the Treasury Department, in collecting import duties, is bound to follow the statute if it is later in date.—Moore, *Digest*, vol. v, p. 366. "In an international tribunal, however, the unilateral repeal of a treaty by a statute would not affect the rights arising under it and its judgment would necessarily give effect to the treaty and hold the statute repealing it of no effect".—Opinion of Chief Justice Taft, acting as sole arbitrator between Great Britain and Costa Rica, Oct. 18, 1923. (*American Journal of International Law*, Jan., 1924, p. 160).

¹ The United States would obviously have the legal right to fix any discriminatory rates it might desire to put into effect with respect to goods coming from countries with which the United States has no treaty stipulations such as those referred to. Thus the proviso in paragraph 369 of the Tariff Act of 1922 (*infra*, subdivision 29) could without violation of international obligations be made applicable to non-treaty countries, and such violation could have been avoided with respect to treaty countries, if a second proviso had been added to it to the effect that it should not apply to products shipped from countries having treaties with the United States, which would be infringed thereby. The legality of this course would not, however, extinguish its inconsistency with Section 317.

which depended upon the existence of a foreign import duty. The free list of the Tariff Act of 1894 included:

Salt in bulk, and salt in bags, sacks, barrels, or other packages, but the coverings shall pay the same rate of duty as if imported separately: *Provided*, That if salt is imported from any country whether independent or a dependency which imposes a duty upon salt exported from the United States, then there shall be levied, paid, and collected upon such salt the rate of duty existing prior to the passage of this Act¹

At that time Germany levied an internal revenue tax upon domestic salt and a corresponding customs duty upon salt when imported from other countries—including the United States. This country proceeded to place the stipulated import duty upon German salt and the German Government insisted that such action violated the Treaty of Commerce and Navigation concluded with Prussia in 1828.² The Attorney General of the United States, Mr. Richard Olney, to whom the question was submitted for an opinion, held the German claim untenable, asserting that:

The form which the provisions of our recent tariff act relating to salt may have assumed is quite immaterial. It enacts, in substance and effect, that any country admitting American salt free shall have its own salt admitted free here, while any country putting a duty upon American salt shall have its salt dutiable here under the preexisting statute. In other words, the United States concedes "free salt" to any nation which concedes "free salt" to the United States. Germany, of course, is entitled to that concession upon re-

¹*Tariff Acts*, p. 502. Act of Aug. 27, 1894, paragraph 608.

²Malloy, *Treaties*, 1496, et seq., Articles v and ix. There is doubt as to whether this treaty was properly considered operative: Hornbeck, Stanley K., *The Most-Favored-Nation Clause in Commercial Treaties*, pp. 96-97. See tables of principal and secondary sources at the beginning of this monograph.

turning the same equivalent. But otherwise she is not so entitled, and there is nothing in the "most-favored-nation clause" which compels the United States to discriminate against other nations and in favor of Germany by granting gratuitously to the latter privileges which it grants to the former only upon the payment of a stipulated price.¹

Certain correspondence which Mr. Olney as Secretary of State subsequently carried on with the representative of Germany suggests that he may later have preferred to rely on other grounds than his interpretation of the most-favored-nation clause in order to defend the duty on German salt.² His former reasoning, however, appears still to be accepted by the Treasury Department, that is to say, such provisos as that quoted from the Tariff Act of 1894, and those contained in the Tariff Act of 1922, while not *reciprocity treaties*, are *reciprocal in their operation* and therefore permissible under the American interpretation of the most-favored-nation clause.³

This view wholly fails to take into consideration the fact that the most-favored-nation clause relates only to matters of discrimination and in no sense to levels of rates. Its fallacy originates in its failure to recognize that the object of the most-favored-nation clause is to effect and maintain equality of treatment among the various countries the goods of which enter a particular market. The real question upon which depends the operation of the most-favored-

¹ Quoted in Moore, *Digest*, vol. v, p. 274. Mr. Olney pointed out that the most-favored-nation clause had been invariably construed as permitting "commercial concessions to a country which are not gratuitous, but are in return for equivalent concessions, and to which no other country is entitled except upon rendering the same equivalent." For judicial decisions, etc., see ch. v, *infra*.

² *Foreign Relations of the United States*, 1896, pp. 208-209.

³ These statements are based upon a conversation with a Treasury Department official.

nation clause is neither the amount of the duty in force nor whether a particular article is free or dutiable, but whether treatment as favorable as that accorded to any other country is accorded to the country guaranteed most-favored-nation treatment. In this connection the American interpretation, being exceptional, should be strictly construed. Even the most strained construction, however, could hardly support the view taken by Attorney General Olney.

Reverting to the above-mentioned typical clause of the Tariff Act of 1922, let it be supposed that the United States regularly imposes an import duty on automobiles of thirty-three and one-third per centum ad valorem; but to every country that does not levy a duty of more than twenty-five per centum on the importation of automobiles it makes a special concession, reducing its own rate to twenty-five per centum. Under the American interpretation the United States must extend this concession freely to country A, to which it is bound by treaty to accord most-favored-nation treatment, if it extends it freely to third countries. Thus inverted the actual situation becomes apparent. No nation accords to the United States any reciprocal concession for maintaining the regular duty at twenty-five per centum. In general other countries continue to levy the same duties that they levied upon American automobiles before the Tariff Act of 1922 became law. What is thus freely granted must be freely extended to country A.¹

This conclusion is strengthened by considerations of practical justice. When, under conditional most-favored-nation pledges, a treaty country is placed at a disadvantage in the American market by a reciprocity agreement between the United States and some third country, it at least has such protection as is afforded by the fact that the discrimi-

¹ See *infra*, cases cited in subdivision 37 (h), last footnote.

nations against it will not be likely to exceed the concessions which the third country is willing to make as an equivalent in favor of the United States. In the mutuality of the reciprocity arrangement with the third country there exists a safeguard for the countries having assurances of conditional most-favored-nation treatment from the United States.

But if the Attorney General's deduction were correct the determination of equivalent compensation would be wholly *ex parte*. Anything that the Congress chose to define as an equivalent compensation would be one and the customs administration would be bound to put into effect any discrimination that was founded upon it. Not even the President—who under the Constitution is the authority designated to conduct foreign relations—would have any right of interference except by veto, which, of course, could be overridden by the Congress. The legislative branch of the American Government would thus in fact become the court of last resort in the interpretation of the most-favored-nation obligations arising from the treaties of the United States.

If the Congress can say that a third country's general rate of twenty-five per centum is an equivalent compensation for making the American duty twenty-five per centum instead of thirty-three and one-third per centum, the Congress would seem to have authority to say that a third country's general duty of twenty-five per centum only compensates for American reduction from thirty-three and one-third per centum to thirty per centum. Identity of compensation need not necessarily be equivalence of compensation. If a great many automobiles were coming to the United States and only a few were being exported, the argument might be made that a small reduction in the American rate was *equivalent* to a large reduction in the other country's

rate. This would be especially persuasive if the other country's rate was definitely higher to begin with.

If the Congress can say that a third country's general duty at a stated arbitrary rate is required to compensate the United States for a smaller reduction or a higher rate, the *reductio ad absurdum* would be that the Congress could say that free importation of automobiles would be necessary in order to compensate the United States for not making its tariff rates higher than they are. Granted the authority of Congress to define *equivalent*, there would seem to be no limitation in regard to the definitions which it might make.

Fortunately, the survey of the present flow of trade, set forth subsequently in the present Chapter, indicates that the actual violations of treaties, resulting from the operation of the eleven provisos of the Tariff Act of 1922, will not be so numerous or important as at first glance might be expected, and will probably involve large imports of goods only in the case of automobiles and their parts from Great Britain and from Italy.¹ Most of the provisos affect goods which are imported chiefly from countries with which the United States has no commercial treaty. The policy expressed in Section 317 is subverted in any case but, where there appears to be the violation of a treaty, such circumstance aggravates the evils of international suspicion and of chauvinism within nations—which evils are the most insidious enemies of a program of fairness and equality.

In view of the fact that the policy expressed in Section 317 requires for its adequate fulfilment the development of a system of commercial treaties containing the *unconditional* most-favored-nation clause, upon which it would be unthinkable to base an interpretation such as that of Mr. Olney, the treaty-violating provisos take on an added inconsistency.

¹ See Appendix 5.

29. ANALYSIS OF THE ELEVEN INCONSISTENT PROVISOS

The clauses of the Tariff Act of 1922 which provide for the penalization of non-discriminatory treatment of American commerce by foreign countries are found in Section 1, paragraphs 369, 371, 401, 1301, 1302; in Section 201, paragraphs 1536, 1541, 1543, 1548, 1585 and 1700. They need to be studied in some detail.

Paragraph 369 refers to automobiles, motor cycles and their parts, not including tires, and imposes an import duty of twenty-five per centum on these commodities. It then adds this proviso:

That if any country, dependency, province, or other subdivision of government imposes a duty on any article specified in this paragraph, when imported from the United States, in excess of the duty herein provided, there shall be imposed upon such article, when imported either directly or indirectly from such country, dependency, province, or other subdivision of government, a duty equal to that imposed by such country, dependency, province, or other subdivision of government on such article imported from the United States, but in no case shall such duty exceed 50 per centum ad valorem.

Imports of automobiles and their parts are almost negligible compared with domestic production, but they amounted, in 1920, to over two million dollars in value.¹ One-third came from Canada, with which country the United States has no treaty that would be violated by the enforcement of a duty higher than twenty-five per centum. One-third came from Great Britain, against which a discriminating duty would seem to violate Article II of the treaty of July 3, 1815.² Great Britain imposes a duty of thirty-three and

¹This and similar information in regard to the products affected by other provisos is taken from the United States Tariff Commission's *Summary of Tariff Information, 1921*.

²Text, *infra*, subdivision 36.

one-third per centum on automobiles¹ and their parts, and would naturally be expected to protest against the imposition of the discriminatory duty by the United States. France exports automobiles to the United States, but the two countries have no commercial treaty containing a most-favored-nation clause. Italy, which also sends some automobiles to this country, has a complicated schedule of import duties applicable to automobiles, motor cycles and their parts, averaging well above twenty-five per centum ad valorem. Articles VI and XXIV of the treaty of February 26, 1871,² may be invoked by Italy against the imposition of a discriminating duty. Imports of motor cycles appear to be very small and hardly worthy of comment in the present connection.

By Treasury Decision 39,351, dated December 9, 1922, the United States customs officials were informed, for the purpose of levying duties in accordance with the requirements of Paragraph 369, of the rates in force upon the importation of automobiles, motor cycles and parts thereof into Germany, Great Britain, France and Italy. Other Treasury instructions make automobiles dutiable at rates higher than twenty-five per centum when imported from Canada and other countries.

Paragraph 371 refers to bicycles and parts, not including tires. The rate is thirty per centum ad valorem and the proviso is the same as in Paragraph 369. Imports are chiefly from Great Britain, which at present admits free of duty bicycles propelled by human power. Customs officials have received instructions to levy additional duties upon bicycles from certain specified countries.

Paragraph 401 refers to logs of fir, spruce, cedar, or

¹ For passenger as opposed to commercial use.

² Malloy, *Treaties*, pp. 971, 976.

Western hemlock. The duty is one dollar per thousand feet, board measure; provided, however,—

That any such class of logs cut from any particular class of lands shall be exempt from such duty if imported from any country, dependency, province, or other subdivision of government which has, at no time during the twelve months immediately preceding their importation into the United States, maintained any embargo, prohibition, or other restriction (whether by law, order, regulation, contractual relation or otherwise, directly or indirectly) upon the exportation of such class of logs from such country, dependency, province, or other subdivision of government, if cut from such class of lands.

The effect of this provision is to discriminate against those countries which see fit, for whatever reason, to restrict the exportation of the timber named, though such restrictions apply equally to all countries. Like paragraphs 369 and 371, it entangles the laws of the United States with the laws of countries over the legislative processes and national policies of which this Government has no control and generally professes to have no concern. It may take effect against a program for the conservation of natural resources which the Departments of Agriculture and of the Interior would probably consider praiseworthy. It very evidently has for its purpose the adjustment of duties on the basis of rates of duty imposed by other countries—in this case export duties, or restrictions of whatever kind. It would seem to contravene the same provisions of treaties that are contravened by paragraphs 369 and 371. In this case, however, importation is chiefly from Canada, with which country no such treaty exists.

The Treasury Department has issued instructions to the effect that certain provisions of law effective in the Cana-

dian provinces of New Brunswick and British Columbia constitute restrictions of export within the meaning of the proviso of Paragraph 401, and consequently that the duty provided for shall be collected on imports from those provinces of the varieties of logs specified.

Paragraph 1301 levies upon printing paper, not specially provided for, a duty of one-fourth of a cent per pound and ten per centum ad valorem. It then provides—

That if any country, dependency, province, or other subdivision of government shall forbid or restrict in any way the exportation of (whether by law, order, regulation, contractual relation, or otherwise, directly or indirectly), or impose any export duty, export license fee, or other export charge of any kind whatsoever (whether in the form of additional charge or license fee or otherwise) upon printing paper, wood pulp, or wood for use in the manufacture of wood pulp, the President may enter into negotiations with such country, dependency, province, or other subdivision of government to secure the removal of such prohibition, restriction, export duty, or other export charge, and if it is not removed he may, by proclamation, declare such failure of negotiations, setting forth the facts. Thereupon, and until such prohibition, restriction, export duty, or other export charge is removed, there shall be imposed upon printing paper provided for in this paragraph, when imported either directly or indirectly from such country, dependency, province, or other subdivision of government, an additional duty of 10 per centum ad valorem and in addition thereto an amount equal to the highest export duty or other export charge imposed by such country, dependency, province, or other subdivision of government, upon either an equal amount of printing paper or an amount of wood pulp or wood for use in the manufacture of wood pulp necessary to manufacture such printing paper.

The elaborateness with which this provision is set forth

does not conceal the fact that it also has the purpose of adjusting rates of duty upon the basis of regulations imposed by other countries, which regulations apply to third countries in the same way that they apply to the United States. Unlike the preceding provisos, it calls for an effort to obtain the desired end by negotiation. In view of the objections of inconsistency and treaty violation already recited, there would appear to be little likelihood that the President will make use of the authorization accorded him.

Paragraph 1301 does not include standard newsprint,¹ which constitutes almost the whole of American imports of printing paper. The real object of the proviso is to obtain, if possible, the unrestricted exportation from Canada of the raw materials for which American paper manufacturers are becoming yearly more dependent upon sources outside the United States. Of the countries from which appreciable quantities of wood pulp or wood for use in the manufacture of wood pulp are imported, Norway appears to have been the only one with which, at the time of the passage of the act, the United States had in operation a treaty containing a most-favored-nation clause. Norway imposes no restrictions upon the export of the commodities referred to, but if the reverse were true and negotiations for the removal of the restrictions were undertaken, their failure would not, it is needless to say, make the imposition of discriminating duties any the less a violation of the treaty.

Paragraph 1302 levies a ten per centum duty on paper board and various similar products, such as roofing paper or felt; and a five per centum duty on pulpboard in rolls for use in manufacturing wallboard. It then provides that, if imported from a country imposing a greater (even though non-discriminatory) duty upon these articles, a duty equal to that imposed by such country shall be imposed

¹ Admitted free, par. 1672.

upon their import into the United States. There is no limitation as to the total amount of this duty, as in Paragraph 369. It seems precisely analogous to that paragraph so far as its relation to most-favored-nation pledges is concerned. No additional duties appear, however, to have been levied under it. Treasury Decision 39,394 of January 6, 1923, announces that the United Kingdom admits sheathing felt free of duty.

Paper board is imported in large quantities from Canada. Very little of this or the other products referred to in Paragraph 1302 appears to be imported from other countries.

Paragraph 1536 places brick, not specially provided for, on the free list, but makes it dutiable at the rate imposed by the exporting country if that country levies a duty, even though non-discriminatory, on brick from the United States. So far as the contravention of treaties is concerned there is nothing to differentiate this paragraph from Paragraph 369.

Imports of brick occur chiefly in the border trade with Canada, but there have been occasional shipments from Denmark and other European countries. A duty imposed upon brick from the last-named country would seem to violate Articles I and IV of the Treaty of April 26, 1826.¹ At present, however, brick enters Denmark free of duty. On December 7, 1922, the Treasury Department instructed the collectors of customs that Canada levied on certain kinds of brick an import duty of twenty-two and one-half per centum, which accordingly would be the duty on such brick coming from Canada into the United States.

Paragraph 1541 places on the free list certain calcium and lime products. It then provides that if any country or dependency imposes a duty on calcium acetate from the

¹Malloy, *Treaties*, pp. 373-374.

United States, an equal duty shall be levied on this product originating there and imported into this country. Imports have apparently not heretofore occurred in important quantities. Under Treasury Decisions 39,364 and 39,420, of December 18, 1922, and January 22, 1923, respectively, such imports would evidently be dutiable at various rates if exported from Canada,¹ Germany, Japan, Mexico, Panama, Sweden or the United Kingdom. If duties are imposed on this product from Japan or the United Kingdom, the agreements assuring most-favored-nation treatment to those countries will apparently be violated.

Paragraph 1543 refers to cement and is in all respects analogous to paragraphs 1536 and 1541. In the past, cement has come to the United States from Germany, Belgium, France, Great Britain, Canada and other countries. Imposition of duties would seem to be in contravention of Article XII of the Treaty of March 8, 1875, with Belgium and Article II of the Treaty of July 3, 1815, with Great Britain. There is at present, however, no import duty upon cement levied by either of these countries. By Treasury Decision 39,298, November 1, 1922, cement from Canada is dutiable at the rate of eight cents per hundred pounds. In accordance with Treasury Decision 39,353, December 12, 1922, cement is dutiable at varying rates if from France, Germany, Italy, Japan, Mexico, Norway, Poland, Sweden and British Virgin Islands.² Of these countries the United States is bound by treaty to grant most-favored-nation treatment to the products of Italy, Japan and Norway.

Paragraph 1548 places coal and products of coal, such as coke, upon the free list, with the proviso that they shall be dutiable at corresponding rates if from countries which im-

¹ By order-in-council effective Dec. 22, 1923, Canada placed acetate of lime on the free list.

² See also Treasury Decision no. 39,693, June 14, 1923.

pose duties upon such commodities from this country. Except in emergencies, such as the great bituminous strike of 1922, when British coal was imported, very little importation takes place and that chiefly from Canada. That country imposes a duty upon bituminous coal, and Spain makes all coal dutiable. Therefore, if imported into the United States from these or from other countries specified in Treasury Decision 39,374, coal and its products must pay duties at corresponding rates.

Paragraph 1585 refers to gunpowder, sporting powder and all other explosive substances not specially provided for. These articles are free except when from countries that impose duties upon similar American products, in which case they are dutiable at corresponding rates. In Canada, from which certain quantities of explosives are sent to the United States, the import duty on gunpowder is three cents per pound. Firecrackers are received from China, where the import duty is five per centum ad valorem. Treasury Decision 39,421, January 22, 1923, shows the rates payable upon explosives from more than a dozen countries, to several of which, including China, the United States is bound by treaty to accord most-favored-nation treatment. To one, Brazil, the United States has since become bound to accord *unconditional* most-favored-nation treatment.

Paragraph 1700 places certain kinds of wood and lumber on the free list. Some of these may, however, be made dutiable at the rates in force in the other country if imported from a country which, after negotiations by the President, continues to levy a duty, even though non-discriminatory, upon similar products from the United States. Imports are chiefly from Canada. The President has not exercised his discretion in favor of undertaking such negotiations and, as the considerations mentioned in the discussion of Paragraph 1301 are no less applicable here, it is improbable that he will do so.

30. TWO DOUBTFUL CLAUSES IN THE TARIFF ACT OF 1922

In addition to the group of provisions outlined in the previous subdivision, there are two other paragraphs in the Tariff Act of 1922 which may appropriately be kept in mind in the consideration of the question of equality of treatment.

Paragraph 406 levies a twenty-five per centum duty on "boxes, barrels, and other articles" containing certain kinds of fruit; provided—

That the thin wood, so called, comprising the sides, tops, and bottoms of fruit boxes of the growth or manufacture of the United States, exported as fruit box shooks, may be reimported in completed form, filled with fruit, by the payment of duty at one-half the rate imposed on similar boxes of entirely foreign growth and manufacture; but proof of the identity of such shooks shall be made under regulations to be prescribed by the Secretary of the Treasury.

There would seem to be ground for arguing that to levy a twenty-five per centum duty on boxes composed of wood originating outside the United States and manufactured in a country with which the United States has a treaty assuring to its products most-favored-nation treatment, and at the same time to levy a duty of twelve and one-half per centum upon similar boxes manufactured in another country out of American thin wood, constitutes a violation of the spirit and intent of that treaty and consequently a similar violation of the policy of Section 317. In either case the total value, the value upon which the differential duties are to be calculated, comprises not only a product of the United States (wood) but also a product of another country (a finished article produced by labor).¹

¹In regard to reimports of goods which have not been increased in value see Tariff Act of 1922, Section 314 (general) and Section 322 (automobiles exported for use of American Expeditionary Forces in the World War).

Paragraph 1453 relates to photographic film, especially moving-picture film. A reduced duty is allowed on the re-importation of films taken from the United States and exposed in another country by an American producer operating temporarily there in the course of producing a picture sixty per centum or more of which is made in the United States. The potential discrimination is against the added value resulting from the use of the films in making parts of pictures—which added value may be very great and would be the product of the country where exposure occurred.¹

31. FORERUNNERS OF THE ELEVEN PROVISOS

Attention has already been called to the fact that provisions penalizing the commerce of other countries for reasons other than discrimination against American commerce were not invented by the tariff makers of 1922. The first such provision in the tariff history of the United States is found in paragraph 218 of the Tariff Act of 1890, which reads as follows:

Sawed boards, plank, deals, and other lumber of hemlock, white wood, sycamore, white pine and basswood, one dollar per thousand feet board measure; sawed lumber, not specially provided for in this act, two dollars per thousand feet board measure; but when lumber of any sort is planed or finished, in addition to the rates herein provided, there shall be levied and paid for each side so planed or finished fifty cents per thousand feet board measure; and if planed on one side and tongued and grooved, one dollar per thousand feet board measure; and if planed on two sides, and tongued and grooved, one dollar and fifty cents per thousand feet board measure; and in estimating board measure under this schedule no de-

¹ Compare Section 12 of the British Finance Act, 1922 (ch. 17, 12 and 13 Geo. v), as amended by Section 9 of the Finance Act, 1923 (ch. 14, 13 and 14 Geo. v).

duction shall be made on board measure on account of planing, tonguing and grooving: *Provided*, That in case any foreign country shall impose an export duty upon pine, spruce, elm, or other logs, or upon stave bolts, shingle wood, or heading blocks exported to the United States from such country, then the duty upon the sawed lumber herein provided for, when imported from such country, shall remain the same as fixed by the law in force prior to the passage of this act.¹

Attention is directed to the fact that this clause, unlike the majority of the foregoing, makes the rate of duty for import into the United States dependent upon an *export* duty imposed by the country of origin. As such its object was, of course, to force the other country, because of its need or desire to have a favorable market for its products, chiefly raw materials, to permit their free export.

The Act of 1894 was quick to follow the example set by its predecessor. Paragraph 166, referring to lead, provided for a differential duty in case the country of origin levied an export duty on lead ore, lead in pigs, *et cetera*. Paragraph 608 levied a duty on salt, otherwise free, if from a country taxing the importation of salt from the United States.² The next example was a similar provision referring to sulphuric acid (Paragraph 643). Paragraph 683 placed a duty on logs and various articles of wood, otherwise free, if from "any country which lays an export duty or imposes discriminating stumpage dues on any of them." The last clause, depending in part upon discrimination, is to be differentiated from the other provisions.

The Act of 1897 contained in Paragraph 393 a provision adding the amount of any export duty levied upon pulp wood to the import duty otherwise provided for wood pulp; Paragraph 396 penalized export duties upon wood pulp by

¹ *Tariff Acts*, pp. 385-386.

² *Supra*, subdivision 28.

increasing the duty upon printing paper imported into the United States; Paragraph 491 levied a duty of one-half of one cent per pound upon binding twine if from a country which taxed imports of American binding twine at any rate whatsoever; Paragraph 626 made petroleum dutiable in the amount of the petroleum import tax, if any, charged by the country of origin; Paragraph 675 made sulphuric acid dutiable if from a country imposing an import duty upon it.

The Act of 1909 contained in Paragraph 406 an extreme example of complexity in clauses of the kind under consideration. It imposed a duty on mechanically ground wood pulp, but admitted that product free when from countries that imposed no export restrictions upon such wood pulp, printing paper or wood for use in the manufacture of wood pulp. If export duties were charged, an import duty in like amount was to be added. Separate provision was made for chemical wood pulp.¹ Other examples are found in Paragraphs 409 (printing paper); 476 (plows, *et cetera*); 507 (binding twine); 687 (sulphuric acid).

The Act of 1913 contained only three analogous clauses: Paragraphs 322 (printing paper); 581 (potatoes), and 644, which placed on the free list

Wheat, wheat flour, semolina, and other wheat products, not specially provided for in this section: *Provided*, That wheat shall be subject to a duty of 10 cents per bushel, that wheat flour shall be subject to a duty of 45 cents per barrel of 196 pounds, and semolina and other products of wheat, not specially provided for in this section, 10 per centum ad valorem, when imported directly or indirectly from a country, dependency, or other subdivision of government which imposes a duty on wheat or wheat flour or semolina imported from the United States.²

Tariff Acts, p. 750.

These clauses with respect to potatoes and wheat are of especial

The Tariff Act of 1922, as has doubtless been observed, outdid its predecessors in respect to the number and importance of such clauses.

32. THE PROVISOS AND RELATIONS WITH CANADA

The products for which differential duties are prescribed by the eleven provisos of the Tariff Act of 1922, as well as by its predecessors, come chiefly from Canada, to which country the United States is legally under no most-favored-nation obligations. But, irrespective of the legal effects of the provisos, the commercial consequences may be considerable. These discriminatory provisions necessarily stir up ill-will wherever their burden threatens to fall. They provoke retaliation. They seem to offer little if any countervailing advantage. They are to be regarded as distinctly regrettable and, as far as they go, they tend to create a suspicion that the United States has embarked upon a policy of trying to keep its own door closed tight, while at the same time endeavoring to force open the door to every other market.

The commercial relations between the United States and Canada ought to be particularly friendly. Canada consumes enormous quantities of American products. Potentially it is a vastly greater market. Yet, not content with imposing high duties that fall heavily upon the producers of that country and not regretful that the reciprocity¹ the Canadians desire appears to be impracticable, this country here

interest because of the corresponding provisions in the Canadian tariff law (*infra*, subdivision 32). Potatoes were made free, but if from a country imposing a duty upon American potatoes, ten per centum ad valorem. Paragraph 322 (printing paper) was amended as to rates but otherwise re-enacted by Sec. 600 of the general revenue act of September 8, 1916.

¹ See Appendix 10.

adds numerous petty knife-thrusts that almost certainly arouse ill-will far out of proportion to any possible gain, even to immediate interests. The Canadians have not returned good for evil. Their tariff law, like that of the United States, is not without its instances of discriminations based upon non-discriminatory foreign customs duties.¹ The United States is obviously the country for the products

¹The following table from Schedule "A" of the Canadian tariff includes these instances and shows them to be few and innocent compared with the similar offenses of the American tariff law:

<i>Tariff Item</i>	<i>British Preferential Tariff</i>	<i>Inter-mediate.</i>	<i>General</i>
60 Wheat, n. o. p.	Free	Free	Free
60a Wheat when imported from a country which imposes a customs duty on wheat grown in Canada per bushel	8 cts.	12 cts.	12 cts.
61 Wheat flour, n. o. p., semolina, n. o. p.	Free	Free	Free
61a Wheat flour and semolina when imported from a country which imposes a customs duty on wheat flour or semolina manufactured in Canada...per barrel	30 cts.	50 cts.	50 cts.
83 Potatoes, n. o. p., and potatoes dried, desiccated or otherwise prepared, n. o. p.	Free	Free	Free
83a Potatoes when imported from a country which imposes a customs duty on potatoes grown in Canada.....per 100 pounds	20 cts.	35 cts.	35 cts.
84 Potatoes dried, desiccated or otherwise prepared when imported from a country which imposes a customs duty on such articles produced in Canada ² ..	15 p. c.	30 p. c.	30 p. c.

²From *The Customs Tariff, 1907, and Amendments, to July 1, 1922*, corrected to Jan. 1, 1924, by the Foreign Tariffs Division of the Department of Commerce. See also Appendix 10.

of which higher duties are provided.¹ The presence in the Canadian law of a provision analogous to Section 317 places Canada in a position of inconsistency similar to that of the United States. This provision declares that

Goods imported into Canada, the product or manufacture of any foreign country which treats imports from Canada less favourably than those from other countries, may be made subject by order of the Governor in Council in the case of goods already dutiable, to a surtax over and above the duties specified in Schedule A to this Act, and in the case of goods not dutiable, to a rate of duty not exceeding, in either case, twenty per centum ad valorem.²

The obvious path of amity and good sense is for Canada and the United States to agree that the inconsistent and unjust provisos shall be cancelled on each side and that unconditional most-favored-nation treatment shall be reciprocally guaranteed.

33. ANOTHER INSTANCE OF APATHY TOWARD TREATY OBLIGATIONS

"This conflict with our treaties," said Mr. Smoot in addressing the Senate concerning certain previously-discussed portions of the Fordney Bill,

should be conclusive against the enactment of these provisions. But I regret to say that even in this body there are men upon whom the treaty obligations of the United States seem to rest but lightly. Their attitude seems to say, "Let us legislate as we please and let the State Department worry about the com-

¹The recent provision by the Canadian Parliament for a possible embargo upon pulp-producing wood grown on private as well as public lands appears to be in part, at least, a provision with which to bargain with the United States.

²The Customs Tariff Act of June 12, 1914, sec. 2. See Appendix 5.

plications; let all the world accuse us of being treaty breakers so long as our constituents vote for us".¹

Another case of legislative disregard of agreements with other nations is found in Section 526 of the Tariff Act of 1922, which discriminates in favor of American owners of trade-marks by offering them certain protection not accorded to the residents of other countries, contrary to the provisions of an international convention to which the United States is a party.² The State Department, replying to an inquiry from one of the Senators, had given sufficient warning:

It will be observed that under the provisions of Article 2 of the Convention³ the nationals of countries whose governments

¹*Congressional Record*, vol. 62, part 6, 67th Cong. 2d Sess., p. 5880, April 24, 1922.

²Subdivision (a) of Section 526 is as follows:

"That it shall be unlawful to import into the United States any merchandise of foreign manufacture if such merchandise, or the label, sign, print, package, wrapper, or receptacle, bears a trade-mark owned by a citizen of, or by a corporation or association created or organized within, the United States, and registered in the Patent Office by a person domiciled in the United States, under the provisions of the Act entitled 'An Act to authorize the registration of trade-marks used in commerce with foreign nations or among the several States or with Indian tribes, and to protect the same,' approved February 20, 1905, as amended, if a copy of the certificate of registration of such trade-mark is filed with the Secretary of the Treasury, in the manner provided in section 27 of such Act, and unless written consent of the owner of such trade-mark is produced at the time of making entry".—*Statutes of the United States of America passed at the Second Session of the Sixty-Seventh Congress, 1921-1922, part 1, Ch. 356. p. 975.*

³The Convention for the Protection of Industrial Property, signed at Washington, June 2, 1911, to which most of the countries of Europe, as well as the United States, Japan, Brazil and others are parties. Article 2 is as follows:

"The subjects or citizens of each of the contracting countries shall enjoy, in all other countries of the Union, with regard to patents of invention, models of utility, industrial designs or models, trade-marks, trade names, the statements of place of origin, suppression of unfair competition, the advantages which the respective laws now grant or

are parties to the Convention are entitled in the United States to the same advantages which the laws of the United States grant to American citizens, and that Article 2 in terms prohibits the establishment of an obligation of domicile on the part of persons entitled to the benefits of the Convention.

It is the view of the Department that, for reasons indicated by the foregoing, Section 526 of the Tariff Bill, if enacted into law, would discriminate in favor of persons domiciled in the United States in contravention of Article 2 of the Convention for the Protection of Industrial Property and would deprive persons who registered trade-marks in the United States Patent Office and who reside abroad of the protection to which they would be entitled under the terms of the Convention.¹

To the development of a commercial policy based on equal rights for all and special privileges for none, Section 526 of the Tariff Act of 1922 adds another to the obstacles described in this chapter.

34. PAST AND FUTURE OF DISCRIMINATORY PRACTICES

The inconsistencies of the Tariff Act of 1922 are well-rooted in history. Ultra-protective customs duties have become traditional with the political party which was in control of the Congress in 1922. Discriminations are as old as tariff legislation. The first American tariff law provided for the preferential treatment of goods imported in vessels

may hereafter grant to the citizens of that country. Consequently, they shall have the same protection as the latter and the same legal remedies against any infringements of their rights, provided they comply with the formalities and requirements imposed by the National laws of each State upon its own citizens. Any obligation of domicile or of establishment in the country where the protection is claimed shall not be imposed on the members of the Union."—*Treaty Series* (published by the Department of State), no. 579; Malloy, *Treaties*, p. 2956.

¹Letter to Senator Moses, Sept. 9, 1922. Published in the *Congressional Record*, Sept. 14, 1922, vol. 62, part 12, p. 12570. 67th Congress, 2d Session.

belonging to American citizens.¹ As late as 1921 the President, in his address at the opening of the regular session of the Congress, felt compelled to announce, in regard to the discriminatory procedure directed by the Merchant Marine Act of the preceding year,²

¹ Act of July 4, 1789:

"That a discount of ten per cent. on all the duties imposed by this act shall be allowed on such goods, wares and merchandises as shall be imported in vessels built in the United States, and which shall be wholly the property of a citizen or citizens thereof, or in vessels built in foreign countries, and on the sixteenth day of May last, wholly the property of a citizen or citizens of the United States, and so continuing until the time of importation".—*Tariff Acts*. p. 15. This appears to have been primarily a defensive measure adopted because of the discriminations practiced against American ships by other countries .

² That in the judgment of Congress, articles or provisions in treaties or conventions to which the United States is a party, which restrict the right of the United States to impose discriminating customs duties on imports entering the United States in foreign vessels and in vessels of the United States, and which also restrict the right of the United States to impose discriminatory tonnage dues on foreign vessels and on vessels of the United States entering the United States should be terminated, and the President is hereby authorized and directed within ninety days after this Act becomes law to give notice to the several Governments, respectively, parties to such treaties or conventions, that so much thereof as imposes any such restriction on the United States will terminate on the expiration of such periods as may be required for the giving of such notice by the provisions of such treaties or conventions.—Sec. 34, Act of June 5, 1920, commonly called the Jones Act. See *supra*, subdivision 11, first footnote.

Section 28 of the same act lays the foundation for lower freight rates on interstate traffic entering into foreign trade if transported in American ships than if transported in the ships of other countries. The Interstate Commerce Commission, by an order of March 11, 1924, provided for such discriminatory rates effective May 20, 1924, applicable to goods other than grain exported from the United States to specified parts of the world or imported into the United States therefrom. In its press release of March 12, the Commission stated that it had provided for publication of revised tariffs of railway rates on less than the usual notice, "in order that all parties interested may be fully advised and that as little confusion and disturbance of commercial conditions as possible will result". Dispatches appearing in the newspapers have indicated that Great Britain and Japan will protest under

During the life of the act no Executive has complied with this order of the Congress. When the present administration came into responsibility it began an early inquiry into the failure to execute the expressed purpose of the Jones Act. Only one conclusion has been possible. Frankly, Members of House and Senate, eager as I am to join you in the making of an American merchant marine commensurate with our commerce, the denouncement of our commercial treaties would involve us in a chaos of trade relationships and add indescribably to the confusion of the already disordered commercial world. Our power to do so is not disputed, but power and ships, without comity of relationship, will not give us the expanded trade which is inseparably linked with a great merchant marine. Moreover, the applied reduction of duty, for which the treaty denouncements were necessary, encouraged only the carrying of dutiable imports to our shores, while the tonnage which unfurls the flag on the seas is both free and dutiable, and the cargoes which make a nation eminent in trade are outgoing, rather than incoming.¹

The inclusion of Section 317 in the present tariff law is a significant forward step and should give encouragement to those who believe in international fair play. The effort of the future should be directed toward making the remainder of the tariff law conform to the new standard.

provisions of their treaties with the United States of 1815 and 1911, respectively (Malloy, *Treaties*, pp. 624 and 2712). Prior to May 20 the order of March 11 was abrogated, apparently as a result of protests by American commercial interests.

With reference to the Merchant Marine Act of 1920, the Chairman of the House of Representatives Committee on the Merchant Marine and Fisheries recently said: "I would not have another treaty made between this country and any other, of any kind. Let the United States stand on her own bottom or die, and she will not die." (*Hearings*, H. R. 8091, 68th Congress, 1st Session, p. 181).

¹Address of Dec. 6, 1921, as officially published, p. 6. President Coolidge is quoted as having indicated that he will not depart, in this respect, from the policy of his two predecessors.—New York *World*, October 17, 1923.

In this connection see also Tariff Act of 1913, Section IV, J, subsections 1 and 7; and *The Five Per Cent Discount Cases*, 243 U. S., 97.

CHAPTER V

THE AMERICAN INTERPRETATION OF "MOST-FAVORED-NATION TREATMENT"

35. THE MOST-FAVORED-NATION CLAUSE IN COMMERCIAL TREATIES

IN the international arrangements by which nations have regulated their commercial intercourse with each other no provision is—or for generations has been—so important as what is called the "most-favored-nation" clause. It is now, indeed, universally recognized as the basis and cornerstone of commercial-treaty structure. Some promise of equality of treatment—treatment as favorable as that accorded to the nation which receives the best or *most favored* treatment is almost always found in general commercial treaties, and, as a rule, the promise effects, among other matters, the matter of the customs-tariff duties to be levied upon the products of the other party to the treaty when imported into the territory of the nation giving the assurance. This is the most important phase of most-favored-nation treatment. So far as the present pages are concerned with most-favored-nation clauses, they are concerned almost exclusively with those which relate to customs tariffs—import and export duties—and regulations. As has already been indicated, similar or identical language in such clauses does not always justify the expectation that governments will agree in regard to the meaning or that they will, when having the power to interpret, give to the same language a uniform construction.

The United States has developed and persisted in a definition of most-favored-nation treatment which is different from and to a certain degree inconsistent with the meaning usually attributed to it by the other commercial nations. According to the American interpretation the most-favored-nation pledge is "conditional," that is to say, the application of equality of treatment is conditioned upon the receipt from the other party to a treaty of a favor or concession equivalent to that which was paid by the third nation to which the United States has accorded the favor or concession in question. As a result, under the treaties by which the United States has pledged most-favored-nation treatment, it has felt itself free to bargain in favors with other countries without extending to its most-favored countries the concessions it has granted to third countries in return for reciprocal concessions; in other words, it has felt that it has fulfilled its obligations, under its pledges to accord most-favored-nation treatment, when it has accorded to a country to which it has promised such treatment the lowest rates of customs duty which it has freely and without special compensation accorded to a third country. In this respect the American interpretation is antithetical to the "unconditional" and commonly accepted form and interpretation of the clause, according to which there must be equality of treatment—and consequently the extension of favors or concessions for whatever reason granted—to all countries with which most-favored-nation treaty-pledges are in operation.

Of course a treaty may be by express language conditional, in which case dispute as to its interpretation, though less likely to arise, has been by no means unknown. Most-favored-nation clauses differ widely in phraseology—a fact which has caused much international friction and much confusion in the commercial world.

In the following paragraphs an outline of the history of the clause in American treaties is set forth in brief.

36. THE MOST-FAVORED-NATION CLAUSE IN THE DIPLO-
MATIC HISTORY OF THE UNITED STATES

The prevailing policy of the United States, so far as the most-favored-nation clause is concerned, has been to give and to secure equality of opportunity in the negotiation of commercial treaties. It has not sought and it has not intended to promise equality of treatment. Its secretaries of state and its courts have, as just pointed out, consistently taken the position that a favor extended to one nation by a treaty should inure to the benefit of another only on the payment of an equivalent compensation. It was characteristic of the individualism which pervaded the political thought of early American statesmen that they should have based their commercial policy upon an idea which assumes that international bargaining is of little legitimate concern to any but the participating states. To grant freely to one country that for which another paid a valuable consideration seemed to them to destroy the equality which it was the purpose of the most-favored-nation clause to maintain.

In view of the prevailing political and economic practices of the times, the conditional type of most-favored-nation agreement was apparently not unsuited to the needs of a new and comparatively weak state just entering into competition with established commercial nations. The theories of mercantilism still dominated the governing minds of Europe. With respect to customs duties and, at that time far more importantly, with respect to navigation rights, dues and privileges, the reverse of present-day equality of treatment prevailed. Discriminations and prohibitions were the order of the time. American ships were excluded from many harbors and, when they were admitted at all,

various articles of American produce entered many markets under disadvantages. In negotiating commercial agreements it was only to be expected that American diplomats would desire to avoid making any concessions except for definite and specific concessions definitely and specifically calculable in return.¹

In the first treaty² entered into by the American government, one of amity and commerce with France, there appears the type of most-favored-nation clause which came to be characteristically employed in American treaties:

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

In its second commercial treaty, however, the United States, in agreeing to extend reciprocal most-favored-nation treatment, specified no condition in regard to compensation:

¹In a *Report on the Privileges and Restrictions on the Commerce of the United States in Foreign Countries*, transmitted to the Congress under date of Dec. 16, 1793, the Secretary of State gave a statistical and descriptive picture of the commercial restrictions affecting American commerce at that time.—*Writings of Thomas Jefferson*, collected and edited by Paul Leicester Ford, vol. vi, pp. 470 *et seq.* Excerpt quoted *supra*, subdivision 22, footnote, indicating the Secretary's recommendations. The Report does not mention the matter of types of most-favored-nation clause.

²The information contained in the remaining pages of this chapter is taken in large measure from the United States Tariff Commission's report on *Reciprocity and Commercial Treaties*; from Hornbeck, *The Most-Favored-Nation Clause in Commercial Treaties*; and from Moore, *Digest*, vol. v. Specific citations will not be given.

³Article II of treaty concluded Feb. 6, 1778. Malloy, *Treaties*, p. 469. "In 1778, with the making of the first American treaty, the most-favored-nation clause was for the first time given the conditional phraseology."—*Reciprocity and Commercial Treaties*, p. 394.

The subjects of the said States General of the United Netherlands shall pay in the ports, havens, roads, countries, islands, cities, or places of the United States of America, or any of them, no other nor greater duties or imposts, of whatever nature or denomination they may be, than those which the nations the most favoured are or shall be obliged to pay; and they shall enjoy all the rights, liberties, privileges, immunities, and exemptions in trade, navigation, and commerce which the said nations do or shall enjoy, whether in passing from one port to another in the said States, or in going from any of those ports to any foreign port of the world, or from any foreign port of the world to any of those ports.

The subjects and inhabitants of the said United States of America shall pay in the ports, havens, roads, countries, islands, cities, or places of the said United Netherlands, or any of them, no other nor greater duties or imposts, of whatever nature or denomination they may be, than those which the nations the most favoured are or shall be obliged to pay; and they shall enjoy all the rights, liberties, privileges, immunities, and exemptions in trade, navigation, and commerce which the said nations do or shall enjoy, whether in passing from one port to another in the said States, or from any one towards any one of those ports from or to any foreign port of the world. And the United States of America, with their subjects and inhabitants, shall leave to those of their High Mightinesses the peaceable enjoyment of their rights in the countries, islands, and seas, in the East and West Indies, without any hindrance or molestation.¹

Of the other treaties concluded during the first fifty years of American national life the most-favored-nation clause appeared less often in a non-conditional form, as exhibited in the latter example, than in an expressly conditional form. The wording, however, varied considerably.

¹Articles II and III of Treaty of Peace and Commerce with the Netherlands, concluded Oct. 8, 1782. Malloy, *Treaties*, p. 1234.

In 1824 the first of a series of treaties with the newly independent states of Central and South America was concluded. Article II was as follows:

The United States of America and the Republic of Colombia desiring to live in peace and harmony with all the other nations of the earth, by means of a policy frank and equally friendly with all, engage mutually not to grant any particular favor to other nations, in respect to commerce and navigation, which shall not immediately become common to the other party, who shall enjoy the same freely if the concession was freely made, or on allowing the same compensation if the concession was conditional.¹

Provisions of similar purport, though with occasional specified exceptions as to their application, were employed in making a score of treaties with Latin-American states during the ensuing half-century. It is the typical American phraseology.

The most-favored-nation clause usually (though not invariably) appeared in general commercial treaties concluded by the United States during the remainder of the nineteenth century and was, as a rule, in approximately the form quoted from the treaty with Colombia; but after 1890, in part because of controversies over the interpretation of the most-favored-nation pledge, its employment became less regular in the conclusion of new treaties.

The treaty with Denmark (1826) contained a covering clause similar to the clause quoted from the treaty with Colombia and, in addition, a clause that was non-conditional in its terms. On the other hand a convention with Great Britain (1827) continued in force the Treaty of 1815, which did not contain the compensation condition, but provided:

¹Malloy, *Treaties*, p. 293.

No higher or other duties shall be imposed on the importation into the United States of any articles the growth, produce or manufacture of His Britannick Majesty's territories in Europe, and no higher or other duties shall be imposed on the importation into the territories of His Britannick Majesty in Europe of any articles the growth, produce or manufacture of the United States, than are or shall be payable on the like articles being the growth, produce or manufacture of any other foreign country; nor shall any higher or other duties or charges be imposed in either of the two countries, on the exportation of any articles to the United States, or to His Britannick Majesty's territories in Europe, respectively, than such as are payable on the exportation of the like articles to any other foreign country; nor shall any prohibition be imposed on the exportation or importation of any articles the growth, produce or manufacture of the United States, or of His Britannick Majesty's territories in Europe, to or from the said territories of His Britannick Majesty in Europe, or to or from the said United States, which shall not equally extend to all other nations.¹

However, in concluding a new treaty with Prussia (1828),² the United States made the express condition that favors in regard to navigation and commerce were to be reciprocally extended freely only when freely granted to a third party; otherwise "on yielding the same compensation". The language of this and other treaties of the period set a standard that was followed as late as 1871, in the treaty of that year with Italy.³

Meantime the Far East entered into diplomatic relations

¹ Article II. Malloy, *Treaties*, p. 625.

² *Ibid.*, p. 1496. Expressly conditional clauses were contained in the treaties of 1785 (Art. XXVI) and 1799 (Art. XXVI).—*Ibid.*, pp. 1485 and 1495.

³ Malloy, *Treaties*, pp. 969 *et seq.* Articles VI and XXIV.

with the Occident. Japan, in 1854, concluded with the United States its first treaty with a western power, and guaranteed, unilaterally, to accord to the United States, "without any consultation or delay",¹ all privileges and advantages granted to third nations. Beginning with the treaty of 1894, the United States and Japan have mutually pledged to each other most-favored-nation treatment, freely, if freely granted to a third country, and on the fulfillment of like conditions, if conditional.

Unilateral and unconditional most-favored-nation treatment has been provided for at one time or another, in treaties with the United States, by China, Egypt, Morocco, Muskat, Samoa, Siam, Tunis, Turkey and the Congo, as well as by Japan.

At the outbreak of the World War the United States was party to some thirty bi-lateral commercial agreements containing most-favored-nation assurances, and was entitled to such treatment unilaterally from Egypt, Morocco and Siam.

The treaties with Borneo, China, Congo, Ethiopia,² Great Britain, Greece, Ottoman Empire, Persia, Portugal,³ Serbia, Tonga and Zanzibar did not contain the compensation condition.

The typical American form of the clause, in varying language, but making always the proviso in regard to compensation, appeared in treaties with Argentina, Austria-Hungary, Belgium, Bolivia, Colombia, Costa Rica, Denmark, Germany (Hanseatic Republics, Mecklenburg-Schwerin, Oldenburg and Prussia, separately) Honduras,

¹ Malloy, *Treaties*, p. 998.

² Though concluded June 27, 1914, this treaty was not proclaimed by the President until Aug. 9, 1920.

³ Exchange of Notes.

Italy, Japan, Liberia, Norway, Paraguay, Sweden and Tripoli.¹

This list was not added to for nearly a decade.² The treaties with the nations with which the United States was at war have, of course, ceased to exist and those with Sweden,³ Congo, Greece, Tonga and Tripoli have terminated. The treaty of 1830 with the Ottoman Empire is to terminate if and when the treaty concluded at Lausanne, August 6, 1923, with the Angora Government, comes into effect. By its treaties of peace the United States obtains the rights to most-favored-nation treatment conceded by the general provisions of the Treaties of Versailles, St. Germain and Trianon.⁴

As has already been stated, both the executive and judicial branches of the United States Government have consistently interpreted the clauses which contained no compensation provisions precisely as though the compensation provision were present. Three treaties have been entered into, however, which were not only silent on the subject of compensation in case of compensation by the third nation, but specifically provided that all favors should be extended unconditionally to each of the high contracting parties, respectively. In the case of the treaty with Switzerland (1850),⁵ this fact led to a controversy in which the United

¹ These lists, with certain corrections, are from Senate Document, no. 29, 62d Congress, 1st Session. The treaty with Prussia had probably ceased to be effective—*infra*, subdivision 37 (f).

² Concerning exchanges of notes effected in 1923 see *infra*, chs. viii and xi.

³ The treaty of July 4, 1827, with Sweden and Norway, remained in effect with the two countries individually after their political separation. It is still in effect with Norway.

⁴ *Infra*, subdivision 61.

⁵ Text and discussion, *infra*, subdivision 37 (g). The unilateral clauses have commonly been considered as unconditional.

States had to admit the correctness of the Swiss claim for unconditional most-favored-nation treatment. The treaty with Orange Free State (1871) was denounced in 1895, but the one with Serbia (1881),¹ has presumably continued in operation and was unique in the American treaty system as it existed at the time of the passage of Section 317.²

37. THE MOST-FAVORED-NATION CLAUSE AND AMERICAN RECIPROCITY ARRANGEMENTS

The more numerous and important, though not the only, diplomatic controversies which the United States has waged, or in which its citizens have been engaged, because of the most-favored-nation clause, have arisen, as might well have been expected, out of the existence of special reciprocal agreements between the United States and third powers extending reciprocal concessions for reciprocal compensation.

(a) *France and the British Treaty of 1815*

In a treaty of 1803,³ the United States stipulated that the ships of France should be treated upon the footing of the most-favored-nation in certain named ports. Great Britain, in order to take advantage of an act of 1815⁴ offering reciprocity in the matter of duties upon ships, ceased to discriminate against American vessels. France took no such action, but nevertheless claimed the same

¹Text, *infra*, subdivision 64.

²Concerning the agreement of August 1, 1906, with Spain, see *infra*, subdivisions 37(g) and 65, note. This agreement contained a clause that might readily have been interpreted as a pledge on the part of each country to accord to the other unconditional most-favored-nation treatment.—See *Reciprocity and Commercial Treaties*, pp. 435-436. For a list of the commercial agreements in effect March 1, 1924, between the United States and other countries, see Appendix 3.

³Treaty for the Cession of Louisiana, concluded April 30, 1803, art. viii. Malloy, *Treaties*, p. 510.

⁴Text, *supra*, subdivision 11.

treatment, in the ports to which the treaty of 1803¹ applied, as was accorded to the ships of Great Britain. The United States maintained that the treaty of 1803 did not imply that France was to have freely a concession for which other nations paid a price—such, it was claimed, instead of being most-favored-nation treatment, would be more than most-favored-nation treatment. The dispute dragged along for nearly fifteen years and was determined only in connection with the settlement of other issues. In 1823 Mr. Gallatin, minister to France, thus stated the American view:

When not otherwise defined . . . [the right of most-favored-nation treatment] is that, and can only be that, of being entitled to that treatment gratuitously, if such nation enjoys it gratuitously, and on paying the same equivalent, if it has been granted in consideration of an equivalent.²

(b) Austria and the French Treaty of 1831

By the treaty of 1831 the United States agreed that the duties on French wines should not exceed a specified amount and France made a similar promise with respect to long-staple cotton from the United States.³ Under the conditional most-favored-nation provision of its treaty of 1829, Austria claimed from the United States the benefit of the lower duty on French wines. This was refused on the ground that France was paying for the favor and that it was not to be extended gratuitously to other countries.

(c) Denmark, Dominican Republic and the Hawaiian Reciprocity Treaty

A controversy over the treaty of 1826 with Denmark, which finally resulted in a decision by the Supreme Court

¹Text, Malloy, *Treaties*, p. 510.

²*American State Papers, U. S. Foreign Relations*, vol. v, p. 673.

³Malloy, *Treaties*, p. 525.

of the United States in the case of *Bartram versus Robertson*,¹ grew directly out of the United States' reciprocity treaty of 1875 with Hawaii. The court was called upon to interpret the most-favored-nation provisions of the Danish treaty, contained in Article IV, which promised, without any stated condition, reciprocal equality of customs treatment as compared with the treatment accorded to third countries; and in Article I, a covering clause, which provided that the contracting parties engaged, reciprocally, not to grant any particular commercial favor to other nations that should not immediately become common to the other party, which should "enjoy the same freely, if the concession were freely made, or on allowing the same compensation, if the concession were conditional".² Said the Court:

Our conclusion is, that the treaty with Denmark does not bind the United States to extend to that country, without compensation, privileges which they have conceded to the Hawaiian Islands in exchange for valuable concessions.

The treaty between the United States and the Dominican Republic (1867) contained an article mutually granting most-favored-nation treatment without any provision in regard to compensation such as was contained in the covering clause of the treaty with Denmark.³ An importer of sugar from San Domingo accordingly sought to obtain the reduced rates granted to imports under the reciprocity treaty between the United States and Hawaii. The Supreme Court declared, however, in *Whitney versus Robert-*

¹ 122 U. S., 116 (1887). Hawaiian treaty text, Malloy, *Treaties*, p. 915.

² *Convention of Friendship, Commerce and Navigation*, concluded April 26, 1826. Malloy, *Treaties*, p. 373. Renewed by convention of April 11, 1857, art. v, *ibid.*, p. 382.

³ Article IX, *Convention of Amity, etc.*, with Dominican Republic, concluded Feb. 8, 1867. Malloy, *Treaties*, p. 403.

son¹ that it did not think the absence of the compensation clause affected the obligations of the United States. In the view of the Court the most-favored-nation clause in the Dominican treaty

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

(d) Other Controversies in Regard to the Hawaiian Treaty

The Hawaiian reciprocity treaty was also the occasion for other serious controversies. Hawaii undertook not to "make any treaty by which any other nation" should "obtain the same privileges, relative to the admission of any articles free of duty", and also promised other exclusive favors. Several European governments objected to this on the basis of rights claimed to be secured by their own treaties with Hawaii. Germany protested notwithstanding the fact that there existed no treaty between Germany and Hawaii.

As a result of the provision in the United States' treaty with Hawaii to the effect that favors granted to this country should not be extended to third powers, it was apparently necessary for Hawaii to violate the treaty of 1851 with Great Britain which contained reciprocal pledges of most-favored-nation treatment. Under the American interpretation of the clause, Great Britain, by offering like concessions, ought to have enjoyed equality of opportunity with the United States to obtain any favors which Hawaii was willing to give. Nevertheless, Great Britain and the other

¹124 U. S., 190 (1888).

European nations finally yielded to the "peculiar circumstances of the case", that is, to the argument of special considerations of geography and political expediency, thus yielding to the United States the unimpaired maintenance of its Hawaiian treaty.

In 1884 Great Britain made an unsuccessful attempt to obtain from the United States for its West Indian possessions, by an extension of Article II of the British-American treaty of 1815, the treatment granted Hawaii under the reciprocity treaty. As this article contained no stipulation in regard to compensation, to invoke it was precisely in accord with the British latter-nineteenth century conception of the meaning of the clause. Such invocation was precisely the reverse of the American interpretation, which held that the most-favored-nation clause only granted equality of opportunity to obtain, by paying the same price, the favors granted to third nations through reciprocity treaties.

The treaty which the United States concluded with Tonga on October 2, 1886, reflects the controversies in regard to Hawaii in the provision that it should be

understood that the Parties hereto affirm the principle of the law of nations that no privilege granted for equivalent or on account of propinquity or other special conditions comes under the stipulations herein contained as to favored nations.¹

As late as 1895 the American Government was still explaining its position to Europe—in the course of a discussion with Russia—and President Cleveland² had been so impressed with the controversies over the seeming conflict between the most-favored-nation clause and reciprocity treaties (even though such conflict was held non-existent by the State Department) that he made the probability of

¹ Article II, Malloy, *Treaties*, p. 1781.

² In his first administration.

embarrassing controversies with other powers one of his reasons for withdrawing certain reciprocity treaties which were under consideration in the Senate.

(e) Colombia and the Tariff Act of 1890

The McKinley Tariff Act inaugurated a new bargaining policy¹ under which reciprocal arrangements were concluded with ten countries. Negotiations with Colombia failed because of the refusal of that country to make the concessions demanded by the United States Government. The covering most-favored-nation clause in the treaty of 1846 with Colombia (New Grenada) is identical with Article II, of the treaty of 1824, above-quoted.² In view of the fact that the free entry of certain products, for the continuance of which concessions were demanded, was accorded by the United States without compensation to some countries, Colombia claimed that free entry belonged as of right to its exports under the treaty article referred to. Haiti took a similar position. Such contentions seem to be sound³ according to the ordinary interpretation by the United States of the most-favored-nation clause in its treaties. Nevertheless the penalty duties provided for were imposed by the United States against these two powerless countries.

(f) Controversies with Germany

Meantime some rather remarkable controversies between the United States and Germany, with which country disagreements over divergent interpretations of the most-favored-nation clause appear to have been the most serious, were demonstrating that a reciprocity agreement may result from as well as be the cause of such disputes.

¹Text and discussion, *supra*, subdivision 18(b).

²*Supra*, subdivision 36.

³See *supra*, subdivision 28.

For some years prior to 1891 Germany refused to admit certain American meat products, nominally on sanitary grounds. After it had been demonstrated that sanitary quarantine was unwarranted, the Congress enacted that the President might, on being satisfied of discriminatory treatment of American goods by a foreign country, prohibit the importation into the United States of such of that country's products as he should deem proper.¹ Germany claimed that the Prussian-American treaty of 1828 was in force and that, notwithstanding the compensation provision of its covering clause, it gave Germany the right to unlimited most-favored-nation treatment.

During 1891 and following years a group of bargaining treaties—the Caprivi Treaties—was entered into by Germany with various countries and the concessions granted were extended to Great Britain without compensation. If the Prussian treaty of 1828 was in force with respect to the German Empire the benefit of the same concessions thereupon belonged to the United States as a matter of right. The United States did not, however, claim them, but by the so-called Saratoga Convention, effected by exchange of notes on August 22, 1891,² obtained some of Germany's treaty concessions, together with the removal of the objectionable German sanitary regulations, in return for a promise that use would not be made against Germany of the penalizing provisions of the Tariff Act of 1890 and of an act of March 3, 1891.

(g) *Switzerland, Spain and the Tariff Act of 1897*

The Dingley Tariff Act embodied bargaining and penalty clauses which were made the basis of reciprocity arrange-

¹ Text, *supra*, subdivision 11; Act of August 30, 1890, sec. 5. This was the most important of several acts adopted.

² Senate Ex. Doc., no. 119, p. 110, 52d Congress, 1st Session.

ments and which brought a new group of diplomatic problems. On May 28, 1898, a reciprocal arrangement was concluded with France. Switzerland promptly invoked the most-favored-nation provisions of its treaty of 1850, which were, essentially, as follows :

In all that relates to the importation, exportation, and transit of their respective products, the United States of America and the Swiss Confederation shall treat each other, reciprocally, as the most favored nation, union of nations, state, or society, as is explained in the following articles.

Neither of the contracting parties shall impose any higher or other duties upon the importation, exportation, or transit of the natural or industrial products of the other, than are or shall be payable upon the like articles, being the produce of any other country, not embraced within its present limits.

In order the more effectually to attain the object contemplated in Article VIII, each of the contracting parties hereby engages not to grant any favor in commerce to any nation, union of nations, state, or society, which shall not immediately be enjoyed by the other party.¹

Correspondence between the negotiators of this treaty confirmed the evidence that it had been meant to assure unlimited or unconditional most-favored-nation treatment. The promise was accordingly made good by extending to Switzerland the concessions of the French treaty. The United States then denounced the articles which contained provisions involving an exception to its treaty policy.²

In the commercial agreement with Spain, concluded August 1, 1906, appeared the following clause :

¹Articles VIII, IX and X, Convention of Friendship, Commerce and Extradition concluded Nov. 25, 1850. Malloy, *Treaties*, pp. 1766-1767.

²Germany, claiming that the concessions to France were extended gratuitously to Switzerland, made an unsuccessful attempt to obtain like treatment under the Prussian treaty of 1828. In 1900 an Argol Agreement, under section 3 of the Dingley Act, was concluded between the United States and Germany.—(Malloy, *Treaties*, p. 558).

Each of the High Contracting Parties . . . shall have the right to rescind forthwith any of its concessions herein made by it, if the other at any time shall withhold any of its concessions or shall withhold any of its tariff benefits now or hereafter granted to any third nation, exception being made of the special benefits now or hereafter given by Spain to Portugal and those now or hereafter given by the United States to Cuba.¹

Under this language Spain obtained the tariff concession granted to France in 1908 on sparkling wines.

(h) *Germany and the Cuban Reciprocity Treaty*

After the United States and Cuba had entered into the exclusive reciprocity treaty of 1902,² Germany claimed, under the treaty concluded in 1828 between the United States and Prussia, the right to offer like compensation and so to obtain the concessions which the United States accorded to Cuba. The claim was not acceded to, but a *modus vivendi* and, later, a reciprocal agreement, were concluded between the two countries, involving reciprocal favors.³

The doctrine that reciprocity agreements are not in violation of the most-favored-nation pledge was reaffirmed by the Court of Customs Appeals in 1911, when an importing

¹III; Malloy, *Treaties*, p. 1719. This was one of the Argol Agreements. It also contained the following language: "The products and manufactures of the United States will pay duty at their entrance into Spain at the rates now fixed in the second column of the Spanish tariff, it being understood that every decrease of duty accorded by Spain by law or in the commercial pacts now made or which in future are made with other nations will be immediately applicable to the United States, exception only being made of the special advantages conceded to Portugal."

By a subsequent exchange of notes the two Governments agreed that their intention was to concede reciprocally the most-favored-nation treatment. See also subdivision 65, *infra*.

²For details see *infra*, subdivision 46.

³These, like the 1900 arrangement, were Argol Agreements.—(Malloy, *Treaties*, pp. 562-563.)

firm had invoked the treaty of 1815 with Great Britain in support of the contention that goods from that country, similar to those favored by the agreements negotiated under the Dingley Act, should receive the same reduction of duty. The Court said:

We think that in logic or effect the negotiation of a treaty upon a consideration does no violence to that treaty provision with His Britannic Majesty. The reciprocity treaty with France is one founded upon mutual considerations. This country gave considerations for the considerations given in exchange therefor by France. If, therefore, this country should concede to Great Britain *without* consideration what it has conceded to France *for* consideration, it would not be conceding to England a favor it conceded to the other country, but it would be conceding to England more than it conceded to the other country, because England in such case gives no consideration for the concession for which France gave a consideration.¹

Other decisions of the Court of Customs Appeals, in 1913, related to section two of the Canadian Reciprocity Act of 1911,² which provided that pulp wood and paper, when exported freely from Canada, should be admitted freely into the United States. Notwithstanding Canada's failure to pass the expected reciprocal measure, the Court held that this provision of the American act was in force, that it constituted a free concession to Canada and, consequently, that it must be generalized to countries entitled to most-favored-nation treatment.

¹ *Shaw v. U. S.*, 1 Ct. of Customs App. 426.

² Act. of July 26, 1911, *American Express Co. et al. v. U. S.*; *Bertuch & Co. v. U. S.*, 4 Ct. of Customs Appeals, p. 146; and *Cliff Paper Co. v. U. S.*, 4 Ct. of Customs Appeals, p. 186.

38. AMERICAN INTERPRETATION AS A HINDRANCE TO THE
NEW COMMERCIAL POLICY

The expression "American interpretation" may be thought of as including both construction of non-conditional provisions as conditional and persistence in maintaining a system of most-favored-nation treatment based on language that, whether in form conditional or non-conditional, is given the conditional interpretation. Section 317, as has already been pointed out, forms the logical basis for the development of unconditional most-favored-nation treatment. It is clearly in opposition to the discriminations and preferences that are permissible when most-favored-nation treatment is interpreted as conditional. The retention by the United States of the "American interpretation" of the most-favored-nation clause would be a scarcely surmountable obstacle in the development of the more far-reaching purposes of the new American commercial policy.

CHAPTER VI

THE AMERICAN COLONIAL PREFERENCES AND THE RECIPROcity TREATY WITH CUBA

Under Section 317 defensive duties, as has been noted, appear to be applicable not only against the discriminations which fully "sovereign" members of the family of nations may see fit to produce through the grant of favors to other fully sovereign states, but also against differential treatment resulting from the exchange of concessions between colonies, or between colonies and sovereign states, even if the latter are the colonies' mother countries. That discriminations against the United States in favor of a country's own colonies are contemplated by Section 317 seems to be an inevitable conclusion from the definition of "foreign country" as "any empire, country, dominion, colony, or protectorate, or any subdivision or subdivisions thereof (other than the United States and its possessions), within which separate tariff rates or separate regulations of commerce are enforced."

With this definition in mind, and remembering the test of "separate tariff rates . . . enforced," the relations of the United States and its possessions should now be examined.¹

¹The information included in the present chapter is largely taken from the U. S. Tariff Commission's report on *Colonial Tariff Policies*. Specific citations will not be given. See table of principal sources at the beginning of this monograph.

39. AMERICAN POSSESSIONS WHICH HAVE NO SEPARATE
CUSTOMS LAWS

There are a few islands in the North Pacific over which the United States exercises sovereignty but which are uninhabited and hence as a matter of fact not governed by tariff laws. They are, however, apparently included within the Tariff Act of 1922, which applies to goods "imported from any foreign country into the United States or into any of its possessions (except the Philippine Islands, the Virgin Islands, and the islands of Guam and Tutuila)." Wake Island, Midway Island, Howland and Baker Islands and the Guano Islands are the lands in question.

Alaska and Hawaii, which are now "territories" and have a status similar to the pre-statehood condition of most of the forty-eight commonwealths, are not considered "possessions" of the United States in the same sense as the remaining non-state area. The duties of the Act of 1922 are collected at their ports just as at the port of New York and the proceeds are paid into the Federal Treasury. Hawaii is of peculiar interest in the tariff history of the United States because of the reciprocity treaty which preceded its annexation.¹ Porto Rico is likewise *assimilated* in the tariff sense—but the customs union is less complete because the revenues arising from duties collected in Porto Rican ports remain in the island and are used in defraying the expenses of the insular government.

There can be no objection from the point of view of the policy of Section 317 to any of the above arrangements. The territories and possessions referred to are, from the point of view of the tariff, simply parts of the United States, enjoying the unimpeded commercial interchange that is in existence within and among the states themselves.

¹*Supra*, subdivision 37(c) and (d).

The present procedure has not, however, always been observed in Porto Rico. Under the Spanish régime, in return for the free admission of Spanish products if imported in Spanish vessels, Porto Rico received preferential treatment both in Spain and in Cuba. During the period of American occupation prior to May 1, 1900, the former maximum Spanish rates were enforced against all countries alike, including the United States.¹ The loss of the preferences in Spain promptly led to a demand for free entry of Porto Rican products into the United States, but this was opposed by American sugar interests and a compromise was effected. The importation of goods from foreign countries into Porto Rico was made subject to the rates of the American tariff, with the exception of a high special rate upon coffee and the free admission of certain Spanish literary, scientific and artistic works, as provided for by the treaty of peace. Interchange between Porto Rico and the United States was to be at fifteen per centum of the ordinary rates, plus the respective internal revenue dues of the two jurisdictions,² and it was provided that after a certain time there should be free trade between them. After July 25, 1901, duties on imports from the United States into Porto Rico and from Porto Rico into the United States were no longer collected.

40. THE CANAL ZONE

The United States enjoys "in perpetuity the use, occupation and control of a zone of land and land under water,"

¹ Regulations permitting payment in Porto Rico silver coins at a fixed rate in terms of dollars had the practical effect of greatly reducing duties. An act of Congress of April 29, 1902, provided for the refund of the duties on goods imported from the United States from April 11, 1899, to May 1, 1900.

² There were certain modifications of this general rule.

across the Isthmus of Panama, ten miles in width,¹ "for the construction, maintenance, operation, sanitation and protection" of the Panama Canal.² The Canal Zone, including certain islands and other lands outside the strip, would seem thus to have become a portion of the United States for administrative purposes, technical sovereignty apparently remaining in Panama. The Zone is not included in the definition of the United States in the Tariff Act of 1922³ and it is not a "possession" of the United States in the sense in which that term is customarily used in tariff legislation.

Under the first orders for the regulation of customs, the tariff of the United States was made applicable to imports from foreign countries, including Panama, into the Canal Zone and imports into the United States from the Canal Zone were permitted to enter free—an arrangement which was regarded as very objectionable by the merchants of Panama. The Secretary of War, Mr. Taft, was sent to Panama to enter into an agreement, which he did on December 3, 1904.⁴ By its terms the ports of the Canal Zone, Ancon and Cristobal, were limited, as ports of entry, to the receipt of goods for the construction and maintenance of the canal, supplies for the employees of the United States, goods in transit across the isthmus bound for points beyond its limits, and fuel for passing ships. Upon these entries, whatever the source of the goods, no duties were to be charged.⁵ Panama, on the other hand, agreed to certain

¹ Also certain lands around and above Gatun Lake.

² Malloy, *Treaties*, pp. 1350, 2770 *et seq.*

³ Sec. 401 (j).

⁴ See Executive Order of Dec. 3, 1904; Act of 58th Congress, approved Apr. 28, 1904; Executive Order of Dec. 6, 1904. Malloy, *Treaties*, pp. 2756 *et seq.* A treaty with Panama to supersede the Taft Agreement was under negotiation in the spring of 1924.

⁵ By Article 1, 2, of the treaty with Colombia signed Apr. 6, 1914, and

reductions and limitations in its import duties and reciprocal free trade between the Canal Zone and the Republic was provided for. Imports into the Zone for persons not employed by the Canal and for native laborers, even though so employed, were to pay duties to Panama according to the rates of its tariff. The distinction was thus not according to the origin of the goods but the status of the person for whom they were destined. Imports from the Canal Zone into the United States are treated exactly as if from a foreign country. No export duties are levied in the Canal Zone.

From the point of view of Section 317, the tariff practice of the Canal Zone appears to be correct. No reciprocal favors are granted between the United States and the Canal Zone. Each treats the products of the other as it does the products of all other nations — except that the Canal Zone maintains no customs wall against Panama. The Canal Zone is not a country having a tariff act of its own and whenever duties are collected within it they are collected according to the schedules of the tariff law of Panama. The case would not, therefore, seem to fall within the contemplation of Section 317.

41. AMERICAN SAMOA

By the convention of 1899 (under which the United States acquired the islands of Tutuila, Manua and the others which make up American Samoa) Great Britain, Germany and the United States stipulated that each power should enjoy equal privileges with respect to commerce and shipping in all the ports of the Samoa group.¹ This established

proclaimed Mar. 30, 1922, the United States guaranteed to products of Colombia customs treatment equal to that accorded its own products entering the Canal Zone.—Malloy, *Treaties*, p. 2539.

¹For texts of the various agreements respecting the Samoan Islands see Malloy, *Treaties*, pp. 1576, *et seq.*

the Open Door for the islands. It would appear, therefore, that the convention was violated when New Zealand, acting as mandatory under the League of Nations of the former German islands, put into operation the preferential tariffs of the Dominion.¹ American Samoa has a simple tariff of import duties enacted by the naval commandant in charge of the Islands, applicable alike to the United States and to other countries.

As is the case with other American possessions, except the Virgin Islands, no export duties are charged; and the United States follows, with respect to American Samoa, the practice, common to the treatment of all American possessions, of admitting its products free of duty.² This free admission of Samoan products constitutes a preference in favor of Samoa which, if practised by another country in favor of a colony or possession having a tariff law of its own, would make applicable the additional rates provided for in Section 317 of the Tariff Act of 1922. This American practice of free admission of the products of an American colony that has its own tariff law is, therefore, inconsistent with the policy of Section 317.³

42. THE VIRGIN ISLANDS OF THE UNITED STATES

The most recent territorial acquisition of the United States occurred in 1917 — through the purchase from Denmark, by treaty of August 4, 1916, of the West Indian islands of St. Thomas, St. John and St. Croix, now known as the Virgin Islands of the United States.⁴ Prior to their

¹*Infra*, subdivision 50(a). Treaty of Versailles, articles 199 and 288.

²The Canal Zone, as pointed out, is not a "possession".

³As copra, the only Samoan export of any consequence, is on the United States free list, the inconsistency is merely academic.

⁴Malloy, *Treaties*, p. 2558. Ratifications were not exchanged until January 17, 1917. See Act of March 3, 1917.

sale to Denmark there were two separate tariffs, one in force in St. Croix, the other in St. Thomas and St. John. They showed no preference for Denmark, but applied equally to imports from all countries. After the transfer products of the United States were accorded free entry into the Islands; the export duty on sugar was increased and other customs duties were continued in force as before. Imports from the Virgin Islands are not subject to duties on entering the United States.

In general the Danish policy was consistent with Section 317. The existence of certain slight preferences exchanged between the Islands themselves, however, was and is inconsistent, as is, of course, the mutual exemption of each other's products from import duties by the Islands and the United States. These practices, when engaged in by other countries, are actionable under Section 317. So far as the export duties are concerned, however, the practice is harmonious with the policy of Section 317; they are applicable to shipments to the United States just as to other countries.

43. GUAM

The island of Guam, acquired, like the Philippines, as a result of the war with Spain, is governed solely by administrative order. Congress has never passed any legislation for it.

The present schedule of import duties has been in force since 1900. The free list contains such important articles as cotton yarns, machinery and live animals. Most of the duties are low and are in part specific and in part *ad valorem*. The products of Guam enter the United States free of duty and Guam levies no duties upon the products of the United States or its possessions—facts inconsistent with the policy of Section 317.

44. COMMERCIAL INSIGNIFICANCE OF THE AMERICAN POSSESSIONS EXCEPT THE PHILIPPINES

The exceptions to the policy of Section 317, noted in the foregoing discussions of Guam, American Samoa and the Virgin Islands, might reasonably be disregarded under the doctrine *de minimis*. Their commerce is so unimportant as to make the theoretical inconsistency in their tariff relations with the United States of little practical moment. This cannot be said, however, of the principal American colony, the Philippines.

45. THE PHILIPPINES

Of the fewer than twelve million inhabitants of the lands beyond the borders of the States, Alaska and Hawaii, above which the American flag flies, well over ten millions dwell in the Philippine Islands. Their area represents an even larger fraction of the total colonial area. In 1919 the value of their exports was over 113 millions of dollars and of their imports nearly 119 millions. Half of the former went to the United States and about five-eighths of the latter came from the United States.¹ But the trade remaining to foreign countries was and is well worth cultivating. The question of a preferential or of an open-door policy in the Philippines is one of moment to the commercial world and any definite breach in the consistency of the new American commercial policy which may be occasioned by regulations affecting the intercourse between the Philippines and other countries can scarcely go unchallenged.

The Philippines, unlike Guam and Samoa, enjoy a high degree of self-government. Their political status resembles, in some respects, that of a British dominion. Their tariff law is highly developed and complex and it has behind it an

¹ In 1922: Exports, \$94,478,000. Percentage to U. S., 62.6.
Imports, \$83,015,000. Percentage from U. S., 60.4.

interesting history. Moreover the Philippine people look forward to the eventual attainment of complete national independence, and in this respect the Islands may be compared with the "A" and "B" mandated areas as organized for administration under the League of Nations.¹ Clearly the relation of the Philippines to the commercial policy of the United States is one for the close scrutiny of all students of commercial relations.

During the peace negotiations which brought to a close the war with Spain the following correspondence took place between the respective plenipotentiaries: The Spanish Commissioners asked:²

Is the offer made by the United States to Spain to establish for a certain number of years similar conditions in the ports of the archipelago for vessels and merchandise of both Nations, an offer which is preceded by the assertion that the policy of the United States is to maintain an open door to the world's commerce, to be taken in the sense that the vessels and goods of other nations are to enjoy or can enjoy the same privilege which for a certain time is granted those of Spain while the United States does not change such policy?

The Americans replied:

The declaration that the policy of the United States in the Philippines will be that of an open door to the world's commerce necessarily implies that the offer to place Spanish vessels and merchandise on the same footing as American is not intended to be exclusive. But the offer to give Spain that privilege for a term of years is intended to secure it to her for a certain period by special treaty stipulation whatever might be at any time the general policy of the United States.

¹ See *infra*, subdivision 58.

² *The Treaty of Paris*, 55th Congress, 3d Session, Senate Document no. 62, pp. 216, 217, 218.

Notwithstanding the enunciation, soon to be made, of the open-door policy for China, there appear to have been few supporters in the United States of such a policy for the new American dependency. Article IV of the peace treaty, however, declared as follows:

The United States will, for the term of ten years from the date of the exchange of the ratifications of the present treaty, admit Spanish ships and merchandise to the ports of the Philippine Islands on the same terms as ships and merchandise of the United States.¹

The Spanish tariff regime was continued during the first years of American occupation except that the extensive preferences which Spain had enjoyed were discontinued and the law underwent considerable simplification.

In 1901 the Philippine Commission promulgated a revision of the tariff. It applied to both American and foreign goods and the duties provided for in the Tariff Act of 1897 were collected upon Philippine goods entering the United States. A decision of the Supreme Court, however, delivered late in 1901, held the latter practice inadmissible because the Philippines were not foreign territory and the Act of 1897 provided for no duties leviable upon goods unless "imported from foreign countries."² The result was temporary free admission of Philippine products.

Early in 1902 the Congress enacted a tariff law for the Islands. At the same time provision was made that Philippine products entering the United States should be dutiable, but at a reduction of twenty-five per centum from the existing American duties. The export duties of the Philippines were rendered ineffective upon articles destined for the

¹Malloy, *Treaties*, p. 1691.

²*The Fourteen Diamond Rings, Emil J. Pepke, claimant, v. United States*, 183 U. S., 176.

United States.¹ Congress enacted another tariff law for the Philippines in 1905. Its general purpose, according to the Ways and Means Committee, was that of giving "the United States such benefits as there are arising from the classification of goods";² in other words, of accomplishing indirectly what would have violated the treaty of peace if accomplished through straightout preferential rates.³

The ten-year equality of treatment provision of the peace treaty having been fulfilled, virtual free trade between the United States and the Philippines was effected by the Payne-Aldrich Act.⁴ Exceptions consisted of rice and of limitations on the total amount of sugar and tobacco that could be brought into the United States duty free. Philippine products containing more than twenty per centum of their value in materials originating in foreign countries were made dutiable on entry into the United States.

At the same time Congress enacted a new tariff law⁵ providing generally moderate duties for the entry of foreign goods into the Philippines. The schedules had been prepared for the most part in the Islands, but American business men had availed themselves of an opportunity to suggest alterations and a few changes were made by the Ways and Means Committee. This law is still in effect. Free entry, except for rice, was accorded to the products of the United States and those of its possessions to which its customs laws applied.

¹Export duties are now forbidden by law.

²House Report No. 4600, 58th Congress, 3d Session.

³By an act of Feb. 26, 1906, certain unintended consequences of the reclassification were rectified. See *Tariff Acts*, pp. 629 and 680.

⁴Section 5, Act of Aug. 5, 1909; *Tariff Acts*, p. 773. Free trade was and is limited to direct shipments.

⁵*Tariff Acts*, pp. 808, *et seq.* Concerning treatment of American goods, see sec. 12.

The Underwood¹ Act repealed the limitations on the amounts of sugar and tobacco entitled to free entry into the United States from the Philippines and provided for the free entry into each jurisdiction of all products—thus including rice—originating in the other. The Act of 1922 re-enacts the provisions of the Act of 1913.²

The result is that to all intents and purposes the United States accords free trade to the Philippine Islands, an area which, except for the fact that it is an American possession, fits precisely the definition of "foreign country" contained in Section 317. The United States permits its possession, which is thus, by the definition of its law, not different from a foreign country, to grant to its products free entry and at the same time enacts in Section 317 a provision authorizing additional duties against the products of the colonies of other countries which do the same thing.

Such an inconsistency in so important a market constitutes a large obstacle in the path of the new commercial policy.

As a matter of practical world politics possibly a proposal to other colonial powers that the United States would abrogate its preferences in return for a similar abrogation on their part might find some advocates. Such intimation might prove a more efficient method of obtaining for the world generally a liberal commercial policy than simply to eliminate the preferential treatment, expecting other countries to do likewise solely out of respect for the fairness of the thing. But even the Philippines are hardly of sufficient importance to be of weight in a bargain involving the vast colonial possessions of countries like Great Britain and France. A policy of clean hands to begin with and insis-

¹Sec. IV, C. (1913).

²Section 301. See also sections 401 and 482.

tent pressure upon other nations to practice similar renunciation appears to be the part of practical as well as of idealistic wisdom for the United States.

The point must be made in connection with the inconsistency of the present commercial arrangements affecting the Philippines that, when free trade with the United States was introduced, the Islands, though having their separate tariff law, did not possess tariff autonomy. Under the Act of 1916 granting the Islands increased autonomy they are, presumably, at liberty to enact their own tariff legislation subject to the veto of the President or of the Congress. They have not, however, exercised this power.¹

46. THE RECIPROCITY TREATY WITH CUBA ²

Cuba, like Porto Rico, Guam and the Philippines, slipped from the sovereignty of Spain as a result of the war of 1898. Unlike the others, however, it became an independent state.³

After an unsuccessful effort to obtain by enactment of Congress a system of tariff reciprocity with Cuba, President Roosevelt negotiated a treaty with the new republic. The

¹The *Christian Science Monitor*, discussing the present arrangement in its issue of September 26, 1922, makes these interesting queries:

"First—Until granted their independence, are the Philippines, in matters of law, trade and development, to be held as fully a part of the United States as any of its forty-eight commonwealths?

"Second—Would a tariff system designed with special reference to the islands' needs multiply their trade relations?—further commercial independence?—stimulate variety of production?—and so develop the best energies of the population?

"Third—Does John Hay's 'Open Door' fundamental apply here, as well as in Korea and Manchuria and China?"

²The then Military Governor of Cuba, General Leonard Wood, has an article entitled "Reasons for Reciprocity between the United States and Cuba," in the *Outlook*, Jan. 18, 1902.

³Cuba is, however, under certain treaty obligations to the United States which are not consistent with absolute independence.

treaty, which was signed on December 11, 1902, contains the following reciprocity provisions:¹

-The free lists then in force in each of the two countries are to continue unchanged with respect to the products of the other during the life of the treaty.

All Cuban goods not on the free list of the then existing tariff law of the United States are to be admitted at a reduction of twenty per centum of the rates from time to time enforced on like merchandise imported into the United States from other foreign countries.

American goods imported into Cuba and not on the free list are to be admitted at reductions varying from twenty to forty per centum of the effective Cuban rates. An exception occurs in the case of tobacco and tobacco products, upon which no concession is made to the United States.

The treaty provided that it was not to go into effect until approved by the Congress. This having been accomplished it was proclaimed by the President on December 17, 1903. The reciprocal concessions are made exclusive to the respective parties. The Tariff Act of 1913 abrogated a proviso in Article VIII which stipulated that during the continuance of the treaty no Cuban sugar should be admitted to the United States at a reduction of duty greater than twenty per centum of the rates of duty thereon as provided by the Tariff Act of 1897, and that no sugar from countries other than Cuba should be admitted by treaty or convention into the United States at a lower rate of duty than that provided by the Act of 1897.

Consideration of the reciprocity arrangement with Cuba in the light of the policy of Section 317 involves questions of somewhat more complexity than the instances of apparent violation of that policy which have already been noted. On

¹For text see Malloy, *Treaties*, pp. 353, *et seq.*; Tariff Act of 1913, sec. iv, B.

the face of the thing the inconsistency is obvious and is aggravated by the treaty-bound exclusiveness of the reciprocal concessions.

On the other hand there are many who hold that the relations between the United States and Cuba are so extraordinary as to justify an exception to the general rule of equality of treatment, which no government could of right refuse to recognize. These publicists point to the facts that Cuba is practically a bordering country; that the relation of the United States to Cuba is, indeed, not otherwise than that of guardian to ward; that morally the United States is bound to guarantee its welfare even to the extent of allowing special privileges in the American market, upon which its economic life in no small measure depends; that in return this country could hardly be expected to forego advantages in the Cuban market; that many nations which otherwise stand for equality of treatment make exceptions with respect to limitroph countries and countries having with each other ties that are peculiar and exclusive.

This line of argument finds its chief strength in the economic advantages of freer trade relations among nations, which arguments became particularly forceful when considered in connection with countries that border each other, and of which the products are such as to encourage exchanges,—for instance, if one is an industrial, the other an agricultural country.¹ To the average mind, however, steeped as it is in the more or less artificial conceptions of political relations, the argument that the United States is justified in special reciprocal arrangements with Cuba, but not justified in an arrangement similar in principle with the Philippines, would probably be lacking in persuasiveness.²

¹ See also, *infra*, subdivision 75(c).

² For a statement by President Harding on the relation of Cuban reciprocity to the policy of unconditional most-favored-nation treatment, see *infra*, subdivision 54, footnote.

47. HAITI'S TREATMENT OF AMERICAN ROPE

There remains one other example—almost too insignificant for mention—of preferential treatment enjoyed by exports from the United States. Under a law enacted on August 20, 1908, the republic of Haiti provides for reductions in customs duties of twenty-five per centum on cordage and of sixty-six and two-thirds per centum on beer, when these articles are imported from the United States. At that time the Dingley Tariff Act, with its policy of bargaining for special favors, was still in effect. Germany had just entered into a reciprocity treaty with Haiti,¹ in accordance with the terms of which preferential rates of import duty were made applicable to a number of German products, including beer and cordage. Strong pressure brought to bear by representatives of the United States to obtain concessions for American products was effective only with respect to the two articles mentioned. The Dingley Act had ceased to exist within a year, the German treaty lapsed when Haiti entered the World War and beer for beverage purposes is no longer a lawful export from the United States. While the American Government cannot, of course, prevent the continuance of the preferential treatment of rope, any request for such continuance would be inconsistent with the policy of Section 317.

¹ Signed July 29, 1908. *Handbook*, p. 556. (See table of principal sources at the beginning of this monograph.) The law of August 20 is printed in the *Moniteur* for Aug. 29, 1908.

CHAPTER VII

COMMERCIAL POLICIES BASED ON SPECIAL BARGAINING AND IMPERIAL PREFERENCE

48. INTERDEPENDENCE OF NATIONS

In relentless disregard of the theories of isolationists, the fact remains that no nation can shape its policies, whether political or economic, without reference to the practices of other nations. The United States may be as one man in favor of equality in commercial relations. It may, consistently with its declared policy as set forth in Section 317 of its tariff law, accept its own definition of a country for tariff purposes and decree the Open Door in those of its insular possessions which maintain individual tariffs. It may abolish the provisos described in Chapter IV and penalize only such practices of other nations as discriminate against its commerce. But, having done so, the country would, in its efforts to establish the new commercial policy, be still confronted with certain entrenched practices which other countries have followed through years and decades or even longer, and in accordance with which their habits of doing business have crystalized. These practices have in many instances been ordained in accordance with carefully developed policies that are not to be readily overturned by outside pressure.

In cases where these policies discriminate against American commerce the obvious step is the imposition of defensive duties in accordance with Section 317. If these defensive duties continue and are numerous they may, as has already been pointed out, become a sort of maximum tariff

schedule. This would be especially true in the event that defensive duties on the same articles should be imposed with respect to several different countries. The result would be a *de facto* inequality of treatment by the United States, which inequality would not be less existent because justified by and dependent upon an inequality persisted in by other countries.

Thus in the event of failure to achieve its purpose the imposition of defensive duties would, from the world point of view, augment the very evil of inequality which Section 317 is designed to allay. Yet to suppose that all other countries can be persuaded, either by negotiation or by the actual imposition of defensive duties or prohibitions under Section 317, to alter important national or imperial policies is to reckon confidently upon something that does not seem entirely probable. The existence of these counter-policies is distinctly a hindrance to the development of the new policy of the United States. The hostile policies may be conveniently divided into two classes: *policies of special bargaining* and *policies of intra-imperial preference*. Illustrative instances must suffice as the subject is too extended for full discussion.¹

49. POLICIES OF SPECIAL BARGAINING

(a) *France*

The most conspicuous example of a national policy which bargains favors for favors, and consequently discriminates where there are no reciprocal concessions, is that of France. Following the treaty entered into with England in 1860, France developed a conventional tariff applicable to all coun-

¹The information contained in this chapter is taken largely from the United States Tariff Commission's reports on *Reciprocity and Commercial Treaties* and *Colonial Tariff Policies*. Specific references will not be made.

tries with which treaties had been put in force (the rates being generalized under the operation of the most-favored-nation clause). The general (statutory) tariff remained and its schedules were applied to those countries to which no concessions had been made.

As the commercial liberalism of the mid-nineteenth century, which, ironically enough, had been in France the autocratic policy of Louis Napoleon and was probably opposed by the people of the country, began to give way to the rising tide of protectionism which marked the closing decades of the century, French economic interests grew more and more impatient with the practice of reducing duties by treaty. The idea of a double statutory tariff began to be urged. Granted that some concessions might be made in return for favorable treatment by other countries, it was nevertheless insisted that the amount of such concessions should be fixed by the parliament. Diplomatic bargaining would thenceforth consist of offering the lower or minimum tariff schedule in return for whatever favors it could purchase. This idea was adopted in the tariff law of January 11, 1892; the rates of both schedules were subject to legislative alteration at any time. Thus tariff *autonomy*, as distinguished from the obligation to keep in effect tariff rates specially fixed by conventions or treaties with other countries, was achieved. The law provided that the minimum tariff might be applied to goods the produce of countries where French goods enjoyed equivalent concessions and were admitted at the lowest rates of duty.

Before the final passage of the Act of 1892 a law was passed under which the Government was empowered to prolong the duration of the commercial treaties, except to the extent that fixed rates of duty were involved, and to apply the rates of the prospective minimum tariff, either wholly or partially, to the wares of those countries to which were

then applied the conventional tariff rates and which were willing to guarantee to France most-favored-nation treatment. These arrangements were not to be made binding for more than a year. Between France and Belgium, the Netherlands, Portugal, Spain, Sweden-Norway and Switzerland treaties containing fixed rates were in force, but were to expire simultaneously on February 1, 1892. With some of these countries understandings were reached under which the minimum duties of the French tariff were granted. The products of several important countries were, however, subjected to the maximum rates. A destructive tariff war with Switzerland followed, at the close of which France granted certain concessions below its minimum schedules; and less serious difficulties resulted with several other states. With Italy commercial relations had for some years been strained and the two countries continued until 1898 to apply to each other's trade their high general tariffs.

The French tariff was thoroughly revised in 1910. The maintenance of statutory double schedules had by this time become a fixed element in French policy; and it was intended that there should be no more conventional decreases from the enacted minimum rates. The law of 1910 contained, however, the following provision:

The Government may, under exceptional circumstances and as a temporary measure, apply the rates of the general tariff of the preceding law ¹ to all or some products originating in a country where French products are not discriminated against.

Measures taken to carry out the provisions of the preceding paragraph shall be submitted for ratification to the Chambers, immediately if they should be in session, or as soon as they shall have convened.²

¹ The new schedules were considerably higher than those of the preceding law (of 1892).

² Art. 8; U. S. Dept. of Commerce and Labor, *Tariff Series*, no. 25, p. 15.

France has never extended to the United States full minimum schedule rates. Tariff concessions on certain products have, however, been granted from time to time,—for instance, in 1893, under threat of the penalty authorized by the McKinley Tariff Act. A convention concluded under the Dingley Act, by which it was proposed to grant to American products most of the minimum rates, failed to receive the consent of the United States Senate. In 1910, in part at least in order to obtain the minimum tariff of the Payne-Aldrich law, France passed an act¹ authorizing the Government to admit at minimum rates certain products from the United States which had previously received privileged treatment, included in twenty-five tariff items; and also those products which were included in sixty-eight other items of the tariff law.² For certain other articles the rates of the general schedule, as fixed before the increases of 1910, were continued in force. This arrangement remains operative today and, with a few other slight concessions, describes the customs tariff treatment now accorded by France to the commerce of the United States. In 1921 the maximum rates were made generally about four times the minimum. This measure was directed against countries with currencies depreciated in terms of the French franc and was not made applicable to the products of the United States; its effect, therefore, is to raise for the present the relative opportunity of American goods in the French market.³

¹Text, *ibid.*, p. 119.

²In the case of 11 items only a portion of the articles included were to have minimum treatment.

³The products of the following European countries are subject to maximum duties: Albania, Austria, Bulgaria, Germany, Hungary, Latvia, Lithuania and Russia (including Ukraine). To certain others the entire minimum tariff has not been conceded. By other changes many American products have been subjected to the highest rates.

The French discriminations are, however, a serious and apparently an increasing burden upon American commerce. It may be helpful to mention a few statistical facts, but only an imperfect indication can be gleaned from them of the total harmful effect of these discriminations.

In 1919, the first year following the World War, demand for American goods remained abnormal in France, prices had risen and the French duties¹ had not been adequately rectified to meet the decline in the value of the franc. In that year some thirty-four per centum of the total imports of American goods were subject to, yet able to surmount the barrier of, discriminating duties. But, had the rates that were imposed upon American goods been imposed upon all imports of goods subject to differential duties when imported into France, more than forty-two per centum of the total French imports would have paid the higher duties. In 1913 only three per centum of the total and ten per centum of the dutiable imports from the United States actually paid the discriminating duties; had these duties been applied to all goods subject to differential duties when entering France, from whatever source, over twenty-five per centum of the total French imports would have been charged the higher rates. Thus there would seem to be reason to suppose that in normal years the discriminatory rates operate as prohibitions in a great number of cases. In 1919 dutiable American goods paid an average rate of ten per centum; the goods of all other countries five and two-tenths per centum. In 1920 the corresponding figures were seven per centum and four and seven-tenths per centum, respectively.²

¹ The French tariff, as revised in 1910, consisted almost exclusively of specific duties.

² A French duty of 10 per cent ad valorem is heavier than an American duty of the same nominal rate: the French valuation includes costs of

As the French discriminatory duties bear hardest upon manufactured goods, which should now have a larger rôle than ever before in American commerce, the tendency is to force the export trade of the United States with France back to the pre-war basis consisting chiefly of raw materials—cotton, copper and mineral oils,—which are more and more needed here as home industry expands.

Some American exporters, for instance, the canned-salmon industry,¹ have complained bitterly of the French discriminations. American policy and the single-schedule tariff alike forbid bargaining in the ordinary sense. Yet French policy is against granting favors except for concessions. The United States imports many luxuries from France and, under its theories of fiscal justice, undertakes to levy high duties upon them. This treatment is, unfortunately, construed by the French public as discriminatory.²

Section 317 is, however, designed to meet just such contingencies and American exporters will do well to insist upon its full application and a thorough test of its effectiveness. The prospect of additional duties raised against French products in so important a market, together with the possibility of complete prohibition, is calculated to aid in the negotiation of an agreement for reciprocal equality and unconditional most-favored-nation treatment. The fact that France has in the past always interpreted the most-favored-

transportation and may include additional amounts arbitrarily added on the basis of "home valuation." In like manner the ad valorem equivalent of French specific duties appears relatively lower than it would be if calculated under the American system.

¹Foreign Tariff Files, Department of Commerce.

²The French are not warranted in this conclusion even under their own reasoning. In the fiscal year 1913 the average rate collected on dutiable imports from France was 43.3%; from all countries, 40%; in 1921, 31.96% and 29.45%, respectively. These figures seem conclusive unless French products were excluded to a higher degree than the products of other countries, which is highly improbable.

nation clause unconditionally should facilitate the achievement of this end.

On the other hand, the difficulties to be encountered because of the necessary refusal of the United States to promise any concessions—and so to offer to France what France would regard as a *quid pro quo* in conformity to the fixed policy of demanding favor for favor—must not be underestimated. Negotiations with France may bring to the surface an instance of inescapable conflict between irreconcilable national policies.¹

(b) *Spain*

On April 22, 1922, the Spanish Government promulgated a law, of which the essential provision was substantially as follows:

The Government shall be empowered to assess, with regard to certain given items of our Import Tariff, duties below those established in the Second Column of the Tariff promulgated by the Royal Decree of February 12, 1922, to any country which may authorize equivalent advantages for Spanish products. Such reductions cannot be general, but must refer definitely to given items and as a general rule must not be below twenty per centum of the duties set by the Second Column of the Tariff.

Advantages which by virtue of this authorization may be granted by the Government to any one country, may not be granted to any other excepting as a result of a special agreement and after obtaining equivalent advantages in favor of Spanish products.²

The Spanish Government was thus authorized, subject

¹The French policy of bargaining for special concessions is exhibited in the treaty signed May 12, 1923, with the Belgium-Luxemburg economic union. Summary in *Board of Trade Journal*, June 21, 1923. Belgium has declined to ratify.

²Translation of text as published in the *Official Gazette* of April 23, 1922.

to specified limitations, to enter upon a regime of special bargaining not unlike one of the policies included in the Dingley Tariff Act of 1897. Following the war Spain had denounced its commercial treaties, though they were in most cases continued from time to time by *modi vivendi*. Spain is usually considered the originator of the maximum and minimum customs tariff system. Prior to the denunciation of the former commercial treaties, however, the Spanish system was more characteristically one of general and conventional rates, the latter being lower than the rates of the minimum schedule. This schedule, indeed, applied only to imports from Colombia and Ecuador. Portugal has long been entitled to exclusive preferential treatment and the products of Andorra are exempt from the payment of customs duties on their entry into Spain. Certain new treaties generalize some of the concessions granted by other treaties¹ and may develop a new conventional tariff analogous to that existing before the war.

Like France, however, Spain appears to be committed to a policy of special bargaining, antagonistic to the development of the American policy of equality of treatment. It seems possible, on the other hand, that Spain will be disposed to cling to its new policy somewhat less tenaciously than its stronger neighbor maintains the policy in which the latter long ago became confirmed.

(c) *Canada*

In addition to the special low rates applicable to products imported from most of the component parts of the British Empire, Canada maintains a double-column bargaining tariff composed of the general schedule and the intermediate schedule. The former is enforced with respect to imports from the United States and is the schedule intended for the

¹ See subdivision 65.

goods of countries that make no concessions to Canadian products. The intermediate schedule, like the minimum tariff of France, is a bargaining instrument.

The Canadian tariff act of 1897 contained the first general provision for "reciprocal" duties:

When the customs tariff of any country admits the products of Canada on terms which, on the whole, are as favorable to Canada as the terms of the reciprocal tariff herein referred to are to the countries to which it may apply, articles which are the growth, produce, or manufacture of such country, when imported direct therefrom, may then be entered for duty, or taken out of warehouse for consumption in Canada, at the reduced rates of duty provided in the reciprocal tariff set forth in schedule D of this act.

These rates were to be twelve and one-half per centum lower than the rates of the general tariff until June 30, 1898, and thereafter twenty-five per centum lower; but the reduced rates were not to apply to alcoholic liquors, molasses, sugar or tobacco. The determination of the countries entitled to the reciprocal duties was left to the controller of customs, subject to the authority of the Governor in Council. The latter authority was permitted to extend the lower duties to "any country entitled thereto by virtue of a treaty with Her Majesty."

The purpose of the reciprocal tariff was to institute a policy of preference to Great Britain and perhaps to some of the British low tariff or "free trade" colonies. After the treaties by which Great Britain had promised to Belgium and Germany treatment equal to that accorded to the most favored nation, including treatment granted among component parts of the British Empire, had been terminated, the reciprocal policy became solely one of imperial preference, the foundation, indeed, of the British imperial system of today.¹

¹ See also *infra*, subdivision 50(a).

A triple arrangement was advocated by the Liberal Party in the campaign preceding the election of 1904. To the general and preferential schedules an intermediate one, for the purpose of negotiating for better treatment for Canadian goods in non-British markets, was to be added. The revised tariff, presented by the Minister of Finance on November 29, 1906, left the general schedule approximately unchanged and instituted an intermediate schedule consisting of duties from two and one-half to ten per centum ad valorem lower. This schedule would, of course, if accorded to any other country, have the effect of relatively reducing the British preferential, which then amounted to about thirty-three and one-third per centum.¹

A treaty was promptly negotiated granting numerous concessions—as a rule the rates of the intermediate schedule—to France and the reduced rates were generalized to those countries, twelve in number, to which Canada was bound by treaty to accord most-favored-nation privileges. Arrangements providing for intermediate rates were entered into, moreover, with certain other countries. In order to avoid the maximum rates of the Payne-Aldrich Act Canada extended its intermediate rates to thirteen specified articles when imported from the United States.

In 1915 a war-revenue act was adopted which added to the intermediate and general tariff schedules a rate of seven and one-half per centum ad valorem, applicable, with specified exceptions, alike to all articles whether previously dutiable or free. The corresponding surtax in the preferential column was five per centum. These surtaxes were not fully removed until 1920.

Canada has made use of the intermediate schedule of its tariff in recent negotiations for new commercial treaties

¹There was also established an "Empire free list."

with several European countries. In the Convention of Commerce with France, signed December 15, 1922, Article VIII provides that:

The natural and manufactured products originating in and coming from France and from the French Colonies, Possessions and Protectorates shall be admitted into Canada under the rates of the intermediate tariff or of any more favourable tariff that Canada may grant to the products of any other foreign country.¹

By Article I Canada receives in part the minimum schedule of the French tariff:

The natural and manufactured products originating in and coming from Canada enumerated in Schedule A to this Convention shall enjoy when imported into France, the French Colonies, Possessions and Protectorates having the same customs tariff as France the benefit of the minimum tariff and of the lowest rates of duties as regards present import duties and taxes and as regards any such duties or taxes which France may hereafter establish and also as regards surtaxes, co-efficients or other temporary increases that France may establish.

From the rates of the intermediate and the minimum schedules, respectively, numerous variations are provided for. The passages quoted are, however, significant in respect to the commercial policies in the ascendancy in both countries.

In so far as these policies are founded on the most-favored-nation principle they are in harmony with the policy of Section 317. But in so far as they consist of special rates in return for special rates they constitute an obstruction to the realization by the United States of its commercial policy derived from Section 317.

¹As officially published by the Canadian Government. In force September 5, 1923.

50. POLICIES OF INTRA-IMPERIAL PREFERENCE

(a) British Empire

Great Britain. Early in the nineteenth century the existing policy of maintaining preferences between Great Britain and the British Colonies was consistent with the mercantilism that still dominated political thought in that day. The repeal of the corn laws between 1840 and 1850 and the subsequent era of "free trade" naturally brought about in Great Britain a regime of equality of treatment, which lasted until after the World War. On September 1, 1919, a law became effective providing generally for preference to dutiable products of other portions of the Empire.¹

At present the preference consists of applying, to most articles included in the regular tariff, duties equal to two-thirds in a few cases, usually to five-sixths, of those levied upon the same articles from countries outside the Empire. The act for the regulation of the importation of dyestuffs (effective January 15, 1921) prohibits the importation of all synthetic organic dyestuffs and intermediates except under license; but for dyestuffs from any part of His Majesty's dominions licenses are to be issued on application. The safeguarding-of-industries law, which imposes a duty of thirty-three and one-third per centum ad valorem on the products of certain "key" industries,² does not extend these

¹It should be remembered, however, that the British tariff extended only to sugar, cocoa, coffee, tea, tobacco, liquors, certain dried fruits, gasoline and several other items, including certain manufactured goods, added during the war—passenger automobiles, clocks and watches, musical instruments, cinematograph films and typewriters. The preference on tea became effective June 2, 1919. The budget introduced in the spring of 1924 provided in general for the abolition of the duties added during the war, and for reductions in several of the others.

²Including in general optical glass, laboratory apparatus, scientific instruments, magnetos, arc-lamp carbons, hosiery latch needles, metallic tungsten and its compounds and ferro-alloys, and synthetic organic chemicals. This portion of the safeguarding-of-industries law will presumably lapse on August 19, 1924.

duties to imports from other portions of the Empire. The anti-dumping and depreciated currency provisions contained in the same act apply, however, to imports of whatever origin.

India. With the exception of a partial rebate of the export duty on raw hides and skins when destined for tanneries within the British Empire, which rebate was abolished early in 1923, there has been no recent example of imperial preference in India. Despite the efforts of British authorities, this greatest of the world's dependencies stoutly maintains its refusal to cooperate in the preference movement. This is in part, at least, due to the opposition of local manufacturing interests and is connected with the Indian insistence upon full fiscal autonomy.

The Crown Colonies. The preferential policy of the crown colonies in general has, not unnaturally, reflected with much accuracy the preferential policy of the mother country. Prior to 1919 the Open Door in customs matters had been maintained almost without deviation for sixty years. The chief exception consisted in the prohibitive export duty imposed by the Federated Malay States upon tin ore destined for smelting elsewhere than in the Straits Settlements and the United Kingdom.¹ This was obviously the result of a policy of monopolizing essential raw materials rather than a policy of stimulating commerce within the Empire. In 1913 the West Indian colonies extended to the United Kingdom and to Newfoundland the preferences accorded to Canada under the reciprocity treaty of 1912.

During the World War prohibitions and licenses were the effective means of controlling commerce. Discriminations in favor of the other parts of the Empire—and sometimes in favor of the allied countries—resulted from the applica-

¹This preference is more fully discussed *supra*, subdivision 9; Australia has since been added.

tion of these measures. With the end of the war prohibitions and their accompanying preferences began to disappear and to be succeeded, in some of the colonies, by a variety of discriminatory customs duties. The trade affected by these differential duties is, however, but a minor fraction of their total trade.

Excluding India and those colonies included in the South African Customs Union, there are some fifty-five of the crown colonies. Of these there are at least five in which differential duties cannot, under existing treaty guarantees, be enacted. Several others are free ports, and consequently very unlikely to embark upon preferential adventures. Twenty-five, however, have accepted, at least temporarily, the preferential policy in respect to certain export or import duties.¹ General systems of preferential import duties have been inaugurated in Fiji, Cyprus and the British West Indies.

The tariff of Fiji, effective January 1, 1922, contains higher rates and larger differentials than those of any other crown colony, at least of those outside the South African Customs Union, and applies to the products of all other parts of the Empire. Specific duties are levied on eighty-three items, e. g., certain foodstuffs, on which the differential is one-half. On coal, coke and a few other articles the whole duty is remitted. On one hundred and twenty items the differential is twelve and one-half per centum ad valorem, the foreign and British rates being, in the majority of cases, twenty-seven and one-half and fifteen per centum respectively.

In concluding its recent survey of the subject the United States Tariff Commission says:

¹ Several have repealed the discriminatory provisions.

While the trade which has been already affected by the preferential duties of the Crown colonies . . . is only a small fraction of the total, it includes the import trade of the West Indies, which for geographical reasons offer a natural market for American products, . . .

While the differential duties at present are so few, in so vast an Empire and one which controls the major part of the world's supplies of so many articles, the reintroduction, on however limited a scale, of the old mercantilist principle of the reservation of colonial products to the Mother Country must cause serious concern to the rest of the world.¹

Canada. In 1897 Canada inaugurated the present-day preferential tariff policy in the British Empire and, with it, what has proven to be a new era in British tariff history. By 1900 the preference to the mother country was one-third and it continues to average about that amount. Canada has made the imperial preference subordinate to its policy of protection to home industries and has not hesitated to lessen the effect of the differential in favor of parts of the Empire by accepting reciprocity treaties with other countries.

The free-trade policy of Great Britain was considered a sufficient return for the original preference; and for its extension to practically all of the crown colonies the low tariffs in force in them were deemed to constitute reciprocally favorable treatment. After New Zealand had extended its preferential rates to Canada, the latter, in 1904, returned the favor. With the Union of South Africa a definite reciprocal bargain achieved a similar end, but repeated efforts looking to an exchange of preferences with Australia have invariably failed. It is because of the protective policies of the Dominions that reciprocal concessions are re-

¹ *Colonial Tariff Policies*, p. 370.

quired. Special rates have been exchanged in successive trade agreements with British West Indian possessions.

In several respects the customs administrative regulations of Canada operate in preference to British as compared with American trade. The customs surtaxes of the war period were removed first with respect to imports of British goods. The Farmers' Party has advocated free trade with Great Britain.

Newfoundland. In the commercially least important of the British Dominions no general policy of participation in the intra-imperial preferential system has been adopted. Newfoundland receives freely the preferences offered by a number of other portions of the Empire. Such products as Newfoundland exports in considerable quantity to Canada and to Great Britain are admitted freely and the fear of retaliation from non-British countries that are especially important to its trade has been an incentive to maintain non-discriminatory tariffs.

There are, however, a number of provisions in its tariff law which favor British products, the most important being the requirement of adding to the value for customs purposes the cost of transportation from countries other than Great Britain, Ireland and Canada. There are certain bargaining and penalty features of the tariff law the result of the potential operation of which may affect trade with other portions of the Empire.

Union of South Africa. Prior to organization into its present status as a self-governing Dominion in 1910, the territory comprised in the Union of South Africa had become a part of the customs union embracing the British colonies in South Africa. This arrangement, which dates from 1903, continues in operation at the present time and provides for free trade among the colonies included, for a common tariff on imports from foreign countries and for

preferential treatment to the products of the mother country and of reciprocating portions of the Empire. Originally the preference amounted to twenty-five per centum of ad valorem duties, except that some very low duties were remitted altogether. In 1906 preferential treatment became applicable in the case of many articles subject to specific duties and the preference with respect to ad valorem duties became uniformly three per centum of the value of the products.

Rhodesia, except that portion the tariff of which is controlled by the international conventions established for the Congo Basin, in addition to the preferences granted as a part of the customs union, accords to all portions of the British Empire, without regard to reciprocity, certain other favors; and in doing so probably accords the highest preferences now existing in the imperial preferential system. The preferential duties of the Union of South Africa are, on the other hand, lower than those of the other Dominions. The customs union has reciprocal trade agreements, granting preferential customs treatment, with Australia, Canada and New Zealand.

New Zealand. The preferential policy of New Zealand dates from 1903 when an act was passed establishing preference in favor of imports from any part of the Empire on thirty-eight items of the tariff then in force. The method employed was that of raising the rates upon goods of non-British origin usually to such extent as to make the preferential rate one-third less than the full rate. From this modest beginning the number of articles on the preferred list has from time to time increased until now a large majority of articles are either free or reduced in rates of duty when imported from other portions of the British Empire. Moreover, special concessions are extended to lists of products of South Africa and of Australia.¹

¹See Appendix 6.

Australia. During the first six years of its existence as a Commonwealth, Australia treated British goods precisely like all others. In 1907 and 1908 preferences to the mother country, averaging about five per centum ad valorem, were established on about half of the dutiable items in the tariff. About three-fifths of the imports from the United Kingdom were affected. Considerable additions to the preferred list were made in 1911, in 1914 and in 1920. Both the amount of the preference and the proportion of preferred to total tariff items were increased. Australia does not extend preferential treatment to the crown colonies. Reciprocal preferences are exchanged with South Africa and New Zealand¹ and provision is made in the tariff laws for concessional arrangements with reciprocating countries, whether British or foreign.

Australia has always taken care that the granting of preferentials should not interfere with its protective policy. Almost invariably the preferences have been granted not in the form of reductions from general rates but by increasing the rates on goods from non-preferred sources.

Ireland. By Article II of the treaty concluded between Great Britain and Ireland on December 6, 1921, it is agreed that

the position of the Irish Free State in relation to the Imperial Parliament, the Government and otherwise, shall be that of the Dominion of Canada, and the law, practice and constitutional usage governing the relationship of the Crown or representative of the Crown and the Imperial Parliament to the Dominion of Canada shall govern their relationship to the Irish Free State.²

This provision automatically accorded to the Irish Free

¹ *Ibid.*

² Text of treaty: *Current History*, Jan., 1922, pp. 568 *et seq.*

State full fiscal independence. On April 1, 1923, its government took over from the imperial authorities the customs service operating within the boundaries of the Free State, which thereupon became, for customs purposes a separate entity.¹ The tariff laws inherited from the United Kingdom have been retained with few alterations; preferences are extended to Great Britain and other portions of the British Empire. Several of the other Dominions have extended their preferences to Ireland.

(b) France

The ascendent policy in France, with respect to customs treatment within its empire, has been, since 1892, one of tariff assimilation. That is to say, France appears to be gradually incorporating its colonial empire into one great customs union. The more important colonies generally, and some of the lesser ones, are already governed by the customs laws of the mother country, though not without numerous special provisions designed to meet local conditions. Sugar and pepper from assimilated colonies are not, moreover, given free entry into France; but generous preferential treatment is accorded. Likewise there are instances of taxes upon French goods entering the colonial markets. Of the non-assimilated colonies some must, under treaty guarantees, maintain equality of treatment; others are required to maintain it out of considerations of policy; in the remainder the preferential system is well developed. Among the colonies free trade is the general but not the invariable rule.

(c) Italy

The preferential system in the Italian colonies is uneven and apparently not as yet well worked out. There are

¹*Commercial Intelligence Journal* (official Canadian publication), April 28, 1923, p. 691.

present certain rather insidious preferences, such as the practice in Libia of favoring Italian goods by a process of undervaluation, with the result of making the duty about half that on foreign goods. Italian products enter Eritrea almost dutiless and effective preferences, especially upon cotton goods, are accorded by Somalia. The reciprocal preferences granted by the mother country were rather ungenerous prior to 1921, when a law was enacted under which most colonial products now enter free of duty. Apparently the only example of intercolonial preference is in the tariff of Somalia, which grants special rates to four products of Eritrea.

(d) Japan

Like France, Japan is manifestly pursuing a policy of tariff assimilation within its colonial empire. This process has been accomplished in Formosa, Saghalin and the Pescadores. At the time of the annexation of Korea (1910) an open-door policy was pledged for ten years, at the close of which period assimilation promptly began and may now be regarded as complete. To goods from Japanese leased territory in China, however, where treaty obligations prevent the extension of the Japanese tariff, the minimum or conventional rates, not free trade, are extended. This partial favor partakes of some of the aspects of intra-imperial preference. There is no reciprocal treatment of Japanese goods.

(e) Portugal

The Portuguese preferential system is widespread; indeed, aside from the portion of Angola which lies within the conventional basin of the Congo,¹ few places under the flag of Portugal are exempt from its application. The rates of preference are, however, uneven and generalization is

¹See *infra*, subdivision 73(a).

difficult. An interesting feature of the system undertakes to encourage shipments of foreign goods to the colonies by way of Portuguese ports. Such goods, when re-exported from Portugal, though not altogether exempt from certain fees there, are not liable to Portuguese customs charges and receive the substantial reduction of twenty per centum in the colonial duties.¹

(f) *Spain*

The colonial policy of Spain, both traditionally and in theory, is definitely preferential. In actual fact, however, the Spanish system makes a measurable approach toward an open-door regime. Thus the Open Door prevails in Morocco by treaty; and in the Canary Islands, Spain's commercially most important possession, equality of treatment is accorded to the products of all countries except for preferences in favor of sugar from Spain and of certain products from the island of Fernando Po. In contrast with the British preferential system, Spain's treatment of colonial products is more generally preferential than is the treatment accorded by the colonies to the mother country.

51. OPEN-DOOR COLONIAL EMPIRES

Belgium and the Netherlands, as was the case with Germany before the Treaty of Versailles took away its colonies, do not maintain intra-imperial favors in customs matters. Belgium is forbidden to do so under international agreements governing the Congo country,—a requirement not infrequently evaded in the past.

The present open-door policy has been maintained by the Netherlands without alteration since 1874.

¹This favor is, in some cases, confined to goods arriving in national vessels.

52. THE PROBLEM IN REGARD TO ASSIMILATING DISTANT
COLONIES

In considering examples of imperial preference as obstacles to American commercial policy under Section 317, the definition of "foreign country" as an area governed by a distinct set of customs laws and regulations should be kept in mind. Where assimilation of colonies has become so complete as practically to eliminate local laws and regulations, the tariff of the mother country has simply extended its sway over an enlarged area which thereafter becomes a customs unit. From one point of view there is no discrimination involved any more than there is discrimination growing out of free trade between the "sovereign" states of the American Union. On the other hand a convincing argument can be made to the effect that customs unions, to be valid from the standpoint of Section 317, must embrace only continuous or, at least, economically related territories, and that political connection is of itself no excuse for economic differentiation.¹ Customs assimilation by France may thus be permissible with respect to Algeria, but not with respect to Indo-China or Guadeloupe. One of the exceedingly nice problems in connection with the development of the present American commercial policy is thus presented for solution.

However, it is only when a colony certainly falls within the definition of a foreign country that differential treatment can be said with assurance to cut athwart the purpose and policy of Section 317 and hence to become an obstacle to the new commercial policy of the United States.

¹ See also *infra*, subdivision 75(c).

PART THREE
AIDS IN THE DEVELOPMENT OF THE NEW
COMMERCIAL POLICY

CHAPTER VIII

INITIAL ACCOMPLISHMENTS

53. DISAVOWING THE PREFERENTIAL TREATMENT ACCORDED BY BRAZIL

In 1904, as a result of negotiations under the provision of the Tariff Act of 1897 which authorized the President to remove from the free list coffee and other articles originating in countries which did not accord to American products reciprocally reasonable treatment,¹ Brazil was induced to grant tariff preferences to certain products of the United States. With the exception of the year 1905, Brazil continued annually thereafter to grant to a list of American products preferential treatment for the ensuing year.

This practice was confirmed and the list extended for the purpose of securing from the United States its minimum tariff rates under the Tariff Act of 1909, though the object of this act was to obtain equal, not preferential, treatment. After the repeal of the Act of 1909 Brazil continued the preferences without formal reciprocity. During 1922 and recent years they amounted to thirty per centum on wheat flour and twenty per centum on condensed milk, certain manufactures of rubber, clocks, certain inks and paints, varnishes, typewriters, ice chests, pianos, scales, windmills, cement, corsets, dried fruits, school furniture and desks.

¹ *Supra*, subdivision 18(c). A full account of the preferential treatment formerly accorded by Brazil to certain American products is contained in the U. S. Tariff Commission's report on *Reciprocity and Commercial Treaties*, pp. 285 *et seq.*

Of these, after September 1, 1920, scales, ice chests, cement, corsets, certain rubber manufactures, pianos, certain inks and paints and varnishes were likewise preferred when imported from Belgium.¹

The exports of the articles on the preferred list have not been of great importance compared with the totals of recent exports from the United States to Brazil, amounting to only about ten per centum in 1920 and six per centum in 1921. Moreover, Brazil receives only a small percentage of the total American exports of any of these articles.

The Brazilian law under which the Executive, by annual decree, has renewed the preferences indicates that favors granted under it are to be reciprocal; and it is true that the United States has continued to admit free of duty Brazil's most important exports. The fact remains, however, that the United States has, at least since 1913, asked for special concessions from Brazil and granted nothing in return that would not have been granted anyhow as a matter of domestic policy and in accordance with domestic law. The policy of annually requesting preferences had, therefore, become anomalous and not wholly creditable to the United States.

As a matter of fact the preferences were the result of long-continued coercion by this country, based upon the same considerations that were generally urged in connection with the bargaining features of the tariff acts of 1890 and 1897.² The policy involved was in strange contradiction to that pursued by Secretary of State Hay a few years before in achieving the Open Door in the Far East.³ It should be noted, moreover, that on two different occasions

¹ *Commerce Reports*, November 4, 1920.

² *Supra*, subdivision 18(b) and (c).

³ *Infra*, subdivision 56.

since 1904 the Congress has decided against a policy of bargaining for concessions and in favor of the policy of equality in return for equality of treatment; first, in the acceptance of the maximum-minimum provisions of the Payne-Aldrich law and, secondly, by the adoption of Section 317 of the Tariff Act of 1922.

The latter, in particular, emphasized and heightened the obvious inconsistency between the general American policy of a fair field and no favors and the opposite policy pursued with reference to Brazil. It made the question of repeating the annual request for renewal of preferential treatment one of serious concern and was directly responsible for the decision of the United States not to ask for the renewal of the preferences at the beginning of the year 1923.

The Department of State was assisted in its consideration of the question, prior to this decision, by officials of other branches of the Government. In a letter to Secretary Hughes, in which the various aspects of the matter were discussed, Dr. W. S. Culbertson¹ concluded that:

The Brazilian preferences . . . are a remnant of a policy which has been discredited by the investigations of the Tariff Commission and twice rejected by Congress. This remnant affords certain narrow and immediate advantages, but it is in conflict with our present policy which offers larger commercial advantages in the long run; . . . is based upon equity and contributes to peace and good will among nations.²

¹Vice Chairman, United States Tariff Commission.

²Dr. Culbertson added: "The conflict between the two policies is immediate since our present general policy requires negotiations with various foreign countries, and the inconsistency of our relations with Brazil will hamper these negotiations. Though the abandonment of our preferential position in Brazil will sacrifice certain immediate interests, this sacrifice will not be so large as it would have been some years ago and such abandonment is necessary if the United States is to adhere to its declared principles and carry out a consistent policy." (Letter of Jan. 3, 1923).

Quotation courteously permitted by Dr. Culbertson and Mr. Hughes.

Replying to an inquiry in regard to the effect upon the trade of the United States of a failure by Brazil to issue a proclamation continuing the preferences, the Secretary of Commerce said:

An analysis of the export trade in American products to Brazil under the preferential arrangement, and a comparison of the list of articles admitted at preferential rates of duty from the United States with those admitted from Belgium, lead me to the conclusion that the loss of preference in the case of the articles not covered by the Belgian list is not likely to result in a sufficient reduction in our trade to justify the United States Government in taking any action that would be inconsistent with the commercial policy implied in Section 317 of the new Tariff.¹

President Harding, addressing the Secretary of State, determined the question as follows:

I think it altogether desirable that you should instruct our Ambassador at Rio de Janeiro that this government will not renew the usual request for the continuation of preferential duties, and that we will content ourselves with most favored nation treatment at the hands of Brazil in precisely the same manner as is expected and accepted at the hands of other nations with whom we maintain commercial relations.²

Thus were accomplished the first fruits of the policy expressed in Section 317. It is pleasant to note that the new policy was initiated by an act which not only involved, on the part of the United States, a recognition of the inconsistency between an old practice and the new policy, but which at the same time was essentially generous toward a

¹Letter to the Secretary of State Jan. 3, 1923. Quotation courteously permitted by Mr. Hoover and Mr. Hughes.

²Letter of Jan. 3, 1923. Quotation courteously permitted by Mrs. Harding and Mr. Hughes.

great republic of South America. It occurred opportunely on the eve of the Fifth Pan-American Conference, the first to be held since the United States and Brazil, and other Latin American countries, were allies in the World War.¹

54. ACCEPTANCE BY THE EXECUTIVE OF THE POLICY OF UNCONDITIONAL MOST-FAVORED-NATION TREATMENT

In taking the indicated action in regard to the Brazilian preferences the United States was fully aware that there was a corresponding positive side to the new policy and that the latter should not be neglected. Explaining the Government's attitude to the American Manufacturers Export Association the State Department said:

In view of the adoption of the Tariff Act of 1922, section 317 of which authorizes the President to declare additional duties upon the products of any country that may discriminate against the commerce of the United States, it was felt that this Government could not consistently ask the Brazilian Government to grant to American goods rates lower than those accorded to similar imports from other countries. A request of this nature by this Government would in effect be a request to Brazil to practice with respect to other countries discriminations which, if applied to the trade of the United States, might call forth a presidential proclamation levying additional duties upon Brazilian trade.

It is the policy of this Government to seek from Brazil and

¹That Brazil was not without embarrassment in connection with its differential tariff practice is indicated by the following excerpt from an article in *Wileman's Brazilian Review* (Rio de Janeiro), June 27, 1923:

"The question of preferential tariffs has led to misunderstandings between Brazil and Great Britain and to much criticism on the other side. After all, equal treatment of all countries, i. e., no favors to anyone, is the best policy and one which avoids misunderstandings and even bad feeling. Once Great Britain sees that she is trading in this country on an equal footing with other countries, there will be a change in British sentiment and it is possible that British investors may again turn their attention to Brazil, where there is much scope for capital."

other countries treatment for American goods as favorable as may be accorded by them to the products of any other country. It is believed that in the long run this policy offers larger commercial advantages to American trade, and that the possibility of adverse effects in the case of American trade with Brazil must be weighed against the advantage to American commerce of having this Government in a position to stand vigorously and without any inconsistency for equality of treatment for American exports entering all foreign countries.¹

The opportunity was, undoubtedly, an admirable one for inaugurating the full policy expressed in Section 317 by undertaking the negotiation of an agreement with Brazil reciprocally pledging unconditional most-favored-nation treatment. While asking no favors the United States would surely be disposed to brook no discriminations. If the preferences which Brazil formerly granted to Belgium should be continued, if the special treatment of certain imports from Argentina should prove detrimental to the export trade of the United States or should any other country obtain advantages in the Brazilian market, the policy of Section 317 required the extension of the same favors to this country. However, for the United States to enter into an agreement with another country in which it should expressly promise to accord unconditional most-favored-nation treatment involved, obviously,² an important decision essentially affecting its general commercial policy. The question of making this decision was clearly one for the President.

Mr. Harding's answer was contained in a letter of February 27, 1923, to the Secretary of State:

I am well convinced that the adoption of the unconditional

¹Excerpt from letter published in *Weekly Export Bulletin*, April 14, 1923.

²See *supra*, ch. v.

avored nation policy is the simpler way to maintain our tariff policy in accordance with the recently enacted law and is probably the surer way of effectively extending our trade abroad. If you are strongly of this opinion you may proceed with your negotiations upon the unconditional policy.¹

Negotiations were accordingly undertaken with Brazil and, on October 18, 1923, the following exchange of notes was effected, as a result of which the United States and Brazil mutually covenanted to accord to each other unconditional most-favored-nation treatment in customs matters:

[The Secretary of State to the Ambassador of Brazil.]

DEPARTMENT OF STATE,

Washington, October 18, 1923.

Excellency:

I have the honor to communicate to Your Excellency my understanding of the views developed by the conversations

¹The preceding portion of the letter was as follows:

"You wrote me under date of January 15th, relative to the policy to be followed in the negotiation of commercial treaties with newly established states, and the revision of long-standing treaties which have become obsolete or impracticable, because of changed conditions. You enclosed to me with your letter the communication of Mr. W. S. Culbertson, of the Tariff Commission, in which he commended, very impressively, the adoption of the unconditional clause in the most favored nation treatment in all our commercial relations. I have gone over your letter and the argument of Mr. Culbertson with some considerable deliberation, and I am pretty well persuaded that the negotiation of the unconditional provision is the wise course to pursue. I am wondering at the moment what this change of policy would effect in our relationship with Cuba, whose very existence seems more or less dependent upon a favoring provision in our tariff law. Our peculiar relation to Cuba apparently imposes something of an obligation, but I assume that if that favoring arrangement is going to disarrange the conditions of our entire foreign trade it would be better to cancel the Cuban provision. This relationship does not seem to be touched upon by either your letter or that of Mr. Culbertson and I may be attaching to it a greater importance than the situation actually justifies."

Publication courteously permitted by Mrs. Harding and Mr. Hughes.

which have recently taken place between the Governments of the United States and Brazil at Washington and Rio de Janeiro with reference to the treatment which shall be accorded by each country to the commerce of the other.

The conversations between the two Governments have disclosed a mutual understanding which is that in respect to customs and other duties and charges affecting importations of the products and manufactures of the United States into Brazil and of Brazil into the United States, each country will accord to the other unconditional most-favored-nation treatment, with the exception, however, of the special treatment which the United States accords or hereafter may accord to Cuba, and of the commerce between the United States and its dependencies and the Panama Canal Zone.

The true meaning and effect of this engagement is that, excepting only the special arrangements mentioned in the preceding paragraph, the natural, agricultural and manufactured products of the United States and Brazil will pay on their importation into the other country the lowest rates of duty collectible at the time of such importation on articles of the same kind when imported from any other country, and it is understood that, with the above mentioned exceptions, every decrease of duty now accorded or which hereafter may be accorded by the United States or Brazil by law, proclamation, decree, or commercial treaty or agreement to the products of any third power will become immediately applicable without request and without compensation to the products of Brazil and the United States, respectively, on their importation into the other country.

It is the purpose of the United States and Brazil and it is herein expressly declared that the provisions of this arrangement shall relate only to duties and charges affecting importations of merchandise and that nothing contained herein shall be construed to restrict the right of the United States and Brazil to impose, on such terms as they may see fit, prohibitions or restrictions of a sanitary character designed to protect human, animal, or plant life, or regulations for the enforcement of police or revenue laws.

I shall be glad to have your confirmation of the accord thus reached.

Accept, Excellency, the renewed assurances of my highest consideration.

CHARLES E. HUGHES

His Excellency

Mr. AUGUSTO COCHRANE DE ALENCAR,
Ambassador of Brazil.

[*The Ambassador of Brazil to the Secretary of State.*]

[Translation]

BRAZILIAN EMBASSY,
Washington, October 18, 1923.

Mr. Secretary of State,

I have the honor to acknowledge the receipt of your Excellency's note of today's date, communicating to me your understanding of the views developed by the conversations which have recently taken place between the Governments of Brazil and the United States at Rio de Janeiro and Washington with reference to the treatment which shall be accorded by each country to the commerce of the other.

I am happy to be able to confirm to you, under instructions from my Government, your Excellency's understanding of the said views as set forth in the following terms:

The conversations between the two Governments have disclosed a mutual understanding which is that in respect to customs and other duties and charges affecting importations of the products and manufactures of Brazil into the United States and of the United States into Brazil, each country will accord to the other unconditional most-favored-nation treatment, with the exception, however, of the special treatment which the United States accords or hereafter may accord to Cuba and of the commerce between the United States and its dependencies and the Panama Canal Zone.

The true meaning and effect of this engagement is that, excepting only the special arrangements mentioned in the preceding paragraph, the natural, agricultural and manufactured prod-

ucts of Brazil and the United States will pay on their importation into the other country the lowest rates of duty collectible at the time of such importation on articles of the same kind when imported from any other country, and it is understood that, with the above mentioned exceptions, every decrease of duty now accorded or which hereafter may be accorded by Brazil or the United States by law, proclamation, decree, or commercial treaty or agreement to the products of any third power will become immediately applicable without request and without compensation to the products of the United States and Brazil, respectively, on their importation into the other country.

It is the purpose of Brazil and the United States and it is herein expressly declared that the provisions of this arrangement shall relate only to duties and charges affecting importations of merchandise and that nothing contained herein shall be construed to restrict the right of Brazil and the United States to impose, on such terms as they may see fit, prohibitions or restrictions of a sanitary character designed to protect human, animal or plant life, or regulations for the enforcement of police or revenue laws.

I avail myself of this opportunity to renew to Your Excellency the assurances of my highest consideration.

A. DE ALENCAR.

His Excellency Mr. CHARLES EVANS HUGHES,
*Secretary of State of the United States of America.*¹

The conclusion of this arrangement put into positive and practical effect the new American commercial policy derived from Section 317 of the Tariff Act of 1922. Its adoption

¹ *Treaty Series*, no. 672. Brazil promptly issued a decree extending to the United States the only preferences granted to an outside country, those affecting fresh fruits from Argentina (the former preferences to Belgium had not been renewed for 1923). Brazil has also issued a decree providing that on and after Jan. 1, 1924, maximum duties will be levied on products of countries which have maximum-minimum schedules and which do not concede minimum rates to Brazil.—*New York Times*, October 25, 1923.

by the executive branch of the Government had already been evidenced by the inclusion of an unconditional most-favored-nation clause in the commercial treaty with Turkey signed at Lausanne on August 6, 1923.¹ "It should . . . be observed," said Secretary Hughes in an address delivered November 30, 1923,² "that in our commercial relations the United States is seeking unconditional most-favored-nation treatment in customs matters." A few days later a new commercial treaty based on that principle was concluded with Germany.³

The new policy may be said to have been completely accepted by the United States if and when such a treaty shall have been entered into by and with the advice and consent of the Senate of the United States.

¹New York Times, August 7, 1923.

²*The Centenary of the Monroe Doctrine.* In this same speech he outlined the policy pursued toward Brazil and expressed readiness to enter into similar engagements with other countries. The State Department set forth the position of the United States Government in a letter of November 13, 1923, to the New York correspondent of *La Nación* (Buenos Aires). The following is an excerpt from this letter:

"Initial steps have recently been taken looking toward the negotiation of new treaties of amity, commerce and consular rights with the five countries of Central America, in each of which it is the purpose of this Government to incorporate a provision for unconditional most-favored-nation treatment in customs matters, should such a provision be found to be agreeable to the Government of the other interested country. The Department contemplates making similar overtures in the near future to other Latin-American countries for the negotiation of new treaties, or the modification of existing treaties, in harmony with this principle, excepting, however, as in the recent exchange of notes with Brazil, the special treatment which the United States accords or hereafter may accord to Cuba and the commerce between the United States and its dependencies and the Panama Canal Zone. Meanwhile, pending the conclusion of a treaty, the Department would be prepared to give prompt consideration to any proposal to bring about reciprocal most-favored-nation treatment by an exchange of notes similar to or identical, *mutatis mutandis*, with the recent exchange between the United States and Brazil."

³Signed Dec. 8, 1923. New York Times, Dec. 9, 1923. Text of Articles VII (most-favored-nation), VIII and IX, *infra*, subdivision 64.

CHAPTER IX

THE AMERICAN TRADITION OF EQUALITY AND THE OPEN DOOR

IN one of the addresses by means of which he stated the policy of his administration to the voters of the country during the campaign of 1922, Secretary Hughes said:

We wish to maintain . . . equality of commercial opportunity—as we call it, the open door. That is not in derogation of anybody else. The door is just as open to others as it is to us. Equality means equality. It doesn't mean privilege.¹

In doing so he re-affirmed a traditional American principle.

Throughout its entire history the United States has been an exponent of the Open Door. The phrase was, however, given the wings upon which it mounted so high in subsequent international thought by the masterly policy through which, in 1899 and subsequent years, John Hay, Secretary of State of the United States, sought to preserve in China both equality of economic opportunity for American commercial interests and the political integrity of that country itself for the benefit of all concerned. The idea involved is in the first instance one of internal administration. It applies primarily to the conditions found in states that are weak politically but which, because of their economic advantages, have attracted the capital of strong states. If there is an Open Door there is no exclusive economic con-

¹Speech of the Secretary of State at Cleveland, Ohio, November 4, 1922, as quoted in *New York Herald*, November 5, 1922.

trol by any one outside nation, and the capital of every nation has equality of opportunity for profitable investment. The principle extends to matters of commerce and may be said to include equality of treatment to all foreign countries with respect to customs duties and all charges that bear upon international exchanges of goods. Some writers have used the words *open door* as descriptive of any region where equality of customs treatment and commercial opportunity prevails.¹

Certainly a very clear and a very helpful analogy exists between the principle of the Open Door and the principle of unconditional most-favored-nation treatment.² The requirements of consistency, moreover, urge upon a country whose policy in general is one of the Open Door the necessity of pursuing, with reference to commercial intercourse with all countries, such a policy as that written into Section 317 of the Tariff Act of 1922. Treaties containing the unconditional most-favored-nation clause are, as has been seen, the appropriate means for translating this policy into practice.

In order to indicate, within the bounds of necessary brevity, the strong hold which the principle embodied in Section 317 has upon the United States because of the consistency of that principle with the well-defined policy of the Open Door, the following topics may be selected as sufficiently illustrative: (a) American tariff policy; (b) the Hay notes concerning China; (c) the pronouncements of the Washing-

¹In this connection see "Preferential Tariffs and the Open Door," by Dr. Benjamin B. Wallace—*The Annals of the American Academy of Political and Social Science*, March, 1924.

²If the phrase "open door" should develop the connotation of equality of economic treatment in and by powerful and wholly independent states as well as in weak or dependent countries, unconditional most-favored-nation treatment might be considered the purely commercial expression of the Open Door.

ton Conference on the Limitation of Armament; and (d) the policy of the United States with reference to territories administered under mandate of the League of Nations.

55. AMERICAN TARIFF POLICY

During the century following the adoption of the Constitution of the United States the tariff laws of this country provided for precisely the same rates of import duties upon goods from all countries without variation.¹ In three instances, however, treaties were adopted which deviated from the rule of strict equality: the treaty of 1831 with France, the reciprocity treaty with Canada (1854) and the reciprocity treaty with Hawaii (1875).² When it is remembered that the war for independence was fought largely as a result of the discriminations with which the mercantilist policies of England burdened colonial commerce, the policy of the United States in encouraging equality of treatment seems the only one consistent with its most venerable national traditions. When discrimination was the general practice in the commercial world, the United States refused to pledge equality except on definite pledge of corresponding treatment, item for item, in return: hence the conditional most-favored-nation clause. Now that equality is the general practice of the commercial world, the United States may and does accord equal treatment as a matter of course, reserving exceptions only in the case of countries that may discriminate against it.

The unduly prolonged maintenance of the American interpretation of the most-favored-nation clause, the bargaining provisions of the McKinley and Dingley Acts, the dis-

¹The differential duties provided for in the first and subsequent tariff acts did not discriminate as between countries. In this connection see articles I and II of the convention of June 24, 1822, with France. (Malloy, *Treaties*, p. 521).

²*Supra*, subdivision 37.

criminating provisos of the Act of 1890 and subsequent tariff acts and, finally, the reciprocity treaty with Cuba, which still survives, aggregate no great number of divergent policies. In the Payne-Aldrich and succeeding laws the normal policy may be said to have been reasserted.¹ On the whole there appears to be sufficient foundation on which to maintain the general declaration that *the tariff policy of the United States has been, historically, one of equality of treatment to all nations, virtually amounting, at least during the greater portion of the time, to a general extension of unconditional most-favored-nation treatment.*

56. THE HAY NOTES CONCERNING CHINA

Following the defeat of China by Japan and the signature of the Treaty of Shimonoseki, 1895, the great European Powers, feeling that China might not continue to exist as an independent state, and being fully aware of the vast opportunities for wealth and power which Chinese lands and the hundreds of millions of Chinese people made possible, proceeded straightway to enter upon a cool and calculating contest for concessions, leases and spheres of influence within the territory of that moribund empire. The situation presented a most delicate problem for those responsible for American foreign policy.

It was not in accord with American custom to join in such procedure as that resorted to by the other powers. Their course, however, was not only offensive to a healthy sense of right and justice but threatened to deprive the United States of commercial and other economic opportunities in China which were unquestionably legitimate as well as potentially of very great value. If China should be carved up among the Powers the doors of commerce and investment would be closed save to the nationals of the Power controlling each particular region.

¹The reciprocity provision of the Act of 1913 was not put in use.

Relying on the moral strength of his position, the Secretary of State, Mr. Hay, late in 1899, instructed the American diplomatic representative to each of the six powers most concerned, Great Britain, Germany, and Russia, Japan, Italy and France, to present to the governments of these countries, respectively, the following proposition, of which the most complete statement was contained in the note of Ambassador Choate to the British Foreign Office.

After reciting the desire of the United States that the interests of its citizens might not be prejudiced by exclusive treatment within any so-called "sphere of interest", as well as the hope of the United States to retain in China "an open market for all the world's commerce, remove dangerous sources of international irritation" and see effected the administrative reforms needed for the purpose of maintaining the integrity of China, this note asks for a formal declaration to the effect (1) that, the British Government

. . . will in nowise interfere with any treaty port or any vested interest within any so-called "sphere of interest" or leased territory it may have in China.

(2) That the Chinese treaty tariff of the time being shall apply to all merchandise landed or shipped to all such ports as are within said "spheres of interest" (unless they be "free ports"), no matter to what nationality it may belong, and that duties so leviabie shall be collected by the Chinese Government.

(3) That it will levy no higher harbor dues on vessels of another nationality frequenting any port in such "sphere" than shall be levied on vessels of its own nationality, and no higher railroad charges over lines built, controlled, or operated within its "sphere" on merchandise belonging to citizens or subjects of other nationalities transported through such "sphere" than shall be levied on similar merchandise belonging to its own nationals transported over equal distances.¹

¹Note of September 22, 1899. *Foreign Relations of the United States*, 1899, pp. 133 *et seq.* See also Moore, *Digest*, vol. v, p. 538.

The United States was successful in obtaining affirmative replies from each of the Powers addressed and on March 20, 1900, Secretary Hay informed them that the United States considered their assent to be "final and definitive."

Subsequent years have revealed many tendencies and some overt acts in violation of the pledges given. The exchanges of notes, however, placed the United States on record as a champion of commercial equality and thus laid the foundation for the undeniable assertion that in this important instance the traditional policy of the United States furnishes ample precedent for leadership in establishing the practice of unconditional most-favored-nation treatment—the policy of Section 317—as the universal practice of the commercial world.

The Hay notes do not present an isolated action. Their principles have been followed ever since by the United States in laying down its policy in the Far East.

57. THE PRONOUNCEMENTS OF THE WASHINGTON CONFERENCE ON THE LIMITATION OF ARMAMENT AND FAR EASTERN QUESTIONS

At the Conference on the Limitation of Armament the United States again demonstrated a superior farsightedness in respect to the Open Door and took advantage of the opportunity to go on record again, in regard to China, at the same time placing the other Great Powers on record, in a fashion more definite and binding than had ever before been realized.¹

The most important accomplishment in this respect was the signature by all of the countries represented—United States, Belgium, British Empire, China, France, Italy,

¹The official record of the Conference, together with texts of treaties and resolutions, is published in a volume entitled *Conference on the Limitation of Armament* (November 12, 1921, to February 6, 1922). Washington: Government Printing Office, 1922.

Japan, the Netherlands and Portugal—of the Nine Power Treaty relating to principles and policies to be followed in matters concerning China. By this treaty the following covenants were agreed to:¹

(a) The Powers other than China agreed to respect the sovereignty, independence and territorial and administrative integrity of China; to provide opportunity for China to develop an effective government; “to use their influence for the purpose of effectually establishing and maintaining the principle of equal opportunity for the commerce and industry of all nations throughout the territory of China”; and “to refrain from taking advantage of conditions in China in order to seek special rights or privileges which would abridge the rights of subjects or citizens of friendly States, and from countenancing action inimical to the security of such States.”

(b) All the parties agreed not to enter into any arrangements of any kind in derogation of the principles just stated.

(c) For the express purpose of effectuating the Open Door in China, the parties other than China agreed not to seek or assist their nationals in seeking any general superiority in respect to commerce or economic development in any designated region; or any monopoly or preference calculated to frustrate the legitimate participation of others in similar enterprises. Acquisition of rights necessary to the conduct of particular undertakings was, however, authorized. China agreed to be guided by these stipulations in dealing with applicants for concessions.

(d) The parties contracted not to support agreements by their respective nationals with each other designed to set up spheres of influence or zones of exclusive opportunities.

¹On April 1, 1924, the Nine Power Treaty had been ratified by all the signatories except France.

(e) China and the other Powers exercising control over Chinese railroads promised to accord equality of service irrespective of the nationality of travelers or the origin of freight.

The treaty relating to the Chinese customs tariffs¹ recognized "the principle of uniformity in the rates of customs duties levied at all the land and maritime frontiers" and made provision to give it practical effect.²

In addition to the treaties the Conference adopted a number of resolutions, among them:

(a) A resolution for the establishment of a Board of Reference to which various questions, for example, whether a particular concession violates the Open Door, may be referred for decision.

(b) A resolution looking to the abolition of foreign postal agencies in China.

(c) A resolution affirming, among other things, that all radio stations operated in China by foreign governments or their nationals, under treaties or concessions, should limit the messages sent and received according to the terms of such treaties or concessions.

(d) A resolution recording hope for the unification of Chinese railways under Chinese control.

(e) A resolution looking to full publicity regarding existing and future commitments by or with respect to China.³

¹Article VI.

²This treaty has not yet been fully ratified.

³Within a year after the close of the Limitation of Armament Conference the United States was given opportunity for a further statement of its Open Door principles in connection with its participation in the Lausanne Peace Conference.

58. THE POLICY OF THE UNITED STATES WITH REFERENCE
TO TERRITORIES ADMINISTERED UNDER MANDATE OF
THE LEAGUE OF NATIONS

By Article 119 of the Treaty of Versailles Germany renounced "in favor of the Principal Allied and Associated Powers [British Empire, France, Italy, Japan and the United States] all her rights and titles over her oversea possessions." This article was among those of which the benefit was extended to the United States by Article II of the treaty with Germany restoring friendly relations, signed August 25, 1921.¹

By virtue of this provision the United States has maintained a claim to all the rights and privileges connected with the mandates of the former German colonies.² As a co-victor in the war which made the mandates possible this country would seem to have ground for similar claims with respect to the mandates of areas formerly a part of the Ottoman Empire.

It has been consistently and persistently argued that, from the very nature of the mandate conception, the Open Door must prevail in mandated territory and no commercial preferences of any kind may obtain there. Such contention is amply justified, so far as the members of the League of Nations are concerned, by the Covenant itself. Article 22 makes perfectly clear the purpose of the mandates to assist and work for the benefit of peoples "not yet able to stand by themselves." Their well-being and development are to form "a sacred trust of civilization" and the mandatories, as trustees, are to render periodic account of their stewardship to the League, an organization designed to represent the

¹ *Treaty Series*, no. 658; Malloy, *Treaties*, p. 2596.

² According to a statement released to the press on April 6, 1921, notes setting forth this contention were, on April 2, addressed to Great Britain, France, Italy and Japan.

entire world. The idea of special privileges could hardly be thought of as consistent with such a theory of administering the affairs of dependent peoples.

Three classes of mandates—which have come to be known as “A”, “B” and “C” respectively—are designated by the Covenant. In the first of these the mandatory’s functions are stated to consist only of rendering administrative advice. In the second the mandatory is given the duty of securing “equal opportunities for the trade and commerce of other Members of the League.” In the third it is expected that the mandated area will be “administered under the laws of the mandatory as integral portions of its territory.” This, however, may reasonably be interpreted as subject to the safeguards, spoken of in the article, designed for the benefit of the natives; and, if the spirit of the mandate principle is to be carried out, may be taken to assure to all states members of the League equality of opportunity in matters of trade and commerce with mandated areas.

The policy of the United States was clearly stated by Secretary of State Colby to Lord Curzon, foreign minister of Great Britain, in the course of a note dated November 20, 1920:

I need hardly refer again to the fact that the Government of the United States has consistently urged that it is of the utmost importance to the future peace of the world that alien territory transferred as a result of the war with the Central Powers should be held and administered in such a way as to assure equal treatment to the commerce and to the citizens of all nations. Indeed it was in reliance upon an understanding to this effect, and expressly in contemplation thereof, that the United States was persuaded that the acquisition under mandate of certain enemy territory by the victorious powers would be consistent with the best interests of the world.¹

¹ League of Nations, *Official Journal*, Mar.-Apr., 1921, p. 140. See also article entitled “Mandates and America’s Stand Regarding Them,” *Current History*, Apr., 1921, pp. 101 *et seq.*

Not having accepted the Treaty of Versailles and so obtained the rights in mandated territories which are expressly guaranteed by that treaty to members of the League of Nations, the American Government was constrained to undertake the negotiation of separate treaties with the mandatory states.

The treaty with Japan in regard to the former German islands in the Pacific Ocean lying north of the equator makes no specification for commercial equality in these small and economically unimportant islands, but provides that existing treaties between the United States and Japan shall be applicable to them. Moreover, it guarantees to the United States open-door treatment with regard to the landing of cables and certain rights in respect to radio-telegraphic communication. This mandate is of class "C."¹

Treaties concerning the "B" mandates have been concluded between the United States and France with reference to Togoland and the Cameroons and between the United States and Belgium with reference to Ruanda-Urundi. In Article 6 of the French and in Article 7 of the Belgian "B" mandates, as confirmed by the Council of the League of Nations, it is provided that

. . . the Mandatory shall ensure to all nationals of States members of the League of Nations, on the same footing as to his own nationals, freedom of transit and navigation, and complete economic, commercial and industrial equality; except that the Mandatory shall be free to organize essential public works and services on such terms and conditions as he thinks just.

Concessions for development of the natural resources of the territory shall be granted by the Mandatory without distinction

¹ *Treaty Series*, no. 664; Malloy, *Treaties*, p. 2723. Signed at Washington, Feb. 11, 1922 (Article II, 3). The text of the most-favored-nation clause in the treaty of 1911 between the United States and Japan is set forth *supra*, subdivision 16(c), note.

on grounds of nationality between the nationals of all States Members of the League of Nations, but on such conditions as will maintain intact the authority of the local Government.

Article 9 of the French mandates (Belgian, Article 10) is as follows:

The Mandatory shall have full powers of administration and legislation in the area subject to the mandate. This area shall be administered in accordance with the laws of the Mandatory as an integral part of his territory and subject to the above provisions.

The Mandatory shall therefore be at liberty to apply his laws to the territory subject to the mandate, with such modifications as may be required by local conditions, and to constitute the territory into a customs, fiscal, or administrative union or federation with the adjacent territories under his sovereignty or control, provided always that the measures adopted to that end do not infringe the provisions of this mandate.¹

The text of the convention between the United States and France relating to the part of the Cameroons under French mandate is essentially as follows:

Subject to the provisions of the present convention, the United States consents to the administration by the Government of the French Republic, pursuant to the aforesaid mandate of the former German territory described in article 1 of the mandate.

The United States and its nationals shall have and enjoy all the rights and benefits secured under the terms of articles . . . 6 . . . and 9² of the mandate to members of the League

¹ The terms of the mandates are set forth in full in the prologues to the treaties signed with the United States.

² The rights secured to members of the League of Nations under Articles 2, 3, 4, 5, 7 and 8 of the mandate are likewise secured to the United States.

of Nations and their nationals, notwithstanding the fact that the United States is not a member of the League of Nations.

Vested American property rights in the mandated territory shall be respected and in no way impaired.

A duplicate of the annual report to be made by the mandatory . . . shall be furnished to the United States.

Nothing contained in the present convention shall be affected by any modification which may be made in the terms of the mandate as recited above unless such modification shall have been assented to by the United States.

The extradition treaties and conventions in force between the United States and France shall apply to the mandated territory.¹

The first treaty with a mandatory power for the purpose of determining the rights of the United States in territory under an "A" mandate was signed on April 4, 1924, with France. It relates to Syria and provides:

that the United States and its nationals shall enjoy in the mandate territory all the rights and privileges assured to States members of the League of Nations under the terms of the mandate. It also provides that, subject to the provisions of local law for the maintenance of public order and public morals, nationals of the United States will be permitted freely to establish and maintain educational, philanthropic and religious institutions.

In the preamble to the treaty, which includes the text of the mandate itself, reference is made to the fact that the United States of America, by participating in the war against Germany, contributed to her defeat and to the defeat of her allies and to the renunciation of the rights and titles of her allies in the

¹Articles 1-6.

The conventions with France in regard to French Cameroons and French Togoland and with Belgium in regard to Ruanda-Urundi are in all respects similar. They were signed on February 13, 1923, February 13, 1923, and April 18, 1923, respectively, and were ratified by the Senate of the United States on March 3, 1924. The texts are set forth in the *Congressional Record*, March 3, 1924, pp. 3586, *et seq.*, unbound issue.

territories transferred by them. In this connection it will be recalled that Turkey, an ally of Germany, under the Treaty of Lausanne renounces all right and title over certain territories including the territory comprising Syria and the Lebanon and that the frontier between Turkey and the new mandate state is defined in an agreement between France and the Angora Government signed October 20, 1921.

In an exchange of notes which is to take place at the time of the signature of the Syrian Mandate Treaty, the French Government undertakes to extend to the United States and to its nationals the benefit of any other agreements or conventions concerning Syria and the Lebanon which may be entered into between the French Government and any other governments.¹

In its stand in regard to mandates, as in regard to the Open Door in China, the United States has set valuable precedents for the development of the policy of Section 317.

¹Press Release, Department of State, for publication in morning newspapers of April 4, 1924. The convention on rights in Syria and the Lebanon was consented to by the Senate on May 14, 1924. Text: *Congressional Record* (unbound), May 14, 1924, pp. 8769 *et seq.*

CHAPTER X

THE GENERAL ACCEPTANCE OF THE UNCONDITIONAL MOST-FAVORED-NATION PLEDGE

The consistency with which the United States abided by the decisions of the Revolutionary Fathers in their conception and treatment of the most-favored-nation clause is not found in the history of European diplomacy. As times and statesmen and nations have changed, changes have also occurred in the form and interpretation of this cardinal feature of commercial agreements. More significant, however, is the fact that, for the last sixty years, generally throughout Europe and the greater part of the commercial world most-favored-nation treatment has been given the simple, straightforward meaning that a nation to which it is accorded shall not be discriminated against, but shall stand on a footing as advantageous as any other, in the markets of the country which accords it.

59. DEVELOPMENT PRIOR TO THE WORLD WAR

"The most conspicuous single event in the commercial history of the nineteenth century," says the United States Tariff Commission, "was the conclusion of the Cobden Treaty of 1860 between England and France."¹ By Article XIX the contracting parties mutually guaranteed to each other, so far as the articles mentioned in the treaty were concerned, every favor which they should grant to any

¹*Reciprocity and Commercial Treaties*, p. 43. Text: *British and Foreign State Papers*, vol. 50, pp. 13 *et seq.* See table of principal sources at the beginning of this monograph.

third power. In the supplementary convention of November 16, 1860, the following Article appeared:

Each of the High Contracting Powers engages to extend to the other any favour, any privilege or diminution of tariff, which either of them may grant to a third Power in regard to the importation of goods mentioned, or not mentioned, in the Treaty of the 23rd of January, 1860.¹

England promptly generalized the concessions made to France, whilst the latter within five years had made similar most-favored-nation treaties with Belgium, Prussia and the Zollverein, Italy, Switzerland, Sweden-Norway, Spain, the Netherlands, Portugal and Austria.

Thus was set on foot the great liberal commercial movement of the third quarter of the nineteenth century. In the view of Europe since that time the function of the most-favored-nation clause has been automatically to distribute or generalize advantages, a view which contrasted with the American policy that its function was to provide merely equality of opportunity to bargain for and obtain concessions by paying in every case an equivalent price. It was as the most efficient instrument for generalizing concessions that the unconditional most-favored-nation clause came at this time to assume its vast importance in European treaties. Great Britain has been the most perfect exponent of the European most-favored-nation policy. Following the Cobden Treaty, the desire for world markets uninterfered with by discriminating duties upon imports was gratified through the successful negotiation by Great Britain of numerous unconditional most-favored-nation agreements.

In 1884 the American Secretary of State submitted to Great Britain a proposal for a reciprocity agreement with the British West Indies which expressly provided that the

¹*Ibid.*, p. 55 (Article V).

privileges conceded should not be granted by either party to other nations by reason of the most-favored-nation clause existing in any treaty with such other nations except upon the giving of a *quid pro quo*. The British minister of foreign affairs replied:

The interpretation of the most-favored-nation clause involved in the United States' proposals is, that concessions granted conditionally and for a consideration cannot be claimed under it. From this interpretation Her Majesty's government entirely and emphatically dissent. The most-favored-nation clause has now become the most valuable part of the system of commercial treaties, and exists between nearly all the nations of the earth. It leads more than any other stipulation to simplicity of tariffs and to ever increased freedom of trade; while the system now proposed would lead countries to seek exclusive markets and would thus fetter instead of liberating trade. Its effect has been, with few exceptions, that any given article is taxed in each country at practically one rate only. . . . But should the system contemplated by the United States be widely adopted, there will be a return to the old and exceedingly inconvenient system under which the same article in the same country would pay different duties varying according to its country of origin, the nationality of the importing ship, and, perhaps at some future time, varying also with the nationality of the importer himself.

It is, moreover, obvious that the interpretation now put forward would nullify the most-favored-nation clause . . . ¹

In order, however, to be able to levy countervailing duties upon bounty-fed sugar and to accept preferential treatment from outlying portions of its empire, Great Britain was later led to modify somewhat the integrity of its original conceptions of the unconditional most-favored-nation clause.

On the continent of Europe, as in England, and as is,

¹ Quoted in Moore, *Digest*, pp. 270-271. See table of principal sources at the beginning of this monograph.

indeed, necessarily the case, tariff policies have been inseparable from and have largely determined the treaty policies of the various states. These tariff policies have varied greatly from that of Great Britain and from each other. The single-schedule tariffs in force in and after 1860 became, through the operation of the most-favored-nation clause in commercial treaties, double-schedule tariffs with the second, or conventional, schedule applicable to the most-favored nations. When any reduction was made on a particular article in a treaty with a particular country, it was automatically generalized to all countries having most-favored-nation agreements with the country making it. On the other hand, in those countries which adopted a statutory double schedule of rates, most-favored-nation treatment usually meant the more or less general application of the lower of the two schedules fixed by legislative enactment.¹ A large majority of the European states which developed differential tariffs clung to the general-conventional type. France was the leading exponent of the maximum-minimum type and Germany of the general-conventional.

In the present connection the fact should be mentioned that a fine art of refined classification developed, during the years following 1890, for devising tariff rates in the treaty schedules. In order that the theoretical generalization of concessions might be made in reality of no advantage to any but the two bargaining states, minute definitions of articles were constructed, so that similar articles from other countries would not fall within them. From the point of view of the commercial ideals of the years 1860 to 1880 such a practice was not only dishonest but, as far as it went, nullifying. Another inharmonious development appeared as a

¹Sometimes reductions below minimum rates are granted by treaty. Under most-favored-nation pledges these must be generalized; hence they tend to form an added conventional schedule.

result of the fact that any one of a number of states bound together by treaty ties could, when renewing treaties, insist upon charging higher duties, thus reducing the practical favor of the most-favored-nation treatment offered. It was a natural thing for other nations to raise their rates and so reduce their favors proportionately — lest they should give more by the treaty system than they received. On the other hand, a state wishing to lower its tariffs, naturally feeling reluctant to do so without the assurance of a *quid pro quo* from other treaty countries, would have to bargain with all the others and obtain through toilsome negotiations the desired cooperation.

Thus the most-favored-nation treaty system, as practiced in Europe in connection with double-schedule tariffs, although originally an instrument of commercial liberalization, may result in the general adoption of higher tariffs. The fact should be remembered, however, that without any treaty system, high tariff walls erected by any one nation form a standing challenge to others to retaliate by similar means; and it is always easier for a nation to head toward commercial illiberalism, dragging others with it, than to lead—and obtain a following—in the opposite direction.

60. THE WORLD WAR AND THE MOST-FAVORED-NATION PRINCIPLE

From the point of view of economic policy the most important event of the war period was the conference attended by representatives of the allied governments which assembled at Paris on June 14, 1916.¹ Its stated object was “to put into practice their [the Allies’] solidarity of views and interests and to propose to their respective Governments suitable measures for realizing this solidarity.”² During

¹The present subdivision, including quotations, is based largely upon Senate Document, no. 491, 64th Congress, 1st Session (1916), entitled, *Trade Agreements Abroad*.

²*Ibid.*, p. 63.

preceding months various threatening, though grandiose, schemes had been put forth in Germany aiming at economic dominance after the war. Various influences in the allied countries, moreover, were at work both before and after the conference with the aim of securing the commercial advantages over Germany which were expected to accrue as a result of an allied victory. The London *Spectator*, in an article written shortly before the Paris resolutions were announced, said:

. . . There is . . . one very important point which ought at once to be dealt with. If the allied powers are to take in the future common action against German commercial methods, they must have their hands free to impose tariffs upon German goods which they do not impose upon the goods of one another. That means that Germany must not be entitled to claim most-favored-nation treatment.

This is of all points perhaps the most immediately important for the Paris conference to settle. In the treaty of Frankfort, which ended the Franco-Prussian War of 1870, there was inserted a permanent most-favored-nation clause regulating the commercial arrangements of France and Germany.¹ This

¹Article XI of the Treaty of Frankfurt, signed May 10, 1871; text as follows:

Les Traités de Commerce avec les différents Etats de l'Allemagne ayant été annulés par la guerre, le Gouvernement Allemand et le Gouvernement Français prendront pour base de leurs relations commerciales le régime du traitement réciproque sur le pied de la nation la plus favorisée.

Sont compris dans cette règle les droits d'entrée et de sortie, le transit, les formalités douanières, l'admission et le traitement des sujets des deux nations ainsi que de leurs agents.

Toutefois, seront exceptées de la règle susdite les faveurs qu'une des Parties Contractantes, par des Traités de Commerce, a accordées ou accordera à des Etats autres que ceux qui suivent:—L'Angleterre, la Belgique, les Pays-Bas, la Suisse, l'Autriche, la Russie.—*British and Foreign State Papers*, vol. 62, p. 81. See also Article XVIII of Additional Convention signed Dec. 11, 1871 (*Ibid.*, p. 98), and Procès-Verbal, signed January 11, 1872 (*Ibid.*, p. 103).

clause was inserted at the request of France, but most French people seem to be agreed that it was Germany who drew the greatest advantage from it. At any rate, there is not likely to be any French opposition to a refusal to insert a similar clause in any treaty of peace that may follow the present war. Nor need there be any opposition from Great Britain.¹

Some months before, a commercial conference at London had gone on record in favor of making provision

(a) For preferential reciprocal trading relations between all parts of the British Empire; (b) for reciprocal trading relations between the British Empire and the allied countries; (c) for the favorable treatment of neutral countries; and (d) for restricting, by tariffs and otherwise, trade relations with all enemy countries, so as to render dumping or a return to pre-war conditions impossible, and for stimulating the development of home manufacture and the consequent increased employment of native labor.²

The recommendations of the Paris Economic Conference were divided into three categories: for the war period, for the reconstruction and for permanent allied collaboration. They aimed generally to insure economic advantage for the allies and corresponding disadvantage for the Central Powers. One of the recommendations intended to operate during the period of reconstruction was as follows:

Whereas the war has put an end to all treaties of commerce between the allies and enemy powers, and it is of essential importance that during the period of economic reconstruction the liberty of none of the allies should be hampered by any claim put forward by enemy powers to most-favored-nation treatment, the allies agree that the benefit of this treatment will not be granted to those powers during a number of years to be fixed by mutual agreement among themselves.

¹ Senate Document, *op. cit.*, p. 44. Quoted from issue of June 17, 1916. *Ibid.*, p. 38.

During this number of years the allies undertake to assure each other, so far as possible, compensatory outlets for trade in case consequences detrimental to their commerce should result from the application of the undertaking referred to in the preceding clause.¹

According to the *London Times*,

The recommendation which was accepted as the most vital of all was that denying to the enemy powers, for a period to be fixed by agreement, of "most-favored-nation" treatment . . .

Members who laid emphasis on the value of the "most-favored-nation" recommendation expressed the view that it struck at the heart of the German fiscal system.²

Liberal opinion, however, saw no good in a scheme to follow up military with economic warfare, and doubtless the President of the United States had the Paris recommendations in mind when, in his address to the Congress on January 8, 1918, he announced as one of the objects to be attained through victory,—

The removal, so far as possible, of all economic barriers and the establishment of an equality of trade conditions among all the nations consenting to the peace and associating themselves for its maintenance.³

Commenting on the Paris recommendations as a whole the *Economic World* said:

On the face of the matter, no international economic project

¹*Ibid.*, p. 65.

²*Ibid.*, p. 52. Issue of June 22, 1916.

³Point III of the Fourteen Points; quoted by Baker, Ray Stannard, *Woodrow Wilson and World Settlement* (Garden City, N. Y., 1922), vol. iii, p. 43.

This attitude on the part of the United States might have been appropriately cited in the preceding chapter as a precedent for the policy of Section 317.

so vast as this in scope, or indeed even remotely comparable with it, has ever been undertaken in recorded history; and, more than this, the very conception of such a project, permanently inimical in its ostensible objectives to two of the greatest of the nations of the world, is utterly novel. There have been in the past, of course, numberless bitter rivalries, economic as well as political, between great peoples on the globe; but there is no previous instance, so far as we can remember, of the employment of every conceivable economic means by one rival or group of rivals for the incessant and indefinitely prolonged impairment of the economic forces of its antagonist or antagonists.¹

So far as the most-favored-nation clause is concerned, the extent to which the Peace Conference followed the recommendations of the 1916 economic conference at Paris will appear in the outline of treaty provisions which follows.

6I. MOST-FAVORED-NATION TREATMENT IN THE TREATIES OF PEACE

The treaty of Versailles, making peace with Germany, caused that country to guarantee that—

Every favour, immunity or privilege in regard to the importation, exportation or transit of goods granted by Germany to any Allied or Associated State or to any other foreign country whatever shall simultaneously and unconditionally, without request and without compensation, be extended to all the Allied and Associated States.²

There was no reciprocal pledge to Germany, but the obligation on Germany's part will cease to be effective after five years (that is, on January 10, 1925) unless the Council of the League of Nations decides, at least a year before that

¹ Senate Document, *op. cit.*, pp. 59-60. Issue of July 1, 1916; article by Arthur Richmond March.

² Article 267.

date, that they shall remain binding, with or without amendment, for an additional period.¹

Most-favored-nation treatment is provided for in an elaborate group of articles embracing various subjects and effective for different periods. For the reconstruction period, at least, the Allied and Associated² Powers are thoroughly secured in their claim for equality in the German markets.

In the Treaties of Saint Germain, Trianon and Neuilly, Austria, Hungary and Bulgaria, respectively,³ have made the same most-favored-nation pledge. In the case of Austria and Hungary, it is agreed, however, that, unless the League of Nations decides otherwise, an Allied or Associated power shall not, after the expiration of three years, be entitled to require fulfillment of the above provision if that power does not accord correlative treatment in return.⁴ As in the treaty with Germany, the treaties with the other Central Powers provide for numerous guarantees of most-favored-nation treatment in various branches of commercial activity.

The Treaty of Sèvres, signed by the Principal Allied Powers and Turkey, contains no provision analogous to those cited in the other treaties of peace, but provides that—

The capitulatory regime resulting from treaties, conventions or usage shall be reestablished in favour of the Allied Powers which directly or indirectly enjoyed the benefit thereof before August 1, 1914, and shall be extended to the Allied Powers which did not enjoy the benefit thereof on that date.⁵

¹ Article 280.

² The United States incorporated these provisions in its treaty of peace with Germany.

³ Articles 220, 203 and 150, respectively.

⁴ Articles 232 and 215, respectively.

⁵ Article 261. The Treaty of Sèvres never went into effect. It was superseded by the treaty signed at Lausanne July 24, 1923, providing for the abolition of the capitulations, but granting mutual most-favored-nation treatment.

At the Paris Peace Conference following the World War, the Principal Allied and Associated Powers also concluded treaties with certain allied states which were to be the recipients of territory detached as a result of the war from enemy powers and Russia. These were Czechoslovakia, Greece, Poland, Roumania and the Serb-Croat-Slovene State. The treaties with these states contain no general most-favored-nation clause relating to imports and exports, such as that included in the treaties with the enemy countries. However, they contain certain interesting provisions, of which Article 15 of the treaty with Poland is typical,—

Poland undertakes to make no treaty, convention or arrangement and to take no other action which will prevent her from joining in any general agreement for the equitable treatment of the commerce of other States that may be concluded under the auspices of the League of Nations within five years from the coming into force of the present Treaty.

Poland also undertakes to extend to all the Allied and Associated States any favours or privileges in customs matters which she may grant during the same period of five years to any State with which since August, 1914, the Allies have been at war, or to any State which may have concluded with Austria special customs arrangements as provided for in the Treaty of Peace to be concluded with Austria.¹

¹Article 222 of the treaty with Austria, to which reference is here made, is as follows:

"Notwithstanding the provisions of Articles 217 to 220, the Allied and Associated Powers agree that they will not invoke these provisions to secure the advantage of any arrangements which may be made by the Austrian Government with the Governments of Hungary or of the Czecho-Slovak State for the accord of a special customs regime to certain natural or manufactured products which both originate in and come from those countries, and which shall be specified in the arrangements, provided that the duration of these arrangements does not exceed a period of five years from the coming into force of the present Treaty."

The treaties with the succession states contain most-favored-nation clauses, dependent upon reciprocity, governing vessels, transit and, in some of them, a few other matters.

Viewing the war period as a whole, one may say without hesitation that the delicately adjusted most-favored-nation régime that had grown up in Europe following the Cobden treaty of 1860 was dealt a severe but not, as will presently be shown, a fatal blow by the developments of 1914-1919.

62. DEVELOPMENTS OF THE RECONSTRUCTION PERIOD

The reaction from the cooperative spirit of allied warfare is inevitably an epidemic of chauvinism. This has been pre-eminently true of the period following the World War and has manifested itself nowhere more definitely than in commercial relations. Tariff walls, undertaken under pressing need for revenue and economic conservation have developed into serious hindrances or even prohibitions of commerce. Great Britain has departed from its free-trade tradition and the continent of Europe has become a maze of high-tariff barriers. Systems of licensing imports and exports, or of limiting them to fixed quotas, have developed in several countries. In the midst of such conditions changes in commercial treaties would not be unexpected.

As a matter of fact, the denunciation of treaties began before the war was over. As between hostile governments the outbreak of war terminated the treaties in force, including commercial conventions.

France, in 1918, announced the intention to terminate all commercial treaties, to which it was a party, which contained "the general clause regarding the most-favored-nation or the consolidation of tariffs." With a few exceptions, however, the treaties were later continued indefinitely, subject to termination on three months' notice, and several new treaties were concluded.¹

The action of France in denouncing its treaties was typical of other continental countries. Thus Greece, in

¹*Handbook, passim and pp. 869 et seq.*

1919, denounced a number of treaties, including one with the United States. Roumania took similar action in 1921. In Russia the revolution of 1917 put an end to the existing treaty régime. In 1917, also, Italy denounced many treaties and actually terminated a number of them. Spain denounced several treaties the next year, but continued them in force for a time and later replaced them by temporary *modi vivendi*. Both Italy and Spain have, however, engaged in extensive negotiations and have concluded a considerable number of new treaties since the war.

In England also there was strong sentiment for denouncing treaties containing the most-favored-nation clause. Such opinion as approved the recommendations of the Paris economic conference of 1916 would naturally have supported so obvious a corollary. Mr. Bonar Law stated in the House of Commons on May 13, 1918, that the treaties would be denounced. The denunciation, however, did not take place, and notwithstanding the resolves of war times and of the period immediately following the war, Europe has not thrown overboard the ante-bellum most-favored-nation treaty system. Therein lies encouragement for the new American commercial policy.

Among the succession states to the Austro-Hungarian Empire the very pressing need for commercial intercourse has forced the adoption of many arrangements, most of them temporary, for tiding over the reconstruction period. At the Porto Rose Conference of 1921 recommendations for a common-sense régime among these states received hearty approval and appear to have laid the foundation for a permanent liberalization of commercial relations. The same may be said of various treaties and conferences affecting former portions of the Russian Empire bordering the Baltic.

The Plenary Session of the Genoa Conference, held May 19, 1922, accepted a report of the Economic Commission containing the following language:

The Conference refers to the principle of equal treatment of commerce enunciated in Article 23 of the Covenant of the League of Nations and strongly recommends the reestablishing of commercial relations on the basis of commercial treaties resting, on the one hand on the system of reciprocity adapted to special circumstances and containing, on the other hand, as far as possible, the most-favored-nation clause.¹

The definite adoption of a policy of unconditional most-favored-nation treatment is seen in many bi-lateral conventions entered into during the last few years. The situation as a whole indicates a tendency toward the re-establishment of the ante-bellum most-favored-nation régime. Aggressive assertion of such a policy by a single powerful country would stand an excellent chance of being crowned with successful leadership in effecting its general adoption.²

63. VITALITY OF THE UNCONDITIONAL MOST-FAVORED-NATION PRINCIPLE

From the point of view of the new American commercial policy the facts outlined in this chapter have much significance. In the first place unconditional most-favored-nation arrangements had, before the World War, become the traditional method of establishing commercial relations. In the second place this traditional policy has proven to be so firmly established that not even the debacle of war could destroy it. In the general wreck of Europe it also was wrecked and for a time it seemed to be abandoned. Recent months have, however, disclosed long strides toward its rehabilitation. Excepting in France and a few other countries, the restoration of its vitality and integrity seems not impossible but rather to be hoped for with some confidence.³

¹ Article 9, see Mills, J. Saxon, *The Genoa Conference*, p. 420 (London).

² See also chap. xi, *infra*.

³ See Chalmers, Henry, "European Tariff Policies Moderating," *Commerce Reports*, Feb. 11, 1924, p. 359.

Those who in a spirit of narrow caution or short-sighted desire for advantage would oppose this open-door liberality are reminded of the example of Germany in the treaty of Frankfurt. The mutual most-favored-nation clause appears to have been inserted at the request of France. But, says the above-quoted passage from the London *Spectator*, "most French people seem to be agreed that it was Germany who drew the greatest advantage from it." Germany was then a country of expanding industry and needed to be guaranteed against discrimination in the markets of all countries. Bismarck was wise enough to see this and to be liberal with defeated France in obtaining it. Can there be any real doubt that the wisdom of Germany in 1871 is a good example for the victorious nations of the world today?

CHAPTER XI

THE RECONCILIATION OF AMERICAN POLICY WITH OTHER SYSTEMS OF COMMERCIAL TREATIES

64. AMERICAN POLICY

The policy of a strong, victorious commercial nation, if set in the direction of reasonable liberalism, is almost certain not only to assist other countries in their commercial progress, but greatly to enhance its own prosperity. In Chapter III the confident conclusion was reached that the future policy of the United States, not only under apparent mandate of law, but as a matter of sound political economy, should seek the negotiation of treaties containing assurances of unconditional most-favored-nation treatment. At the close of the chapter a list was given of some of the countries with which such treaties seem immediately desirable. The convention of commerce and navigation between the United States and Serbia (1881) contains an unconditional most-favored-nation clause.¹ It may be considered to have been extended² so as to be operative with the new and ex-

¹Malloy, *Treaties*, p. 1613. Article VI is as follows: "As to the amount, the guarantee and the collection of duties on imports and exports, as well as regards transit, re-exportation, warehousing, local dues and customhouse formalities, each of the two High Contracting Parties binds itself to give to the other the advantage of every favour, privilege or diminution in the tariffs on the import or export of the articles mentioned or not in the present convention, that it shall have granted to a third power. Also every favour or immunity which shall be later granted to a third power shall be immediately extended, and without condition, and by this very fact to the other Contracting Party."

²By note of Oct. 24, 1922, the minister of the Kingdom of the Serbs, 479]

panded Kingdom of the Serbs, Croats and Slovenes, and it provides a precedent for unconditional most-favored-nation treatment long existent in the treaty system of the United States. Its unconditional assurances have not, however, been tested in practice.

If new treaties incorporating unconditional most-favored-nation provisions are to be negotiated, the matter of framing an adequate most-favored-nation clause becomes important. An effort to meet the need for such a clause is readily seen to involve several considerations:

(1) In view of the interpretation which American diplomats and courts have placed upon most-favored-nation clauses the language of which is neither expressly conditional nor expressly unconditional, care must be taken to make the unconditional obligation of the new treaties clear beyond peradventure of doubt.

(2) The complexity of the customs and other duty barriers that have been set up in the path of commerce makes of probable necessity a rather detailed statement of most-favored-nation guarantees.

(3) The relations of the United States with Cuba and with the Philippines, Guam, the Virgin Islands and American Samoa (American dependencies having their own customs laws), are clearly preferential and hence discriminatory against other nations. As there is no provision in the statute law of the United States authorizing a change, and no perceptible movement in favor of it, and as the reciprocity treaty between this country and Cuba¹ makes the prefer-

Croats and Slovenes informed the Secretary of State that all trade treaties and conventions concluded between the former Kingdom of Serbia and other countries and still in force had been made applicable to the whole territory of the Kingdom of the Serbs, Croats and Slovenes. The Department of State expressed no dissent.

¹Concluded Dec. 11, 1902. See Art. VIII. Malloy, *Treaties*, pp. 353, 355-356.

ences exclusive, there appears to be no practicable alternative to the necessity of noting an exception of the treatment of the products of Cuba, and also of the above-named dependencies with respect to trade both with the United States and among themselves. It would seem essential that exception with respect to the dependencies should be specifically stated in order that the expression "most-favored-nation treatment", unmodified, may develop the absolute meaning required by the definition of "foreign country" in Section 317 of the Tariff Act of 1922, and that the foundation may be laid for dealing with the colonial preferential systems elsewhere existing as soon as the United States advances to the point of willingness to dispense with its own.¹

(4) Certain provisions that might be considered modifications of the absolute obligation of a most-favored-nation clause, for example a provision for quarantine affecting goods of a particular origin, are commonly recognized and should be included.

These requirements would seem to be fully met in the following elaborate article of the general treaty of *Friendship, Commerce and Consular Rights*, concluded with Germany on December 8, 1924, and promptly submitted to the Senate for its consent to ratification:

Between the territories of the high contracting parties there shall be freedom of commerce and navigation. The nationals of each of the high contracting parties equally with those of the most favored nation, shall have liberty freely to come with their vessels and cargoes to all places, ports, and waters of every kind within the territorial limits of the other which are or may be open to foreign commerce and navigation. Nothing in this treaty shall be construed to restrict the right

¹ Similar exceptions will doubtless be demanded by other countries in the course of actual negotiations.

of either high contracting party to impose, on such terms as it may see fit, prohibitions or restrictions of a sanitary character designed to protect human, animal, or plant life, or regulations for the enforcement of police or revenue laws.

Each of the high contracting parties binds itself unconditionally to impose no higher or other duties or conditions and no prohibition on the importation of any article, the growth, produce, or manufacture of the territories of the other than are or shall be imposed on the importation of any like article the growth, produce, or manufacture of any other foreign country.

Each of the high contracting parties also binds itself unconditionally to impose no higher or other charges or other restrictions or prohibitions on goods exported to the territories of the other high contracting party than are imposed on goods exported to any other foreign country.

Any advantage of whatsoever kind which either high contracting party may extend to any article, the growth, produce, or manufacture of any other foreign country shall simultaneously and unconditionally, without request and without compensation, be extended to the like article the growth, produce, or manufacture of the other high contracting party.

All the articles which are or may be legally imported from foreign countries into ports of the United States in United States vessels may likewise be imported into those ports in German vessels without being liable to any other or higher duties or charges whatsoever than if such articles were imported in United States vessels; and, reciprocally, all articles which are or may be legally imported from foreign countries into the ports of Germany in German vessels may likewise be imported into these ports in United States vessels without being liable to any other or higher duties or charges whatsoever than if such were imported from foreign countries in German vessels.

With respect to the amount and collection of duties on imports and exports of every kind, each of the two high contracting parties binds itself to give to the nationals, vessels, and goods of the other the advantage of every favor, privilege,

or immunity which it shall have accorded to the nationals, vessels, and goods of a third State, and regardless of whether such favored State shall have been accorded such treatment gratuitously or in return for reciprocal compensatory treatment. Every such favor, privilege, or immunity which shall hereafter be granted the nationals, vessels, or goods of a third State shall simultaneously and unconditionally, without request and without compensation, be extended to the other high contracting party for the benefit of itself, its nationals, and vessels.

The stipulations of this article shall apply to the importation of goods into and the exportation of goods from all areas within the German customs lines, but shall not extend to the treatment which either contracting party shall accord to purely border traffic within a zone not exceeding 10 miles (15 kilometers) wide on either side of its customs frontier, or to the treatment which is accorded by the United States to the commerce of Cuba under the provisions of the commercial convention concluded by the United States and Cuba on December 11, 1902, or any other commercial convention which hereafter may be concluded by the United States with Cuba, or to the commerce of the United States with any of its dependencies and the Panama Canal Zone under existing or future laws.¹

¹ Article VII. *Congressional Record* (unbound), Feb. 7, 1924, pp. 2042, *et seq.* (2043). The Senate in this case removed the injunction to secrecy without having previously consented to ratification. Complete text also published in *Board of Trade Journal*, Feb. 23, 1924, pp. 283, *et seq.* Articles VIII and IX, of interest in the present connection, are as follows:

"The nationals and merchandise of each high contracting party within the territories of the other shall receive the same treatment as nationals and merchandise of the country with regard to internal taxes, transit duties, charges in respect to warehousing and other facilities, and the amount of drawbacks and bounties.

"No duties of tonnage, harbor, pilotage, lighthouse, quarantine, or other similar or corresponding duties or charges of whatever denomination, levied in the name or for the profit of the Government, public

Having thus made use of a most-favored-nation clause that seems to be sufficient for the purpose of putting into effect a commercial policy such as that outlined in this monograph, the American Government is doubtless confronted with the question of the compatibility of such provisions with the treaty systems of the states with which treaties are to be sought. Can treaties the contents of which are centered around an unconditional most-favored-nation clause be said to have a reasonable hope of acceptability when measured by the requirements of other treaty systems?

A foregoing chapter has set forth some of the difficulties arising from the tariff policies of other countries. The chief object of the present chapter is to inquire whether the commercial treaties that have succeeded or survived the World War reaction may upon examination prove to have been correctly counted as an aid in the development of the new American commercial policy. As limitations of space forbid an examination of the treaty systems of all of the countries with which new treaties may be desirable, much less the score of countries the American treaties with which seem to need revising—unconditioning—resort must be had to brief discussions of certain treaties of a few countries which present typical problems for the negotiators of the United States. For this purpose the choice of Spain, Finland, Poland, Russia, Czechoslovakia, Australia and the Central American states seems likely to yield the maximum benefit. The cited treaties of certain of these countries

functionaries, private individuals, corporations, or establishments of any kind shall be imposed in the ports of the territories of either country upon the vessels of the other, which shall not equally, under the same conditions, be imposed on national vessels. Such equality of treatment shall apply reciprocally to the vessels of the two countries, respectively from whatever place they may arrive and whatever may be their place of destination."

with France and Italy will exhibit and contrast the treaty policies of those two countries.¹

65. SPAIN

Spain is one of the more important states of Europe in respect to both population and area. From the earliest times it has occupied a notable place in the foreign relations of the United States, both political and economic. It is a good customer of the United States, importing in the record year 1920 nearly 150 million dollars' worth of American goods—chiefly raw cotton,² wheat and, in increasing amounts, manufactured products, such as machinery and automobiles.³ In return Spain sends to the United States large quantities of olives and olive oil, nuts, fruits and vegetables, cork, skins and pyrites, amounting in each of the last few years, however, to less than half the value of Spain's imports from this country.⁴ Continental Spain and the neighboring Spanish islands contain upwards of 20 million inhabitants; the colonies nearly one million.

Since the World War Spain's commercial policy has apparently been very greatly influenced by its war-born industrial enterprise. In former years Spain had devoted almost its entire energy to agriculture and to its natural resources.

At the present time the discriminations practiced by Spain against American commerce appear to be limited to the pref-

¹ In Italy there is reported to be insistent advocacy of equality of treatment in commercial treaties. This stand is consistent with Italian policy since the Kingdom was constituted and is based on Italian endeavors to secure foreign markets for its national products.

² 35% of the total in 1921.

³ In 1912 the total exports from the United States to Spain amounted to \$31,671,556; in 1921, to \$69,197,443; in 1922, to \$70,931,175.—*Statistical Abstract of the United States, 1921*, and figures obtained from Department of Commerce.

⁴ Imports into the United States from Spain amounted to \$22,221,201 in 1912; to \$26,159,927 in 1921; to \$28,668,681 in 1922 (*ibid.*).

erential treatment accorded to a few products of Italy,¹ to Portugal and to the Spanish dependencies.² But the action of Spain in formally denouncing, effective November 5, 1923, the commercial agreement concluded with the United States on August 1, 1906, which agreement contained a most-favored-nation clause, may be the prelude of more serious and less justifiable discriminatory treatment.³ This action emphasized the immediate necessity of a treaty with Spain providing for unconditional most-favored-nation treatment and negotiations were actively commenced about June 1, 1923.

For the purpose of studying present tendencies in Spanish commercial policy the recently-concluded treaties with Great Britain, France, Switzerland and Norway seem most illuminating.

¹Under treaty effective December 10, 1923. *Commerce Reports*, January 14, 1924, p. 122, *e. g.*, sulphur.

²The free importation of the products of Andorra, and certain existing classifications for the collection of harbor and other dues which favor the goods of Europe as compared with those brought from another continent, seem unworthy of mention here. It is doubtful whether the latter instance may properly be pronounced discriminatory in principle.

³The commercial agreement of Aug. 1, 1906, was one of the "argol agreements" concluded under the tariff act of 1897 (*supra*, ch. ii). So far as the United States was concerned it was terminated at the expiration of one year following notice given on Aug. 7, 1909, after the passage of the new tariff act of that year. In acknowledging the action of the United States by which Spain was accorded the minimum schedule of the Act of 1909, the Spanish Government indicated that it would continue to accord favorable treatment to the ships and products of the United States.

Just prior to November 5, 1923, Spain informed the United States that it would agree to a six months' extension of time during which American goods should continue to be admitted as theretofore. It was expressly stipulated, however, that concessions accorded under treaties thereafter concluded would not be extended to the United States. Extension to May 5, 1925, was later agreed to.

The essential clauses of the 1906 agreement are quoted in subdivision 37(g), *supra*.

The *Anglo-Spanish* commercial treaty,¹ signed October 31, 1922, and promptly put into effect as a *modus vivendi* pending ratification, provides in the first place for "reciprocal freedom of commerce and navigation" between the territories of the two contracting parties. Article 2 is a general most-favored-nation clause, as follows:

The Contracting Parties agree that, in all matters relating to commerce, navigation, and industry, any privilege, favour, or immunity which either Contracting Party has actually granted or may hereafter grant, to the ships and subjects or citizens of any other foreign State, shall be extended simultaneously and unconditionally without request and without compensation to the ships and subjects of the other, it being their intention that the commerce, navigation, and industry of each Contracting Party shall be placed in all respects on the footing of the most favoured nation.

National or most-favored-nation treatment or both are reciprocally provided for in the first four articles with respect to a variety of economic matters.

Article 5 sets forth the customs treatment to be accorded to British goods entering Spain.—(1) There is a group of specified articles which, if produced or manufactured in "His Britannic Majesty's Territories," shall not be subjected to higher rates than those mentioned in an appended schedule.² These embrace more than one hundred and thirty items of the Spanish Tariff and the fixed rates are in most instances materially lower than those of the second-column schedule. Iron and steel plates, bars and sheets;

¹ Text: *Board of Trade Journal*, November 9, 1922; May 1, 1924. Ratifications exchanged April 23, 1924.

² A note to the schedule states that British articles shall enjoy the reductions conceded by Spain to similar goods of French or Swiss production or manufacture by the treaties of July 8 and May 15, 1922, respectively.

copper, brass and bronze plates, tubes and pipes; locomotives; motor cars; and certain cotton and woolen fabrics may be mentioned as important instances. (2) A group including 1258 of the 1540 headings in the Spanish tariff is guaranteed most-favored-nation treatment. (3) All articles included in the 282 remaining tariff headings are guaranteed second-column rates, provided—

that if at any time any benefit or advantage is conceded to any foreign country in respect of any specified article which is of interest to the trade of His Britannic Majesty's territories, the Government of His Catholic Majesty will be prepared to extend such benefit or advantage to similar articles produced or manufactured in His Britannic Majesty's territories, on receiving an application for such extension from His Britannic Majesty's Representative at Madrid.

(4) Most-favored-nation treatment with respect to modifications in the Spanish customs regulations governing the classification of goods not specially mentioned in the tariff, and respecting packing and tare allowance, is also provided for. The special treatment that is or may be accorded to the products of Portugal or of the Spanish Zone of Morocco, is, however, excepted from these guarantees.

Article 6 sets forth the reciprocal customs treatment to be accorded the products of Spain when imported into "His Britannic Majesty's territories" — (1) Free entry (except for prohibitions in time of war) is provided for iron ore, cork, cork discs, grapes, walnuts, hazel nuts, almonds, onions, tomatoes, oranges, bananas, olive oil and preserved vegetables. (2) Wine and wine lees, brandy and raisins may not be subjected to higher import duties than those in force at the date of the signature of the treaty. (3) All Spanish products are to be accorded most-favored-nation treatment.

Most-favored-nation treatment, with respect to prohibited imports, with exceptions for sanitary and other reasons, is provided for in Article 7. Articles 8 to 25 embrace a variety of subjects normally found in commercial treaties, such as industrial property, corporations and companies, transit and commercial travelers.

Most-favored-nation treatment with respect to export, tonnage, port and other duties and restrictions is to be mutually accorded. The treaty applies only to the United Kingdom, so far as the British Empire is concerned, unless subsequent notification is given of the adherence of other portions. For six months, however, from the coming into force of the treaty, according to an arrangement effected by exchange of notes, goods originating elsewhere in the empire were to be dutiable at Spanish second-column rates, provided Spanish goods were accorded most-favored-nation treatment.

The *Franco-Spanish Treaty*,¹ signed July 8, 1922, and provisionally put into effect a week later, resembles the treaty subsequently entered into between Spain and Great Britain in its general—though less complete—basis of most-favored-nation treatment, and in the fact of special concessions provided for in addition or exception thereto.

Certain enumerated articles, products of Spain and its possessions, are to be admitted into France and its possessions in which the French customs tariff is in force, at the rates of the minimum schedule and certain others at rates intermediate between the minimum and general schedules. Spain may not, however, claim with respect to such articles the preferential rates that may be accorded (1) to French protectorates; (2) under special régimes resulting from economic unions with neighboring countries; (3) temporarily

¹ For outline, see *Board of Trade Journal*, July 20, 1922.

in order to facilitate the operation of financial arrangements with countries at war with France in the period 1914-1918 France promises with respect to the goods accorded minimum rates to extend to them most-favored-nation treatment including any reductions that may be effected by modifications in tariff nomenclature or from specializations that may be introduced into the tariffs through legal or administrative measures.

Spain agrees on its part to accord to a long list¹ of products of France and its possessions, entering the Spanish mainland or the Balearic Islands, specific rates lower² than those of the Spanish second-column schedule. These rates may not be increased and France is to have, through the guarantee of most-favored-nation treatment, the benefit of any reductions that may be made, with respect to the products enumerated, to countries other than Portugal or the Spanish Zone of Morocco. Future administrative and other modifications that may result in reductions in duties affecting these goods, are to be extended to France. All other French goods are to enjoy second-column rates and many of them are, in accordance with a most-favored-nation clause, to enjoy, with the same exceptions, any reductions that Spain may later make to third countries.

Spain promises most-favored-nation treatment to the goods of France and possessions entering the Canary Islands and the Spanish possessions in northern Africa.

General most-favored-nation treatment with respect to export duties and the relaxation of import prohibitions is mutually guaranteed. Should either France or Spain establish new import or export prohibitions, the possibility of relaxing such prohibitions or of fixing contingents is to be

¹Numbering over 300.

²There appears to be an occasional instance where the second-column and the treaty rates are the same.

studied by either country at the request of the other with a view to the avoidance of unnecessary interference with commercial relations between the two countries. Most-favored-nation treatment in all that concerns import and export duties and customs facilities in each country's overseas colonies having special customs régimes is mutually accorded.

The treaty contains numerous other provisions commonly a part of commercial arrangements.

The *Spanish-Swiss Treaty*,¹ provisionally effective May 16, 1922, provides in the first place for mutual most-favored-nation treatment with respect to imports, exports and transit shipments. This provision is, however, modified by a number of special arrangements. Each country concedes to the other the importation of articles specified in extensive lists at rates lower than the statutory tariffs. Thus Switzerland accords special rates to certain articles for which Spain wishes particularly to find foreign markets, for instance, specified fruits, nuts, wines and cork products. In return Spain accords a number of rates reduced below those of the second column of the Spanish tariff in amounts generally from five to fifteen per centum; also reductions as great as thirty per centum in the case of certain machinery and eighty per centum in the case of certain varieties of watches.

Spain, in promising most-favored-nation treatment, makes the usual exception of the rates accorded to Portugal and the Spanish Zone of Morocco. Moreover, an unusual arrangement is included which prevents Switzerland from later claiming, for certain products, the benefit of any reductions from second-column rates which Spain may accord to a third country. This provision is of obvious importance in view of the numerous reductions below second-column

¹For outline, see *Board of Trade Journal*, May 25, 1922. See also *ibid.*, May 11, 1922; *Commerce Reports*, June 19, 1922.

rates provided for in the subsequent treaties with France and Great Britain.

The *Spanish-Norwegian* treaty¹ of October 7, 1922, provisionally put into effect before signature, is largely devoted to arrangements under which Spanish wines may be admitted into Norway. In regard to general commerce Spain agrees to apply to Norwegian merchandise the duties of the second column. To a limited number of goods, notably to products of the fisheries, rates lower than those of the present second column are fixed. To these articles and to certain others, Spain guarantees most-favored-nation treatment.

The Norwegian government is, in a general way, to apply to Spanish goods the duties of the minimum tariff in force at any time. To a specified list of articles, chiefly fruits, special reduced rates are accorded and most-favored-nation treatment is guaranteed to all Spanish goods.

To its most-favored-nation pledge Spain makes exception of such advantages as it may extend to Portugal, the Spanish Zone of Morocco or to the Spanish-American republics; correspondingly Norway makes exception in regard to neighboring islands, to Denmark and to Iceland.

The foregoing review indicates the limitations that have been placed by Spain around the most-favored-nation provisions of its recent treaties. It indicates also that these treaties contain, in regard to matters of commerce, substantial guarantees of most-favored-nation treatment, approximating completeness in the latest and, probably, the most important of them, the treaty with Great Britain. These facts must not, however, lead to undue optimism in regard to the reconciliation of the commercial policy of Spain with the new commercial policy of the United States. The two

¹ For outline see *Board of Trade Journal*, Oct. 12, 1922. See also *Commerce Reports*, Jan. 30, 1922.

policies are, as was made evident in a preceding chapter,¹ mutually antagonistic and are both supported by legislative enactments. Complete accord must come, if at all, through willingness on the part of one or both parties to depart from the full implications of the respective national programs. Certain pertinent facts and circumstances may appropriately be considered by the people of both countries:

(1) While it is true that the policy proposed by the United States is believed to be one that will benefit American commerce, it is also believed to be one that will be equally beneficial to the commerce of the other countries adopting it. The policy of special bargaining, on the other hand, appears to be one that leads to commercial strife and tariff war—to the detriment of all participants. Discriminations against the United States are likely to invoke the additional duties of Section 317 against the products of the discriminating country.

(2) Spain is in a relatively unfavorable position to carry on a tariff war with the United States. American cotton is a necessity in Spain and could be paid for only with increasing difficulty if Spanish goods were at a disadvantage in the American market. The United States, on the other hand, could readily dispense with all imports from Spain. Moreover, the American market is relatively more important to Spain than is the Spanish market to the United States. Though the value of the exports from the United States to Spain is almost invariably much greater than that of American imports from Spain, yet these exports were, in 1922, less than two per centum of the total American exports, while of its total exports Spain sends to the United States nearly thirteen per centum.

(3) There seems to be no reason for great alarm in

¹ *Supra*, ch. vii.

regard to the reciprocity provisions of Spanish statute law. These provisions undoubtedly indicate a line of policy, but both policy and law may be altered by a treaty signed and ratified. The American tariff law of 1897 laid down certain rules in regard to the negotiation of reciprocity treaties. But the reciprocity treaty of December 11, 1902, with Cuba, was concluded independently of those rules and of the program of the Act of 1897 and embraced provisions in no sense contemplated by the statute.¹

(4) Spain has already conceded what appears to amount to a general grant of most-favored-nation treatment to the British Empire. The protection of Spanish industries would not be seriously interfered with, it would seem, by a grant to the United States of the desired straight-out pledge of treatment not less favorable than that accorded to any other foreign country.

(5) Both Spain and the United States will undoubtedly desire to make exception of their treatment of their respective dependencies. To counterbalance the special treatment which the United States accords to Cuba, Spain may appropriately except its treatment of Portugal in pledging most-favored-nation privileges.

In view of these considerations, notwithstanding the obstacles to be overcome, the eventual conclusion of a treaty with Spain containing an unconditional most-favored-nation clause would appear to be well within the realm of reasonable possibility.

¹A precedent in American constitutional law is, of course, not necessarily a precedent with respect to Spain. In the present case, however, there appears to be no lack of power on the part of the Spanish Government to negotiate an unconditional most-favored-nation treaty; whether the Cortes will ratify it is another matter.

Concerning the reciprocity provisions of the tariff act of 1897, which remained law until 1909, see *supra*, subdivision 18(c).

66. FINLAND

Finland declared its independence of Russia on December 6, 1917, and the latter country recognized the new republic by the Treaty of Dorpat, signed October 14, 1920. It is a country of vast forests, of farms and of some manufacturing industries. Imports from the United States amounting on the average to more than ten millions of dollars a year may be expected. It is in a position to furnish to the United States great quantities of the much-needed wood-pulp for making newsprint and other paper. The population is well over three millions.

Finland at present discriminates against the United States, and in favor of countries with which it has concluded treaties, respecting certain import duties¹ and certain dues falling upon ships entering its harbors. The treaty system which is developing in Finland includes agreements with France, Russia, Esthonia and Germany.

France was the first country to enter into a purely commercial treaty with Finland.² This compact became effective July 21, 1921, and contains the pledge of reciprocal most-favored-nation treatment in respect to export duties, to prohibitions of imports and to other economic matters, subject to specified exceptions. Finland guarantees most-favored-nation treatment with respect to the importation of products originating in and coming from France or the French colonies and possessions; also with respect to the importation of coffee, tea, spices, tobacco, cotton, wool, silk and rubber of whatever origin when such importation is made by French commercial houses entered on the commercial register of France. France limits its reciprocal agreement to most-favored-nation treatment of a specified list of

¹ Foreign Tariff Files, Department of Commerce.

² Signed July 13, 1921. *Handbook*, pp. 38, 508 *et seq.*

Finnish products. Each country grants to the other reductions in duties upon articles included in specific lists. Finland stipulates, moreover, that it will grant reductions in duties upon exports of wood pulp, cellulose and hair of animals when destined for France or the French colonies and possessions. To the pledges of most-favored-nation treatment just set forth, certain exceptions are noted: (a) preferences to frontier traffic; (b) Finland's preferences to Esthonia; (c) preferences that France may accord as a result of economic unions with bordering countries.

Russia, in the treaty of peace signed October 14, 1920, entered into certain commercial covenants with Finland. Most-favored-nation treatment is provided for in respect to numerous matters, among them port and harbor dues. Finnish raw materials and products of home industry are, when exported to Russia, to enter free from all import duties.

Esthonia and Finland are parties to an elaborate commercial treaty signed October 29, 1921.² The first of the provisions important from the point of view of the present discussion is a covering clause guaranteeing to the citizens of each country within the territory of the other the enjoyment of "the same rights and privileges of all kinds with respect of commerce and industry" that the citizens of the most favored nation shall enjoy. With respect to import and export duties, customs formalities and other taxes charges and facilities affecting commerce,

the two contracting parties pledge themselves to grant to each other, immediately and unconditionally, all advantages, prerogatives, and tariff reductions which have been or in future may be granted to any third power.³

¹ *Op. cit.*, p. 511.

² The Treaty came into effect on October 13, 1922. See *Commerce Reports*, Jan. 23, 1922; Jan. 8, 1923.

³ Article IV.

In addition to most-favored-nation treatment, specified lists of goods from the other country are accorded by each party reduced rates or free admission. Moreover,

both contracting parties hereby declare that the advantages, rights, privileges, and special tariff reductions stipulated herein shall in no case and under no conditions be transferable to other nations on the ground of most-favored-nation agreements, they being mutually obliged to take this article into consideration in entering international treaties in future.¹

On the other hand, exception to the most-favored-nation guarantee is made by both countries for border traffic agreements and customs unions or other alliances with third countries.

Finally, the treaty contains, among others, provisions reciprocally extending national treatment, with certain exceptions, to the shipping of the two parties, respectively; undertaking to avoid unnecessary import and transit embargoes affecting the other country's commerce; and agreeing that, if one of the parties imports or exports certain products according to prices fixed by the government, or some organization authorized by the government, the conditions prescribed with respect to the other party shall be the most favorable which may be applied to any other country.

Germany and *Finland* concluded an economic agreement on April 21, 1922, providing for most-favored-nation treatment in certain matters of commercial interest, not including customs duties, and embodying provisions in regard to commercial travelers, shipping and railway traffic.² Both parties declare their readiness to begin in the near future negotiations for a more comprehensive treaty.

¹ Article XVIII.

² *Commerce Reports*, June 5, 1922; March 26, 1923.

From the point of view of the United States the exclusive features of the treaty with Esthonia would seem to present the most serious problem confronting the negotiation of a Finnish-American commercial convention. Yet it cannot be convincingly denied that exceptional economic relations exist between the two countries as well as between each of them and other portions of the former Russian Empire bordering the Baltic.¹ So long as the United States continues its present favors to Cuba and its own dependencies it can offer no consistent protest, nor does the fact of discrimination against its commerce in favor of the commerce of a small neighboring country seem to be a sufficient evil to be weighed against the undoubted mutual need of especially close customs relations between Finland and Esthonia. This problem having been avoided by a specified exception, there would appear to be nothing in the way of an unconditional most-favored-nation treaty between Finland and the United States.

67. POLAND

The Republic of Poland is one of the most important political results of the World War. It reunites an old nation partitioned among powerful neighbors a century and a half ago. The present population is upwards of 26,000,000.² The country offers an admirable field for agriculture and is rich in mines and forests. Petroleum³ is an important product. The portion of Upper Silesia allotted to

¹Whether the granting of exceptional treatment by Finland or by Esthonia, etc., to Russia itself would be a justifiable exception to most-favored-nation stipulations is another question.

²An Associated Press dispatch, Warsaw, May 14, 1923, stated that the population had grown to more than 30,000,000. (*Washington Post*, June 4, 1923).

³Poland has concluded agreements in regard to petroleum exploitation with France and Italy.

Poland contains a great industrial region. Imports from the United States may reasonably be expected to amount to at least 25,000,000 dollars annually.

Poland has entered into a number of important commercial treaties, under the provisions of which certain reductions in import duties are provided which are not extended to products of a corresponding kind from the United States.¹ These reductions have, however, been generalized among the countries with which Poland has entered into agreements providing for most-favored-nation treatment. Some indication has already been given of the economic provisions of Poland's treaty with the Principal Allied and Associated Powers, signed at Versailles, June 28, 1919.² Limitations of space forbid consideration of the conventions negotiated with various states, including Austria, Belgium, Czechoslovakia, Germany,³ Hungary, Roumania, Russia, Switzerland and Danzig — the last named establishing a customs union applying the Polish customs tariff. There follow brief reviews of the treaties concluded with France, Italy, Japan and the Serb-Croat-Slovene State.

The *Franco-Polish* commercial convention,⁴ signed at Paris on February 6, 1922, presents an interesting and characteristic example of post-war treaty-making. This treaty contains elaborate provisions for most-favored-nation treatment, but, on the part of France, falls short of extending such treatment fully and unconditionally.

The raw and manufactured products of France and its possessions, when imported into Poland, "will be granted

¹In most cases, however, the favored products are not of a kind that the United States exports.

²*Supra*, ch. x.

³Relative to Upper Silesia, containing detailed customs provisions. See *Board of Trade Journal*, Aug. 31, 1922, p. 249.

⁴*Commerce Reports*, February 27, 1922, p. 530. The treaty went into effect June 20, 1922.

the privilege of the most favorable tariff which the Polish Government accords or may accord to any third Power or to the citizens of any third Power." Moreover, cacao, coffee, tea, pepper, spices, vanilla, tobacco, cotton, wool, silks and rubber, provided they are imported into Poland "by French or Polish business houses, established in France and inscribed in the French Register of Commerce," will be accorded most-favored-nation treatment irrespective of their origin. In addition to the liberal treatment just recorded Poland accords to the French products included in a list embracing more than fifty items of its tariff, reduction from the stated rates varying from twenty to fifty per centum.

France, in turn, accords to products embraced within about forty-seven items of the French tariff, when "originating in or coming from Poland, . . . the benefits of the minimum tariff both as to the import duties now established and as to the surtaxes, coefficients, or other temporary increases," which have been or may be established. To the Polish products included within some fifty other French tariff items, France accords reductions varying from twenty-five to seventy-five per centum, "as applied to the difference between the rate of assessment under the general tariff and that of the minimum tariff." The percentage is to "remain the same whatever may be the increases or reductions in the tariff, surtaxes and coefficients which France may institute in the future." In all cases the favors granted extend to imports into the French colonies and possessions.

Other provisions guarantee mutual most-favored-nation treatment in regard to prohibitions of imports, to government-prescribed prices affecting imports and exports and to schedules of "transportation and all additional charges." Article IX provides, finally, as follows:

Each of the High Contracting Parties engages itself to allow the other to profit immediately and without compensation, by any favor, privilege, or lowering of customs taxes, excise duties, and all additional or local taxes pertaining to importation, exportation, reexportation, transit, and ware-housing for merchandise mentioned or not mentioned in the present convention which it has or has not accorded or might accord to another Power.

The treatment of the most favored nation is likewise guaranteed to each of the High Contracting Parties in all that concerns the transshipment of merchandise and the completion of the customs formalities. The consideration granted to nationals is reciprocally accorded in everything concerning the taxes on consummation.

The most-favored-nation provisions are not, however, to debar "a preferential régime that either of the High Contracting Parties may grant in virtue of an economic union with border countries."

Italy and Poland signed at Genoa on May 12, 1922, a commercial agreement¹ by the terms of which the former receives the favorable treatment previously enjoyed only by France in the Polish market. Most-favored-nation treatment is assured by each party to the commerce of the other without condition and with only a few stated exceptions of the ordinary variety, and no special treatment for listed commodities is provided for. The exceptions include special treatment for border traffic, special favors resulting from a customs union and the stipulations of Poland's provisional customs arrangement with Germany relating to Upper Silesia.²

¹This went into effect April 1, 1923, *Commerce Reports*, May 7, 1923, p. 393. It is an amplification of the Agreement of August 23, 1921.

²Italy, as a party to the treaty between Poland and the Principal Allied and Associated Powers, receives the benefit of its provisions.—*Supra*, ch. x.

The two countries agree that the existing restrictions and prohibitions concerning importation and exportation of certain goods will not be maintained except during the time and in the measure strictly necessary for meeting contemporary economic conditions. While awaiting the reestablishment of unrestricted interchanges, they engage to make all necessary arrangements to reduce to a minimum the inconvenience arising from the continuance of restrictive and prohibitive measures. These engagements, however, do not apply in case the restriction or prohibition is enforced for the purpose of fostering a state monopoly or native industry, or for reasons of sanitation or public safety.

Japan and *Poland* signed on December 7, 1922,¹ at *Warsaw*, a comprehensive treaty of commerce and navigation which may well be considered a model for post-war commercial and most-favored-nation covenants. There are, indeed, stated exceptions, but the most-favored-nation treatment is unconditional and is applicable to a wide range of commercial activity. There is to be, in the first place, reciprocal freedom of commerce and navigation between the territories of the two countries.

Articles, the produce or manufacture of the territories of one High Contracting Party, upon importation into the territories of the other, from whatever place arriving, shall enjoy the lowest rates of customs duty applicable to similar articles of any other foreign origin.

The treaty similarly provides that the products of each country when exported to the other shall be accorded most-favored-nation treatment; moreover, import and export prohibitions and restrictions, except as the articles affected constitute a state monopoly or are excluded for reasons of safety or sanitation, must conform to the most-favored-nation principle.

¹ *Journal of Commerce* (New York), Dec. 27, 1922.

Nationals of one country residing in the other may export the proceeds of the sale of their property and their goods in general without being subjected as foreigners to higher duties than are paid by native subjects or citizens under similar circumstances.

Equality of treatment in the matter of taxation and facilities is to be mutually accorded to commercial travelers and Poland undertakes, on condition of reciprocity, to accord such treatment to Japanese business companies established in its territory whenever granted to the companies of any non-contiguous state. Generous provisions for national or most-favored-nation treatment of shipping and of goods in transit are included. The stipulations of the treaty do not, however, apply:

1. to tariff concessions granted by either of the High Contracting Parties to contiguous States solely to facilitate frontier traffic within a limited zone on each side of the frontier,
2. to the special favors resulting from a customs union,
3. to the provisional regulations of customs between Polish and German Parties of Upper Silesia,
4. to the treatment accorded to the produce of the national fisheries of the High Contracting Parties or to special tariff favors granted by Japan in regard to fish and other aquatic products taken in the foreign waters in the vicinity of Japan,
5. to the special laws of protection of the national commercial vessels according to the international custom.

On the other hand, by a clause of the accompanying protocol, it is understood that the terms of the treatment of the most favored nation in this Treaty are to be interpreted as immediate, and unconditional unless expressly otherwise provided.

*The Kingdom of the Serbs, Croats and Slovenes,*¹ after

¹The treaty has now been ratified by Jugoslavia. See despatch from commercial attaché, Oct. 6, 1923, Foreign Tariff Files, Department of Commerce.

continued negotiations, agreed upon and signed a commercial convention with Poland, on October 23, 1922, containing, among others, the following provisions:

Citizens or subjects of each country are to enjoy in the other "the same rights, privileges, *immunities*, favors and exemptions as the citizens or subjects of the most favored nation." The same is true as regards their juridical status, their goods and chattels and their rights and interests. Internal taxes in one country "are not to affect the products, merchandise or articles" of the other country "more or more embarrassing" than "indigenous products" or products of the most favored nation. Moreover,

All the products of the soil and of industry, originating in or proceeding from Poland, which are imported into the Kingdom of the Serbs, Croats and Slovenes, and all products of the soil and of industry originating in or proceeding from the Kingdom of the Serbs, Croats and Slovenes, which are imported into Poland, destined either for consumption, warehousing or reexportation, or in transit, are to be subjected, during the duration of the present Convention to the treatment accorded to the most favored nation, and namely, cannot be in any case submitted to duties either higher or other than those which are levied on the products or merchandise of the most favored nation.

Exports destined for one of the Contracting Parties are not to be burdened by the other with duties or taxes other or higher than are levied on the export of the same articles in the countries most favored in this respect.

Each of the Contracting Parties binds itself, thus, to grant to the other immediately and without other conditions all favors, privilege or reduction of duties or taxes which it has already accorded or may in the future accord, in the respects mentioned, either permanently or temporarily to a third nation.¹

¹Article 7.

Exception is made, however, in the case of border traffic regulations, customs unions and the provisional customs régime existing between the Polish and German portions of Upper Silesia. Customs formalities and railroad rates form the subjects of other most-favored-nation guarantees. Clauses tending to liberalize restrictive and prohibitive regulations affecting trade between the two countries are included, as well as the following interesting article:

The two Contracting Parties agree that goods originating in and proceeding from one of the Contracting Parties are not to be burdened upon their entrance into the territory of the other Party with Customs multiples imposed for motives proceeding from the depreciation of the exchange value of the currency of the exporting country.¹

The policy of Poland in the commercial treaties heretofore negotiated shows a readiness to reconcile itself with the policies of other countries; there would appear to be no reason for exception should the United States seek a treaty based upon the policy of Section 317.

68. RUSSIA

The Union of Soviet Socialistic Republics, extending from the Baltic Sea to the Pacific Ocean and, with its associated and dependent countries, embracing more than eight million square miles of territory and containing about 132 million inhabitants, is not only the world's largest contiguous area under unitary political control, but is a land offering natural resources of almost every variety and commercial potentialities of inestimable value. General recovery appears to be in progress from the débâcle of the World War and the subsequent revolutions which overthrew the Russian imperial régime. Likewise, a moderating influence appears

¹Article 9.

to be at work accommodating some of the stricter tenets of communism to the practicable attainments of economic life. Exports from the United States to Russia in Europe averaged, in 1910-1914, about twenty-three million dollars annually. In 1919 the corresponding figure was about thirty million dollars; in 1920, fifteen millions; in 1922, twenty millions. Imports into the United States from Russia were valued at an average of about nineteen millions in the years 1910-1914 and at about a quarter of a million in 1922.¹

Until such time as the United States is prepared to accord recognition to the Soviet Government, the question of negotiating a commercial treaty with Russia must be held in abeyance. The *de jure* recognition by Great Britain and by Italy, early in 1924, however, suggests that at no remote date the other Great Powers may decide upon a similar course.

The Soviet authorities have negotiated for trade agreements with a considerable number of countries.² In those actually concluded an opportunist policy is apparent. Russia appears, however, to have adopted a definite policy of favoring, in matters of commerce, those countries that are willing to enter into treaties and so extend recognition.³

Great Britain and Russia signed a trade agreement on March 16, 1921, which was, by its terms, "to come into force immediately". The first article contains the following provision:

Both parties agree not to impose or maintain any form of blockade against each other, and to remove forthwith all obstacles hitherto placed in the way of the resumption of trade between the United Kingdom and Russia in any com-

¹ *Statistical Abstract of the United States*, 1922, p. 357.

² See "Treaties and Trade Agreements of Soviet Russia," *Commerce Reports*, June 25, 1923, p. 809.

³ See *supra*, subdivision 23, note.

modities which may be legally exported from or imported into their respective territories to or from any other foreign country, and not to exercise any discrimination against such trade, as compared with that carried on with any other foreign country, or to place any impediments in the way of banking, credit and financial operations for the purpose of such trade, but subject always to legislation generally applicable in the respective countries. It is understood that nothing in this article shall prevent either party from regulating the trade in arms and ammunition under general provisions of law which are applicable to the import of arms and ammunition from, or their export to foreign countries.

Nothing in this Article shall be construed as overriding the provisions of any general international convention which is binding on either party by which the trade in any particular article is or may be regulated (as for example, the Opium Convention).¹

The Anglo-Russian trade agreement deals with a variety of other matters such as the equal treatment of ships in ports, clearing the seas of mines, renewal of postal and telegraphic communication and refraining from propaganda and hostile action. Canada adhered to the agreement as from July 3, 1921.²

Recognition *de jure* was not considered as effected by the conclusion of this agreement.

Germany and Russia signed a temporary commercial agreement at Berlin, May 6, 1921,³ chiefly for the purpose of resuming something approaching normal relations and of promoting trade. Its contents relate mainly, therefore, to the status of the official representatives of each country in

¹ *League of Nations Treaty Series*, vol. iv, pp. 129-130. (Treaty No. 104).

² See *Commercial Intelligence Journal*, August 12, 1922.

³ The agreement is by its terms effective from date of signature. See *New York World*, May 8, 1921.

the other, to the opening and keeping open of means of communication, to passports, to legalization of documents, and to the rights and privileges of the respective nationals in the territory of the other country. The German representation in Russia is specifically authorized "to import, free of customs taxation, the materials necessary for the maintenance of its office business, as well as for the furnishing of its quarters"; also "necessary food supplies and requisite articles for the support of the German personnel, up to 40 kilograms per person and month." By Article X,

The German Government assures to Russian ships, and the Russian Government to German ships, in their territorial waters and harbors, treatment according to international usage. In case hereafter Russian ships in the merchant trade are granted any special privileges, as state-owned ships, in connection with shipping charges, the Russian Government assures the same privileges to German merchant vessels.

In that case, however, a ship of one of the contracting parties in the harbors of the other party may be made accountable for such money claims as are immediately connected with this ship, as, for instance, harbor tolls, cost of repairs, and claims for damages for shipping collisions.

The treaty which was concluded at Rapallo on April 16, 1922,¹ by German and Russian representatives to the Genoa Conference,² finally restores normal diplomatic relations between the two countries which were severed by the World War. In accordance with its terms,

¹ Except for a provision relating to expenditures for war prisoners and to certain other war matters, and for Article 4 (quoted below) the treaty is by its terms immediately effective. Ratifications were exchanged Jan. 31, 1923. The exchange of ratifications covers the extension of the Rapallo Treaty to the other Soviet Republics.

² Rathenau and Tschitscherin.

Both Governments are agreed furthermore that the principle of most-favored-nation shall apply to the general judicial position of the one party in the territory of the other party as well as for the general regulation of trade and economic relations. The principle does not include privileges or facilities which the Soviet Government accords to another Soviet republic or to a similar state which was formerly a component part of the former Russian Empire.¹

Italy and Russia have concluded a comprehensive commercial treaty, the ratifications of which were exchanged on March 7, 1924. This treaty is supplemented by a customs convention in which the two countries grant each other most-favored-nation treatment for products which enter particularly into their respective trade.

Italy obtains important reductions in Russian tariff rates; for example, seventy-five per centum on lemons and sixty per centum on other fresh fruit, including oranges. Italian wines, olive oil, marble blocks and slabs, sulphur, certain textiles, farm machinery and automobiles are among the other beneficiaries. In return Italy accords to Russia certain reductions on raw materials.²

Denmark and Russia signed a trade agreement on April 23, 1923, and ratifications were exchanged on June 15, following. According to Article II,

Both parties agree by every means to facilitate trade between the two other countries; such trade shall be carried on in conformity with the legislation in force in each country. Trade between the two countries shall not be subjected to other restrictions or other or higher duties than those imposed on the trade with any other country. Denmark shall, however, not be entitled to claim the special rights and privileges accorded by Russia to a country which has recognised or may recognise

¹Art. 4.

²See *Messaggero* (Rome), March 8, 1924.

Russia *de jure* unless Denmark is willing to accord to Russia the corresponding compensations . . . ¹

It is evident that nothing in the treaties here described—and the same may be said for Russian treaties generally—is necessarily antagonistic to the new American commercial policy. It is all but certain that a treaty reciprocally according unconditional most-favored-nation treatment would, if offered by the United States as a means of recognition, be willingly accepted by the Soviet authorities.

69. CZECHOSLOVAKIA

The Republic of Czechoslovakia occupies an area that formerly constituted the northwestern portion of the Austro-Hungarian Empire. It is apparently the most successful of the war-born states, a fact due not only to the intelligence of its leaders but to its natural advantages and highly-developed industrial organization. Czechoslovakia may be thought of as primarily an industrial country; in addition, however, it is able to produce some foodstuffs for export. Coal, iron and other minerals are found in large quantities and there are extensive forests. The population is about fourteen millions. Imports to Czechoslovakia from the United States were valued at less than one and one-half millions of dollars in 1921.² During the same period Czechoslovakia's exports to the United States amounted to more than eight millions. A considerably larger market for American goods could probably be developed in the event of the relaxation of the stringent system of restrictions now in force.

The new republic made early and active efforts to develop

¹ *Board of Trade Journal*, July 5, 1923. "Other," the thirteenth word is probably not intended.

² *Statistical Abstract of the United States*, 1921, p. 446. Doubtless there was in addition some indirect importation of American goods.

a widespread system of commercial treaties. Negotiations have been undertaken with almost every country in Europe, as well as with Japan and Australia, and have resulted in a large number of agreements.¹ Brief mention may here be accorded to four of them — concluded with France, Italy, Portugal and Greece.

France and Czechoslovakia signed an elaborate commercial convention on November 4, 1920.² As in the later Franco-Polish and Franco-Finnish treaties, there was serious deviation from the principle of equality of treatment in order to permit special treatment for long lists of commodities.

Czechoslovakia, however, accorded most-favored-nation treatment to natural or manufactured products originating in or coming from France, her colonies and possessions with respect to import duties and to surtaxes, coefficients and increases. The same treatment was also to be accorded to certain listed foodstuffs and colonial products of whatever origin, provided they were imported by French firms. Czechoslovakia reserved the right, however, to make exceptions, under certain circumstances, in favor of bordering states.

France, in return, granted its minimum tariff rates to a specified list of natural or manufactured goods originating

¹In regard to the earlier agreements, see *Handbook*, p. 33. The liberality of Czechoslovakia in dealing with the other Austro-Hungarian succession states is noteworthy. The treaty signed with Great Britain, July 14, 1923, is especially noteworthy; text, *Board of Trade Journal*, July 19, 1923, p. 76.

²Effective April 28, 1921; denounced by the French Government, February 2, 1923; prorogued by decree of May 30 until July 15, 1923, under certain stated conditions. Negotiations for a new treaty were promptly begun (*Commerce Reports*, March 12 and June 18, 1923) and a revised commercial convention was put into force as from Sept. 1 (*Board of Trade Journal*, Sept. 13, 1923, p. 273).

in or coming from Czechoslovakia, and reductions from its general rates on other listed products. These reductions, moreover, were to be extended "immediately and unconditionally" so as to equal the most favorable rate which France might accord to any other country. Certain exceptions were, however, noted — including the treatment accorded to bordering countries with which France may enter into customs union.

With exceptions similar to those reserved in the case of import duties, the two countries mutually agreed to most-favored-nation treatment in export charges and regulations. Czechoslovakia agreed to admit free of import duty certain listed products from France and to grant licenses for the importation annually of specific quantities of others. The provisions concerning the granting of export and import licenses and concerning prohibitions were detailed and involved both countries. Unconditional most-favored-nation treatment was guaranteed with respect to the raising of prohibitions of entry, to the importation or exportation of merchandise according to price conditions and to local duties and charges affecting commercial interchange between the two countries.

Italy and Czechoslovakia signed on March 23, 1921,¹ a commercial treaty differing in important respects from the one just described.² It contains no lists of goods to be accorded special customs treatment. It starts out with the provisions that "there shall be full and entire liberty of commerce and navigation among the subjects" of the two

¹ See *Commerce Reports*, May 2, 1921. Effective April 15, 1921.

² On the same day Italy and Czechoslovakia signed an agreement containing elaborate provisions for the interchange of specified quantities of commodities ordinarily prohibited except under license. Effective April 15, 1921. *Commerce Reports*, June 25, 1921. A new treaty was signed on March 1, 1924.

countries and its general most-favored-nation clause presents an interesting example of comprehensiveness. Except for its last paragraph this article might well be considered a model one:

With respect to the amount, guarantee, and collection of import and export duties, including surtaxes, coefficients, and increases to which such duties are or may be subject, as well as with respect to the transit carriage, reexportation, warehousing, and custom-house formalities, and the transshipment of goods and in general all that relates to commerce and industry, each of the high contracting parties undertakes to grant the other all favors and immunities which one of them may have granted or may in future grant to a third power.

In accordance with this principle, the products of the soil and industry of the Czecho-Slovak republic which are imported into Italy and the products of the soil and industry of Italy which are imported into the Czecho-Slovak republic shall, whether they be intended for consumption, warehousing, reexportation, or transit carriage, be subject to the same treatment and not liable to any different or higher duties than those levied on the products of the most favored nation.

It is understood that these provisions do not apply to the special favors now granted or which may subsequently be granted to contiguous nations in order to promote frontier traffic.

It is likewise agreed that, as far as the amount of import duties is concerned, the granting of the most-favored-nation treatment as provided in the present article will be mutually obligatory between the two high contracting parties only in case they grant such treatment to some third power. If one of the high contracting parties does not grant most-favored-nation treatment unconditionally and without compensation to any other nation in the matter of import duties, it shall have the privilege of ceasing to apply such treatment to the other contracting party upon giving the latter two months' previous notice. In this case the obligation on the part of the other

high contracting party to grant most-favored-nation treatment shall also cease.¹

By the provisions of a subsequent article, most-favored-nation treatment is agreed upon with reference to transit taxes affecting goods of all kinds coming from or bound for the territories of the respective countries. In view of existing abnormal conditions the two countries "reserve the right to regulate the importation and exportation of products by means of embargoes or restrictions." Unless there is a special agreement of waiver, however, each country must apply such embargoes as are in force against the other "in the most favorable manner and to the most favorable degree possible."

Portugal and *Czechoslovakia*, by a commercial treaty signed December 11, 1922,² mutually pledge most-favored-nation treatment in regard to import duties and restrictions. *Czechoslovakia* excepts from this guarantee the treatment which may be granted to bordering countries under the provisions of the treaties of *Trianon* and *St. Germain*,³ but agrees to permit the unrestricted importation of a number of *Portuguese* products. It is understood that in case *Portugal* shall concede to any country, except *Spain* or *Brazil*, exemption from the payment of customs duties in gold or from liability to any surtax, the same favor shall be accorded to *Czechoslovakia*.

Greece and *Czechoslovakia* concluded a provisional commercial agreement on January 10, 1923,⁴ by which each country grants most-favored-nation treatment for certain

¹ Article 8.

² See *Board of Trade Journal*, January 4, 1923, and *Commerce Reports*, January 22, 1923. Apparently effective twenty days after signature.

³ See Articles 205 and 222, respectively. *Supra*, subdivision 61.

⁴ See *Commerce Reports*, March 19, 1923, March 17, 1924. Made effective by *Czechoslovakia* in February, 1923; ratifications exchanged Nov. 15, 1923.

listed articles imported from the other. Czechoslovakia undertakes to authorize the importation of specified quantities of certain Greek products which are subject to license requirements.

The four arrangements just described obviously represent four rather distinct types of international commercial agreement. The adaptability of Czechoslovakia to accommodate itself to such diverse policies as those of France and Italy¹ would seem to point to a comparative readiness to accept an unconditional most-favored-nation treaty such as the United States might be expected to offer. A preliminary arrangement between the two countries was effected by an exchange of notes operative November 5, 1923.² The most serious problem in the negotiation of a permanent treaty appears to grow out of the difficulty of bringing within the principles of unconditional most-favored-nation treatment the Czechoslovak practice of requiring export and import licenses and establishing fixed quotas or contingents of goods for the commerce of other countries by separate agreements.

70. AUSTRALIA

Though continental in area, the Commonwealth of Australia is a country of scarcely more than five and one-half inhabitants. Its agricultural products are not unlike the United States and it has large timber and mineral resources. It is, however, particularly jealous in regard to its manufacturing industries, and its commercial policy appears to have been framed with the intent of fostering their interests. The value of Australia's imports from the United States amounted to approximately 120 million dol-

¹There has been reported to be some sentiment in Italy favoring the abandonment of most-favored-nation agreements, at least until commercial conditions in Europe have become more stable, and the negotiation of special agreements with other countries.

²*Treaty Series*, No. 673-A.

lars in 1920,¹ but this high mark is unlikely to be reached in normal years for some time to come.

Australia has never developed a commercial treaty system. Its relations with countries outside the British Empire are conducted through London and the benefits and obligations of a number of Great Britain's treaties extend to the whole or to parts of the Commonwealth, sometimes by the terms of the treaty in question, sometimes by the exercise of the option of adherence. However, as a recognized state at the peace conference of 1919, Australia signed the Treaty of Versailles and has signed other instruments then and since concluded. It became a member in its own name of the League of Nations and now functions as mandatory for most of the former German possessions in the Pacific. The Commonwealth has, moreover, as already noted, entered into reciprocity agreements with two of the other British self-governing dominions, New Zealand² and the Union of South Africa.

Australia is emphatically a country that cannot be ignored in considering and planning for an American system of commercial treaties. A market so important in the trade of the United States, and potentially so vastly more important, is one in which American exports should have the protection of such assurances of continued entry as may be furnished by a treaty containing a most-favored-nation clause. This would seem obvious even if American goods were at present accorded equality of treatment. The fact is, however, that discriminations resulting from preferences allowed to other portions of the British Empire are numerous and effective.³ Moreover, the exceedingly illiberal policy of Aus-

¹ *Statistical Abstract of the United States, 1921*, p. 468.

² For text see Appendix 6. See also *Board of Trade Journal*, Oct. 5, 1922. Effective, Sept. 1, 1922.

³ Concerning Australia and the British preferential system, see *supra*, subdivision 50(a).

tralia with respect to rates of duty is one that may well be restricted as far as possible by treaties requiring equal rates to all countries. It must be confessed, however, that the repeated failure of negotiations undertaken by Canada, the difficulties presented by the problem of discriminations resulting from imperial preferences, and Australia's distance from and apparent exemption from necessary dependence upon the United States for a market, do not combine to present a particularly encouraging outlook. On the other hand, there appear to be no legal obstacles in the way of Australia's granting to the United States guaranteed most-favored-nation treatment, meaning thereby treatment as favorable as that accorded not only to any foreign country but to any other portion of the British Empire as well.

Whether the application by the United States of defensive duties to Australian wool would prove an effective argument for the achievement of this end presents an interesting question.

71. THE CENTRAL AMERICAN STATES

The United States is a party to treaties containing conditional most-favored-nation clauses now in force with two of the five Central American states, namely, Costa Rica and Honduras.¹ With the others there exists not even that limited protection against discrimination. Several treaties, which certain ones of them have entered into with European countries in order to obtain favorable markets for their raw materials, have provided in return for reduced import duties on manufactured goods, which are thus enabled to compete with advantage against nearer sources of supply in the United States.

Guatemala, with an estimated population of two millions, imports an average of about six million dollars' worth of

¹For specific references see Appendix 3.

goods annually from the United States, with which country it has no agreement assuring most-favored-nation treatment. Its principal treaties affecting commercial relations are with Italy, Spain and France.¹ The last-named treaty, promulgated by the President of Guatemala under date of April 30 1923,² provides for tariff favors to Guatemalan products entering France and for special reductions, ranging from fifteen per centum of the regular duties to total exemption on seventy-eight French products imported into Guatemala.

Unless these duties are to continue to discriminate against American products an agreement with Guatemala providing for unconditional most-favored-nation treatment would appear to be necessary.

Honduras has a population of nearly 650,000 and an import trade with the United States averaging about eleven million dollars annually. Besides its treaty with the United States³ it has commercial treaties with Belgium, France, Great Britain, Italy and Mexico.⁴ These instruments do not appear to contain any discriminatory clauses affecting commerce.

Nicaragua, with approximately the same population, has, for the United States, about half the commercial importance of Honduras. Like Honduras it has non-discriminatory commercial agreements with several European states and with Mexico. The Treaty of January 27, 1902, with

¹ *Handbook*, pp. 61, 62. A treaty with Chile is reported to have been concluded April 20, 1920.

² By decree of May 4, France brought the treaty into force as of May 8, 1923, see *Board of Trade Journal*, May 17, 1923; *Commerce Reports*, June 4, 1923. It was approved by the Guatemala legislature April 26, 1923.

³ Treaty of July 4, 1864. See Articles III and IV. Malloy, *Treaties*, p. 952.

⁴ *Handbook*, p. 62. There is a free-trade treaty with El Salvador, signed Feb. 28, 1918.

France,¹ however, provides that Nicaraguan coffee and other specified products are to be admitted into France and its possessions at the lowest rates of import duty applicable to similar products of any other foreign origin and that, in addition to reciprocal most-favored-nation treatment, Nicaragua is to grant a twenty-five per centum reduction in rates of import duty to certain listed products of France and its dependencies. This reduction has been extended to products from Great Britain, Italy and Spain.² It has not been extended to the United States. In Nicaragua, as in Guatemala, the United States should seek unconditional most-favored-nation assurances.³

El Salvador has a million and a half inhabitants and imports annually from the United States about five million dollars' worth of goods. It is not a party to a commercial treaty with the United States but maintains commercial arrangements with Belgium, Ecuador, France, Germany, Italy, Spain, Switzerland and Venezuela.⁴ Under the terms of the French treaty discriminations are practiced against the commerce of the United States. After a pledge by France, including dependencies, of most-favored-nation treatment to coffee and other enumerated products and by Salvador to all products, provision follows that "the tariff rates in force in Salvador will in so far as they affect the

¹ This treaty was denounced by France in 1918 but revived in 1921.

² Administrative circular dated November 1 and published November 9, 1923. *Commerce Reports*, January 7, 1924, p. 62. See also *Handbook*, p. 76.

³ By Decree of August 23, 1911, the Government of Nicaragua, in order to obtain the benefit of the minimum schedule of the United States Tariff Act of 1909, extended to American products the reduced rates of the French Treaty. The favor has not been accorded since the revival of that treaty.

⁴ *Handbook*, p. 86.

⁵ Preferential treatment is extended to other countries under most-favored-nation pledges.

French products enumerated" in an appended list, "be reduced so that those products will in no case be liable . . . to rates higher than those stipulated". Here again there is needed for the United States an unconditional most-favored-nation pledge. The reciprocal character of the French treaty is such that the special rates are not given without compensation. Hence their benefit would not inure to the United States under a conditional most-favored-nation covenant.

Costa Rica has a population of somewhat more than half a million and is usually considered the most prosperous and progressive of the Central American republics. Its annual imports from the United States average about four millions in value. Besides the treaty with the United States,¹ commercial treaties are in force with Great Britain and Spain.² These treaties do not contain discriminatory provisions but a European country is reported to be negotiating for an agreement with *Costa Rica* apparently providing for reduced import duties on certain of its products entering the latter. Should such a treaty, based upon reciprocal concessions, become operative, the conditional most-favored-nation clause in the treaty with the United States would be ineffective and an unconditional clause would be needed to protect American commerce from discrimination.

At the conference of the Central American States held in Washington from December 4, 1922 to February 7, 1923, the republics of Guatemala, Honduras, Nicaragua and El Salvador signed a Convention for the Establishment of Free Trade, providing essentially as follows:

The importation and exportation through the custom houses

¹Treaty of July 10, 1851, Articles III and IV. Malloy, *Treaties*, p. 342.

²*Handbook*, p. 33. A treaty with France expired Mar. 1, 1923 (*Commerce Reports*, Mar. 26, 1923).

of the Signatory Republics at the various ports or on the frontiers of articles grown or manufactured in said Republics, shall be absolutely free of import and export duties and of municipal taxes or imposts of an eleemosynary nature.

Manufactured articles, in which the raw materials originating in the manufacturing or exporting country, do not form the greater percentage, shall not be included in this exemption.

Coffee and sugar are excluded from the foregoing provision, as are also those articles the sale of which is or may become a governmental monopoly or may be unlawful. Provision is made for the adherence of Costa Rica should that state later so desire.¹

This and other free-trade conventions that Central American countries have from time to time concluded with each other may be considered to be reciprocal, and hence not to onerate the contracting parties with obligations to extend free trade to outside countries, parties to conditional most-favored-nation agreements. It is practically certain that the United States would not ask, even under an unconditional most-favored-nation pledge, for the benefit of favors mutually exchanged among these little countries. However, specific exception in this respect may appropriately be made in drafting treaties with them. Central American treaties with European countries characteristically provide, in according most-favored-nation treatment, for an exception of treatment which one may accord to the others of the Central American group.

However inadequate is the picture presented by the hasty review just given of a few of the treaties that make up the conventional systems with which the United States, in developing a new system of its own, must endeavor to effect

¹*Conference on Central American Affairs* (Washington, Government Printing Office, 1923), pp. 388 *et seq.* The quoted passage is Article I.

reconciliation, there seems to be reasonable certainty that most countries will welcome proposals for treaties of the general character urged in the preceding pages. France and the British Dominions present the most formidable obstacles and the powers of Section 317 will be put upon their mettle in dealing with these extreme cases of commercial individualism and pronounced illiberality.

The Economic Commission of the International Economic Conference held at Genoa in 1922 considered that the peace of the world depended upon the restoration of the commercial treaties which before the World War united the peoples of many lands in a customs system involving equality of treatment, and also upon the resumption of the methods that were followed in the conclusion of those treaties. If any degree of truth is to be conceded to this conclusion, the end in view would seem to justify the most courageous and persistent application of every legitimate means to the advancement of the new American commercial policy and a reconciliation with it of the treaty systems of all countries.

CHAPTER XII

INTERNATIONAL CONFERENCES AND CONVENTIONS

72. LIMITATIONS OF BI-LATERAL AGREEMENTS

With reference to the celebrated treaty of 1860 between England and France, usually designated as the Cobden Treaty, Gladstone is quoted as saying :

It is the fact that, in concluding that Treaty, we did not give to one a privilege which we withheld from another, but that our Treaty with France was, in fact, a treaty with the world, and wide are the consequences which engagements of that kind carry in their train.¹

There can be little doubt that the adoption by the countries of the world generally of unconditional most-favored-nation treaties with all the others would result in a system of fair and equal treatment of commerce which would indeed knit the world together in a sense similar to that in which two countries are bound by their mutual treaty engagements. The Cobden Treaty, as has already been shown,² led to the adoption of treaties the provisions of which, generalized under the most-favored-nation clause, spread such a system over Europe. Stability of commerce and stimulation of exchange were the result. The policy expressed in Section 317 of the American Tariff Act of 1922 aims at the creation—so far as bi-lateral treaties to which the United States is a party can create it—of a world-wide system of a similar kind.

¹ Morley, John, *The Life of Richard Cobden*, vol. ii, p. 345.

² Subdivisions 25(c) and 59, *supra*.

Granted the success of this policy, however, and its full adoption by all other countries, so that an interlacing system of unconditional most-favored-nation agreements would apply to all commerce, there would nevertheless remain unsolved certain important problems of commercial equality and facility: no system of bi-lateral treaties can approximate the advantages of complete uniformity, simplicity and certainty which would be possessed by a single universal convention to which all countries were parties. Moreover, there are other connected problems—such as the interpretation of the language of treaties and the properly recognized limitations upon the absolute application of the most-favored-nation clause—which can hardly be settled so long as the diversity of form and content inevitable in a multitude of instruments is allowed to persist.

These considerations, while suggesting the desirability of a general treaty, point also to the need of a world tribunal—perhaps the Permanent Court of International Justice—competent to interpret phrases and provisions of treaties and to make its decisions of uniform application everywhere. The present chapter has for its object an examination of some of the efforts that have already been made in this direction and a suggestion in regard to certain further steps that may be required in the future.

73. CUSTOMS QUESTIONS VIEWED AS MATTERS OF INTERNATIONAL CONCERN

The second half of the nineteenth century witnessed a remarkable development of the practice of nations acting together in groups for the accomplishment, through multi-lateral agreement, of peaceful and constructive purposes.¹ Import and export regulations and customs rates were

¹The United States is a party to more than forty such agreements—listed in Appendix 4.

among the subjects that occasionally came to be dealt with in this way.

(a) *The General Act of Berlin and Subsequent Conventions*

The remarkable discoveries of Stanley during the years preceding 1877 led to renewed interest in Africa. The rival claims of the powers in the Congo basin and adjacent areas, extending eastward to the Indian Ocean, were brought before an international conference at Berlin, which adopted a General Act on February 26, 1885, solemnly promising, so far as the fourteen signatory states were concerned, that "the trade of all nations" should "enjoy complete freedom" in those regions. The conference created the Congo Free State, which by treaty of January 24, 1891, pledged to the United States—

all the rights, privileges and immunities concerning import and export duties, tariff régime, interior taxes and charges and, in a general manner, all commercial interests, which are or shall be accorded to the signatory Powers of the Act of Berlin, or to the most favored nation.¹

By this same treaty the United States assented to the establishment of limited and uniform import duties in the Congo Free State, which had been established for the conventional basin of the Congo by a declaration affixed to the Act of Brussels concluded July 2, 1890. The declaration provided, among other things,

That in applying the customs system which may be agreed upon, each power will undertake to simplify formalities as much as possible, and to facilitate trade operations.²

¹Article XII. Malloy, *Treaties*, p. 332.

²Hertslet, *Commercial Treaties*, vol. xix, p. 304. See table of principal sources at the beginning of this monograph.

The United States, though not a party to the declaration, signed the Act, which contained, as incidental to its purpose of repressing the slave trade, provision for the restriction of import of firearms and intoxicants. On September 10, 1919, a convention revising the general Acts of Berlin and of Brussels was signed at St. Germain, providing for equal treatment in the Congo region to the commerce of the signatory states only, instead of to that of all countries as in the earlier instruments.¹

(b) The International Sugar Convention

Primarily European problems would seem comparatively susceptible to solution by general convention because of vicinage and the resulting similarity of interest and necessity for cooperation. Not unnaturally, therefore, what is perhaps the most interesting and far-reaching example—so far as cooperative control of national tariff matters is concerned—of multilateral treaties affecting customs was originally concluded to meet an emergency among European states.

At the end of the nineteenth century a number of continental European states had developed systems of bounties to encourage the domestic production of sugar. As the financial burden began to appear intolerable a way out of the difficulty without exposing the producers of any one state to competition with bounty-fed sugar from others became an imperative necessity. Great Britain produced no sugar, but feared the bounty system would destroy its colonial plantations and eventually develop monopolies and resulting high

¹ The treaty of 1919 has never been put into effect. In the Fourth Assembly of the League of Nations a resolution looking toward a new convention to replace it was proposed. The United States was to be invited to cooperate in preparing the draft.

In 1899 France and Great Britain entered into a treaty pledging for thirty years equality of commercial treatment in their respective colonies on the Gulf of Guinea.

prices. At a conference in Brussels on March 5, 1902, Great Britain, Germany, Austria, Hungary, Belgium, Spain, France, Italy, the Netherlands and Sweden entered into an international sugar convention,¹ which created a permanent commission of representatives of the contracting countries, empowered practically to dictate, by a majority vote, certain matters of national legislation affecting sugar. The essential covenants of the convention and its protocol are as follows:

The High Contracting Parties engage to suppress, from the date of the coming into force of the present Convention, the direct and indirect bounties by which the production or exportation of sugar may profit, and not to establish bounties of such a kind during the whole continuance of the said Convention. . . .

The High Contracting Parties engage to limit the surtax—that is to say the difference between the rate of duty or taxation to which foreign sugar is liable, and the rate of duty or taxation to which home-produced sugar is subject—to a maximum of 6 francs per 100 kilograms on refined sugar and on sugar which may be classed as refined, and to 5 francs 50 centimes on other sugar.

This provision is not intended to apply to the rate of import duty in countries which produce no sugar; neither is it applicable to the by-products of sugar manufacture and of sugar refining.²

¹ Hertslet, *Commercial Treaties*, vol. xxiii, pp. 579 *et seq.* Russia and several other, including non-European, governments subsequently adhered to the convention. For an account of the bounty problem and its solution see Sayre, Francis Bowes, *Experiments in International Administration* (New York, 1919), pp. 117 *et seq.* An additional Act was signed Aug. 28, 1907, and an Accord, still farther extending the duration of the convention, on March 17, 1912. Earlier Sugar Conventions had proven ineffective for lack of penalty provisions.

² Spain, Italy and Sweden were to be exempt from the foregoing engagements under certain conditions.

The High Contracting Parties engage to impose a special duty on the importation into their territories of sugar from those countries which may grant bounties either on production or on exportation.

This duty shall not be less than the amount of the bounties, direct or indirect, granted in the country of origin. The High Contracting Parties reserve to themselves, each so far as concerns itself, the right to prohibit the importation of bounty-fed sugar. . . .

The High Contracting Parties engage reciprocally to admit at the lowest rates of their tariffs of import duties sugar the produce either of the Contracting States or of those Colonies or Possessions of the said States which do not grant bounties, and to which the obligations of Article 8¹ are applicable.

Cane sugar and beet sugar may not be subjected to different duties. . . .

Considering that the object of the surtax is the effectual protection of the home markets of the producing countries, the High Contracting Parties reserve to themselves the right, each as concerns itself, to propose an increase of the surtax, should considerable quantities of sugar produced by one of the Contracting States enter their territories; this increase would only apply to sugar produced by that State.

The proposal must be addressed to the Permanent Commission, which will decide, at an early date, by a vote of the majority, whether there is good ground for the proposed measure, as to the period for which it shall be enforced, and as to the rate of the increase; the latter shall not exceed 1 franc per 100 kilograms.

¹"The High Contracting Parties engage, for themselves and for their Colonies or possessions, exception being made in the case of the self-governing Colonies of Great Britain and the British East Indies, to take the necessary measures to prevent bounty-fed sugar which has passed in transit through the territory of a Contracting State from enjoying the benefits of the Convention in the market to which it is being sent. The Permanent Commission shall make the necessary proposals with regard to this matter."

(c) *Sealing of Railway Trucks*

Seventeen European countries are parties to an agreement signed May 15, 1886, regarding the sealing of railway trucks which are to be subject to customs inspection. This instrument, which deals with the method of constructing railway cars and specifies in detail the means of securely sealing them, was revised in 1907¹ and confirmed by the peace treaties of 1919.

(d) *Publication of Customs Tariffs*

About fifty countries, including the United States and embracing practically the entire commercial world, are parties to the *International Convention concerning the Formation of an International Union for the Publication of Customs Tariffs*, signed at Brussels, July 5, 1890, and confirmed by the peace treaties of 1919. Article 12 is as follows:

In order to enable the Institution to edit the International Customs Bulletin as accurately as possible, the contracting parties shall send it, directly and without delay, two copies:

(a) of their customs law and their customs tariff, carefully brought up to date.

(b) of all provisions that shall ultimately modify said law and tariff.

(c) of the circulars and instructions that shall be addressed by the said Governments to their custom-houses concerning the application of the tariff or the classification of goods, and that can be made public.

(d) of their treaties of commerce, international conventions and domestic laws having a direct bearing upon the existing tariffs.²

¹ A Final Protocol was signed in 1907. Martens, *Recueil des traités*, vol. 82, pp. 42-51; *Handbook*, p. 801.

² Malloy, *Treaties*, p. 1998.

In this manner is to be accomplished the object of the convention, that is, to obtain publicity in customs matters for the information of governments and the guidance of international traders. The *Bulletin* is published in English, French, German and Spanish. The collected data and trained staff of the Brussels organization would seem to form an excellent nucleus around which to assemble future international gatherings for the study of and for action in regard to customs problems.

(e) Arrangements for China and Turkey

Certain bi-lateral treaties between the Powers, sometimes including the United States, and such countries as China, Persia, Siam and Turkey, partake of the nature of international multi-lateral agreements. They emphasize, however, the assumption of obligations by only one country rather than mutual undertakings among the powers forming the other side of the compact. The essential element of true multi-lateral treaties, namely mutuality of obligation among all parties, appears, therefore, to be for the most part absent.

(f) The Act of Algeciras

The conference held at Algeciras in 1906 prepared a General Act which was signed on April 7 by the representatives of twelve powers, including the United States. The subject was the affairs of Morocco and "economic liberty without any inequality" was one of the expressly sought ends. One of the seven chapters of the Act is entitled "A regulation concerning the customs of the Empire and the repression of fraud and smuggling." Article 66 provides that—

Merchandise of foreign origin shall temporarily be subject on entry into Morocco to special taxes amounting to 2½ per cent ad valorem. The whole proceeds of this special tax shall form a special fund, which shall be devoted to the execution

of and expenses connected with public works for the development of navigation and the general trade of the Shereefian Empire.¹

The Act of Algeciras is something more than an imposition of rules upon a weak power: it is an agreement among the great powers that a specified régime in Morocco shall be respected by them.

(g) *The Porto Rose Conference*

It is often impracticable for one or two states to take action that is admittedly desirable, unless other states will agree to take the same action at the same time. The reduction of the innumerable restrictions upon commerce with which the new states born of the war in central and south-eastern Europe felt it necessary to protect themselves is an example in point. At the economic conference held at Porto Rose, near Trieste, in the fall of 1921, and attended by representatives of the succession states of the former Austro-Hungarian Empire—Austria, Hungary, Italy, Rumania, Poland, Czechoslovakia and the Kingdom of the Serbs, Croats and Slovenes—a convention was signed for the purpose of removing or reducing these restrictions and of preventing the levying of duties that would have a prohibitive effect upon trade.²

(h) *The Genoa Conference*

The formation of customs unions or the elimination of customs duties between groups of small states has been discussed at recent conferences of various countries bordering

¹ Malloy, *Treaties*, p. 2172. See also Articles 67 and 123. France has put into effect in Morocco discriminatory duties against German goods, acting under the Treaty of Versailles. The Convention of Madrid (1880) had provided for the Open Door in Morocco for the contracting parties only.

² See *Commerce Reports*, Jan. 23, 1922, p. 211.

the Baltic, and the latter was actually provided for, with certain exceptions, in a convention concluded by the States of Central America,¹ except Costa Rica, in their recent parleys at Washington. The Genoa Conference (1922) adopted recommendations, largely originating in the pre-conference work of economic experts assembled at London, for obtaining greater publicity and stability in customs matters. Among other things, the Conference felt that

no export duty should be maintained or imposed upon raw materials, the output of which exceeds home needs, except duties of a purely fiscal character which, on account of their character as such, should not exceed a low percentage of the value of the product, although they may vary according to the country and the nature of the product. . . .

Subject to treaties and agreements, export duties should not vary according to the foreign country of destination.²

With certain exceptions it was further resolved that

Whatever may be the importance of the reasons of an economic or financial character alleged by certain States, in the exceptional circumstances in which they find themselves, as justifying the maintenance or institution of import or export prohibitions or restrictions, it is recognized that these measures constitute at the present time one of the gravest obstacles to international trade.

In consequence, it is desirable that no effort should be spared to reduce them as soon as possible to the smallest number.

Finally, the Genoa recommendations contained the following articles:

The questions relating to dumping and differential prices

¹*Supra*, subdivision 71.

²The economic recommendations of the Conference are published in *Commerce Reports*, July 24, 1922, pp. 262-263.

being among those which concern most closely the equitable treatment of commerce, it is desirable that the League of Nations should undertake at an early date an inquiry on the subject. . . .

It is desirable that all the Governments concerned should inform the League of Nations without delay of all modifications introduced in their customs tariffs and in their regulations relating to import or export prohibitions or restrictions.¹

(i) *The International Chamber of Commerce*

Passing for a moment to unofficial international organizations, it should be noted that the International Chamber of Commerce, meeting at Rome in March, 1923, included upon its agenda "Equitable Treatment of Trade as regards Customs Formalities and Analogous Questions" and "Removal of Export Taxes on Raw Materials". Among other matters affecting customs, resolutions were adopted to the effect that all customs regulations and customs changes therein should be published regularly and promptly by the states enacting them and by the International Bureau at Brussels; and, moreover, that the League of Nations should undertake to make certain supplemental publications;² that all states should examine the possibilities of admitting goods at the old customs rates in case duties are increased after direct shipment but before delivery of the goods; that enacting states should publish general indexes and explanatory notes in connection with their tariffs, and that the elements used in applying ad valorem duties should be determined in accordance with a uniform basis.³

¹ *Ibid.* Concerning the conference generally, see Mills, J. Saxon, *The Genoa Conference* (London).

² Delay and imperfection in the publication of information about customs regulations was an important topic at the Congress of Chambers of Commerce at Prague (1908) and at former meetings of the International Chamber of Commerce.

³ International Chamber of Commerce, Appendix to Brochure, no. 26, *Customs Regulations*, 1923.

(j) The Santiago Conference

“The uniformity of customs regulations and procedure” was one of the topics adopted by the governing board of the Pan-American Union for discussion by the Fifth International Conference of American States, held at Santiago, Chile, in the spring of 1923.¹ Among the propositions appropriate for consideration at such a conference were the following:

(1) That the countries involved should agree that when a new tariff law or regulation increasing customs duties goes into effect shipments which are already en route should be exempted from its operation.

(2) That there should be full security against the delivery by the customs officials of the country to which goods are shipped of so-called “to order” shipments in the absence of presentation of endorsed bills of lading.

(3) That there should be greater tolerance in regard to the imposition of penalties for clerical errors and that appeals from decisions of customs officials in this regard should be allowed during a period of not less than 60 days.²

These and other matters were discussed and a number of resolutions were passed. Conventions were concluded providing for the publication by all of the signatory countries of the customs regulations of each of the others and for the use of a more uniform nomenclature in the classification of merchandise in import and export statistics. Provision was made for the calling of a Pan-American customs conference after the necessary information for its efficient conduct should be collected by the Inter-American High Commission. Moreover, a recommendation was unanimously adopted that

¹ *Bulletin of the Pan American Union*, February, 1923, p. 119.

² Item (1) would require alteration in the customs laws of the United States.

the American governments should be represented in the international customs conference called to meet at Geneva on October 15, 1923, and that they should give consideration to the work of that conference for the purpose of utilizing it in the investigation of possible modifications in their customs legislation.¹

74. THE WORK OF THE LEAGUE OF NATIONS WITH RESPECT TO CUSTOMS QUESTIONS

Among the resolutions adopted by the International Financial Conference held under the auspices of the League of Nations at Brussels in 1920 was one that,

within such limits and at such time as may appear possible, each country should aim at the progressive restoration of that freedom of commerce which prevailed before the war, including the withdrawal of artificial restrictions on, and discriminations of price against, external trade.²

The real work of the League in the present connection has, however, been accomplished by its Economic Committee, working under the provision of the Covenant which pledges the members, subject to and in accordance with the requirements of existing or future international conventions, to

make provision to secure and maintain freedom of communications and of transit and *equitable treatment for the commerce* of all Members of the League.³

¹ See *Commerce Reports*, June 25, 1923, pp. 808-809 (article by Ralph H. Ackerman, one of the technical advisers of the United States delegation); also the August, 1923, issue of the *Bulletin of the Pan American Union*. An interesting proposal for free trade among American states was prepared to be presented to the Buenos Aires conference (1922) of the International Law Association, by Dr. Daniel Goytia.

² *Proceedings of the International Financial Conference*, vol. i, p. 22.

³ Article 23(e). Italics not in original. In this connection the special necessities of the regions devastated during the World War were to be borne in mind.

Basing its action upon a report of the Economic Committee presented to the Council and to the Assembly in 1922, the Council of the League on January 30, 1923, adopted a resolution convoking a conference on customs formalities to meet at Geneva on October 15, 1923. The Conference remained in session until November 3 and gave its approval to an elaborate Convention relating to the Simplification of Customs Formalities, together with a Protocol and Final Act.¹ The more important provisions contained in the thirty articles of the Convention may be thus summarized:²

¹ Text: League of Nations document C. D. I. 96 (1), 1923.

League of Nations *Official Journal*, Dec., 1923, pp. 1571 *et seq.*

Partial text: *Board of Trade Journal*, Nov. 15, 1923, pp. 515 *et seq.*

Text and comment: *The Customs Convention and its Benefits to Trade*, Brochure No. 33, International Chamber of Commerce.

Discussion: *Monthly Summary of the League of Nations* for October, 1923 (vol. iii, no. 10; Nov. 15, 1923).

The Manchester Guardian and Commercial, Nov. 15, 1923, p. 517.

The European Commercial (Vienna), Oct. 27, 1923, p. 102.

² The following countries, members of the League of Nations, participated in the Conference:

*Union of South Africa; Commonwealth of Australia; *Austria; *Belgium; *Brazil; *British Empire; Canada; *Chile; China; Czechoslovakia; Denmark; *Finland; *France; *Greece; Hungary; India; Irish Free State; *Italy; Japan; *Lithuania; *Luxemburg; The Netherlands; Poland; *Portugal; Rumania; *Kingdom of the Serbs, Croats and Slovenes; *Siam; *Spain; Sweden; *Switzerland and *Uruguay.

The following countries not members of the League of Nations accepted the invitation of the Council to participate in the Conference: *Germany; *Egypt; *Protectorate of the French Republic in Morocco and the *Regency of Tunisia, French Protectorate.

The representatives of those participants marked with an asterisk signed the Convention and Protocol. The Convention will be open to signature until October 31, 1924.

The United States, with the consent of the League of Nations, arranged for the American Consul at Geneva to attend the sessions of the Conference and to keep this Government fully informed in regard to it.

(1) The contracting states undertake that their commercial relations shall not be hindered by excessive, unnecessary or arbitrary customs or other similar formalities, and that they will revise appropriately their laws and regulations for the purpose of giving effect to this provision. They promise mutually to accord most-favored-nation treatment in this respect.

(2) The contracting states undertake to reduce import and export prohibitions and restrictions to a minimum, to simplify prerequisite conditions and to expedite the issuance of licenses, which licenses should be non-transferable.

(3) The contracting states agree to make prompt publication of all regulations relating to customs and similar formalities and all modifications thereof, and, except in cases affecting essential national interests, not to enforce customs regulations prior to publication. Provision is also made for ensuring the publication of customs tariffs in a way calculated to meet the requirements of traders. Copies of publications must be furnished to the other contracting states, to the League of Nations and to the International Union for the Publication of Customs Tariffs at Brussels.

(4) The contracting states agree to take measures for the prevention of the arbitrary or unjust application of their laws and regulations and to insure redress in the event of abuse.

(5) Goods which form the subject of a customs dispute must, in general, at the request of the declarant, be placed at once at his disposal pending the solution of the dispute, provided he can give satisfactory guaranties.

Technical experts representing the Commerce and Treasury Departments and the United States Tariff Commission were present as assistants to the Consul.

The International Chamber of Commerce, which had been invited by the Council of the League to participate in the Conference in a consultative capacity, was represented by a delegation including members from several different countries, including the United States.

(6) Each contracting state, within twelve months from the coming into force in its own case of the present Convention, and periodically and on request thereafter, is to furnish to the Secretary General of the League a summary of all the steps which it has taken to bring about simplification in customs matters.

(7) Commercial samples are in general to be admitted free of duty subject to exportation within not less than six months and to certain additional safeguards. The Convention deals with this subject at some length and sets forth the language of a specimen identity card for commercial travelers.

(8) The contracting states are to reduce as far as possible the number of cases in which certificates of origin are demanded and to simplify their requirements in this respect.

(9) Consular invoices will not be required unless their production is necessary either to establish the origin of the goods in cases where the origin may affect the conditions under which the goods are admitted, or to ascertain their value in cases where the commercial invoice would not suffice for the purposes of an ad valorem tariff.

(10) Where imported goods must meet technical conditions, for example standards of purity, the contracting states will endeavor to make arrangements to accept guaranties made by the exporting country, and so avoid subjecting such goods to a second analysis.

(11) The contracting states will consider the most appropriate methods of simplifying and making more uniform and reasonable the formalities relating to the rapid passage of goods through the customs, the examination of travelers' luggage, and other matters. The temporary importation and exportation of goods in order to undergo manufacturing processes, and for other purposes, is to be facilitated.

(12) The present Convention is not to prejudice emergency measures or sanitary regulations and is not to abrogate the obligation of contracting states in relation to customs regulations under agreements concluded before November 3, 1923; but effort is to be made to modify conflicting agreements.

(13) In conformity with Article 23 (e) of the Covenant of the League of Nations, any contracting state which can establish a good case against the application of any provisions of the Convention to its territory on the ground of the grave economic situation arising out of acts of devastation during the World War, is to be relieved temporarily of the obligations arising from the application of such provision. Moreover, the Convention is not to regulate rights and obligations *inter se* of territories forming part or placed under the protection of the same sovereign state.

(14) Arrangement is made for the amicable settlement of disputes through reference to technical bodies to be appointed by the Council of the League of Nations or through the Permanent Court of International Justice.

That these proposals are not vital or, comparatively speaking, far-reaching, must be admitted, but the adoption by a considerable number of states of the Convention outlined above, would be of very great convenience and saving to the commercial and traveling public. It could probably be effected without interfering with genuine national policies of any kind because its subjects are almost wholly technical and administrative. The possibility of considering problems of national policy such as the height of tariff walls was, indeed, envisaged by the Economic Committee, but it was generally felt that the moment had not arrived in which any effective attempt could be made to deal with them. Matters of national policy were, therefore, specifically excluded from the program of the customs conference.

Previous conferences on customs regulations were held at Paris in 1900 and 1913 and were attended by representatives of the United States.

The catalog of instances of the treatment of customs matters through general international convention, as presented above, indicates that, excepting the problem of bounty-fed sugar, questions involving important constituent elements of the national policies of powerful states have not been accorded this method of solution. But it is also evident that substantial precedents have been set and the way partially cleared for world consideration of the tariff problem, including the question of equal treatment for all and special treatment for none.

75. THE PROBLEM OF THE FUTURE

(a) *A Universal Treaty of Commercial Equality*

"I believe," said Secretary Hughes in a recent address, that we shall be able at no distant day to keep within reasonable limits some of our pressing economic rivalries by fair international agreements in which the self-interest of rivals will submit to mutual restrictions in the furtherance of friendly accord.¹

Such a statement would seem to imply confidence in the further extension of the multi-lateral convention as a means of reaching settlements in matters affecting international commerce. The most immediately pressing questions requiring a uniformity of solution improbable of attainment through the medium of special treaties connecting the countries of the world two by two are as follows:

1. The precise meaning of *most-favored-nation treatment* is a matter about which there is room for no little diver-

¹ From the advance press copy of "The Pathway of Peace," p. 10, delivered before the Canadian Bar Association at Montreal, Sept. 4, 1923.

gence of opinion. A country may enter into treaties with two different countries intending to realize exactly the same concept of most-favored-nation treatment. Slight variations in language, however, may occur and may give rise, especially on the part of the two foreign countries acting separately, to divergent interpretations. Even where the words are similar, unless they are more clear and unmistakable than treaty language sometimes is, widely different meanings may be deduced. The United States, it will be remembered, has engaged in many diplomatic contests over the meaning of most-favored-nation clauses which were not expressly conditional or unconditional and has persistently clung to a meaning from which most of the rest of the world has dissented. While the general adoption of the expressly unconditional form of the clause would go far toward giving it certainty of meaning, only the universal adoption of the same precise language in a single general treaty can reduce to a minimum the chances of variation. Uniformity of meaning is probably more important to the business public than any particular meaning.

2. Even where the language of a most-favored-nation clause is expressly unconditional some doubts may arise as to its absolute application. If the United States makes such a guarantee without expressly excepting the treatment it accords to its own dependencies having individual tariff laws, shall this country be understood to promise the advantages which it accords to them? A universal agreement determining this point and also specifying what, if any, intra-imperial preferences are allowable, would be of great advantage to the commercial world.

3. Treaties entered into between countries bi-laterally often specify exceptions to the otherwise full measure of most-favored-nation treatment for which they provide. Thus the United States may expressly except its treatment

of Cuban products; Spain, those of Portugal; the Baltic states, those of each other. Is this a practice deserving the approbation of the world? If so, what are its precise limitations? Here, also, a single universal statement, such as a world treaty could contain, would seem to promise a maximum of uniformity and certainty.

While a widespread system of bi-lateral unconditional most-favored-nation treaties should naturally precede a single general treaty, the appropriate ultimate result of the consistent application of such a policy as that expressed in Section 317 of the Tariff Act of 1922 would seem to be a universal world compact defining equality of treatment and pledging a full measure of it from every country to every country.

(b) A World Tribunal for Interpretation

A proposal to create a recognized agency for the consideration and determination of disputed points of language or policy may be either alternative or supplementary to the proposal of a universal most-favored-nation treaty. The general acceptance of a stated tribunal which would specialize in commercial cases and build up a common law based upon precedent would seem almost indispensable if the commercial world is to continue to rely chiefly upon bi-lateral agreements. Such a special court, or a general court, appropriately the Permanent Court of International Justice, could do much to eliminate the inadequacies of a system of separate treaties, each concluded by two countries only, and to establish that uniformity which is the primary virtue of a single treaty. Its services would still be useful, however, should general regional or world treaties come into operation; for there would still be necessary the application of the language and policy of the general instruments to continually changing circumstances.

(c) *Is the Question Essentially Economic or is it Political?*

There remains for final mention a question of high policy, suggested on a previous page,¹ that may become acute in the not far distant future. *In the matter of most-favored-nation treatment should political or economic considerations be regarded as controlling?* For instance, should Canada, bound by political ties to other portions of the British Empire, but situated, except for Newfoundland, thousands of miles away from any of them and having with them little or no natural economic relationship, be considered justified in discriminating in favor of Great Britain or New Zealand against the United States? On the other hand, would Canada, which has thousands of miles of common geographical boundary with the United States, and is bound to it by almost every conceivable economic tie, be justified in discriminating in favor of the United States in tariff matters or, perhaps, in exclusively offering it entire free trade?

Section 317 answers both these questions in the negative, but they are obviously questions that concern all countries and not merely the United States. Perhaps world opinion, expressed through a universal treaty or by the decision of a world tribunal, might answer one or the other or both in the affirmative. At all events there would be advantage to all countries in an authoritative pronouncement which would suffice for a guide to uniformity, and complete understanding of the most-favored-nation clause. Pending such time as matters of this sort may be determined by universal treaty a series of decisions on such subjects would be of vast benefit to the commerce of the world and would contribute materially toward comity and good understanding of nations.

¹*Supra*, subdivision 52.

Already one may be justified in asserting that a country's tariff is no longer a "local issue" or even a question of merely national concern. It is rapidly becoming a matter of recognized world interest.¹

¹ The international aspect of the tariff problem was interestingly set forth in an address by Dr. W. S. Culbertson, of the United States Tariff Commission, before the American Economic Association, at Richmond, December 28, 1918. Dr. Culbertson suggested general treaties governing certain tariff matters and the creation of an international tariff commission.

In the United States Tariff Commission's report on *Reciprocity and Commercial Treaties*, prepared in large part before 1919, occurs (p. 42) the following passage:

"When the peace settlement is being decided, it should be found possible to frame a model pledge or pledges intended to secure equality of treatment; also to devise machinery for the construction and enforcement of such, along with other international pledges."

Recent editorials, moreover, have recognized that an exclusively national interest in tariffs can no longer be defended; e. g., "Tariffs: A World Problem" (*New York Journal of Commerce*, Dec. 2, 1922); "Economic Internationalism" (*Christian Science Monitor*, May 17, 1923).

CONCLUSION

The object and effort of the foregoing pages has been to set forth a full exposition of Section 317 of the Tariff Act of 1922, to inquire into its antecedents and the precedents by which it is sanctioned, and to explain the international commercial policy which naturally grows out of it.

Section 317 was shown to represent the determination of the American Government to demand and maintain, through the potential imposition of defensive additional duties upon imports from other countries into the United States, reasonable equality for American exports, so far as customs duties and all other charges affecting commerce are concerned, in all of the markets of the world. Existing discriminations adversely affecting American goods were shown to be of appreciable extent and seriousness.

After observing the development of the idea underlying Section 317 through preceding legislation, the ways and means for making the operation of Section 317 of most practical benefit to American commerce were discussed. The conclusion was reached that the new policy could best be given effect through the negotiation of treaties with the other countries of the world containing assurances of unconditional most-favored-nation treatment. The actual imposition of defensive duties was in general favored only after failure to obtain by reasoned persuasion the other country's promise of equality of treatment.

In Part Two the obstacles confronting the policy just outlined were considered in some detail. Not the least serious of them were discovered in the numerous provisions incon-

sistent with the policy expressed in Section 317 which the Tariff Act of 1922 was found to contain. Discriminations against other countries resulting from the colonial policy of the United States, as well as the peculiar interpretation of most-favored-nation treatment heretofore espoused by this country, appeared also to constitute troublesome impediments. These, however, can be altered by the American Government; more serious obstacles were found in antagonistic and reactionary policies of other countries which bid fair to oppose stubbornly the liberalism of the new American policy.

Set over against these obstacles definitely encouraging facts were found to exist and were outlined in Part Three. In the first place, Section 317 has already borne fruit in the development of the policy that it expresses. The traditional American policies resulting in equality of treatment in tariff and commercial matters, the firm stand taken by this Government for the Open Door and for equality of treatment in areas mandated under the League of Nations; and, moreover, the unconditional character of the most-favored-nation clause as accepted, with some post-bellum irregularities, by most of the important countries of the world, were seen to constitute powerful arguments as well as influential precedents for the establishment of such a commercial policy as that called for by Section 317.

Finally, the steadily increasing acceptance of multi-lateral conventions as a method of stabilizing international relations, and the growing number of conferences in which the nations are willing to discuss and determine commercial and customs questions, were cited as fundamental facts hopefully pointing to the ultimate consummation of the new American commercial policy in a universal convention establishing perfect equality of treatment in all countries to the commerce of all the countries of the world.

APPENDIX I

TEXT OF SECTION 317 (TARIFF ACT OF 1922) AS ORIGINALLY PRESENTED IN THE SMOOT AMENDMENT

(67th Congress, 2d Session, H. R. 7456. In the Senate of the United States, January 10, calendar day January 12, 1922. Amendment intended to be proposed by Mr. Smoot. The text as reported by the Finance Committee is found in subdivision 16, note; as passed by the Senate, in Appendix 2; as finally enacted, at the beginning of Chapter I).

ADDITIONAL DUTIES TO PREVENT DISCRIMINATION AGAINST AMERICAN FOREIGN COMMERCE

SEC. 4. (a) That from and after the passage of this Act, subject to the provisions of subsections c to k, inclusive, of this section, all products, when imported into the United States from any foreign country, shall be admitted under the provisions of Titles I and II of this Act.

(b) That the President may by proclamation specify and declare new or additional duties as hereinafter provided upon the products of any foreign country whenever he shall find as a fact that such country—

Imposes, directly or indirectly, upon the disposition or transportation in transit through or reexportation from such country of any product of the United States any unreasonable charge, exaction, regulation, or limitation which is not equally enforced upon the like products of any foreign country;

Imposes, directly or indirectly, upon the importation from the United States of any article not the product of the United States any customs, tonnage, or port duty or any other charge, exaction, regulation, or limitation whatever which is not equally enforced upon importation from every foreign country of the like article not being the product of the country whence it is directly imported;

Imposes upon any product upon its exportation to the United States any duty, charge, restriction, or prohibition whatever which is not equally enforced upon the exportation of such products to every foreign country;

Discriminates against the commerce of the United States, directly or indirectly, by law or administrative regulation or practice, by or in respect to any duty, fee, charge, exaction, classification, regulation, condition, restriction, or prohibition, in such manner as to place the commerce of the United States at a disadvantage compared with the commerce of any foreign country; or fails to accord to the commerce of the United States treatment equal and equivalent to that accorded to the commerce of any foreign country.

(c) If at any time the President shall find it to be a fact that any foreign country has not only discriminated against the commerce of the United States, but has, after the issuance of a proclamation as authorized in subsection (b) hereof, maintained or increased its discriminations against the commerce of the United States, the President is hereby authorized in his discretion to issue a further proclamation directly that such products of said country as he shall deem proper shall be excluded from importation into the United States.

(d) That any proclamation issued by the President under the authority of this section may in his discretion extend to the whole of any foreign country or may be confined to any subdivision or subdivisions thereof; and the President may at any time suspend, revoke, supplement, or amend any such proclamation.

(e) The President shall find as a fact the burdens placed on the commerce of the United States by the discriminations aforesaid, and when issuing any such proclamation shall declare therein new or additional customs duties determined by him to be equivalent to such burdens, not to exceed 50 per centum ad valorem or its equivalent, and shall specify the date upon which such proclamation and any new or additional customs duties declared therein shall take effect and from and after such date there shall be levied, collected, and paid on the products enumerated in such proclamation when imported into

the United States such new or additional customs duties; or in case of products declared subject to exclusion from importation into the United States under the provisions of subsection (c) hereof, such products shall be excluded from importation.

(f) That whenever the President shall find as a fact that any foreign country enforces upon the exportation of any product any export duty, restriction, or prohibition, or grants any bounty on production or exportation, any rebate of duties or any preferential allowance upon exports which unduly or unfairly discriminates against the United States, any products thereof, or consumers therein, he may by proclamation specify and declare new or additional duties as provided in subsections (b), (d), and (e) upon importation from any foreign country into the United States of the products of any industry which receives any benefit from any such discriminatory provisions aforesaid; and said new or additional duties shall be levied, collected, and paid as provided in such proclamation.

(g) All articles of merchandise imported contrary to the provisions of this section shall be forfeited to the United States and shall be liable to be seized, prosecuted, and condemned in like manner and under the same regulations, restrictions, and provisions as may from time to time be established for the recovery, collection, distribution, and remission of forfeitures to the United States by the several revenue laws. Whenever the provisions of this Act shall be applicable to importations into the United States of the products of any foreign country, they shall be applicable thereto whether such products are imported directly or indirectly.

(h) It shall be the duty of such department or independent establishment of the Government, as the President may direct, to ascertain and at all times to be informed whether any of the discriminations against the commerce of the United States enumerated in subsections (b), (c), and (f) of this section are practiced by any country; and if and when such discriminatory acts are disclosed, it shall be the duty of the said Commission to bring the matter to the attention of the President, together with recommendations.

(i) The Secretary of the Treasury, with the approval of the President, shall make such rules and regulations as are necessary for the execution of such proclamations as the President may issue in accordance with the provisions of this Act.

(j) That when used in this section the term "foreign country" shall mean any empire, country, dominion, colony, or protectorate, or any subdivision or subdivisions thereof (other than the United States and its possessions), within which separate tariff rates or separate regulations of commerce are enforced.

APPENDIX 2

TEXT OF SECTION 317 (TARIFF ACT OF 1922) AS IT WAS FIRST ADOPTED BY THE SENATE

(*Congressional Record*, August 11, 1922, vol. 62, pt. 11, 67th Cong.,
2nd Sess., p. 11249).

SEC. 317. (a) That from and after the passage of this act, subject to the provisions of this section, all products when imported into the United States from any foreign country shall be admitted under the provisions of Titles I and II and sections 315 and 316 of this act.

(b) That the President shall by proclamation specify and declare new or additional duties as hereinafter provided upon the products of any foreign country whenever he shall find as a fact that such country—

Imposes, directly or indirectly, upon the disposition in or transportation in transit through or reexportation from such country of any product of the United States any unreasonable charge, exaction, regulation, or limitation which is not equally enforced upon the like products of any foreign country;

Discriminates against the commerce of the United States, directly or indirectly, by law or administrative regulation or practice, by or in respect to any customs, tonnage, or port duty, fee, charge, exaction, classification, regulation, condition, restriction, or prohibition, in such manner as to place the commerce of the United States at a disadvantage compared with the commerce of any foreign country.

(c) If at any time the President shall find it to be a fact that any foreign country has not only discriminated against the commerce of the United States, as aforesaid, but has, after the issuance of a proclamation as authorized in subsection (b) hereof, maintained or increased its said discriminations against the commerce of the United States, the President is hereby

authorized, if he deems it consistent with the interests of the United States, to issue a further proclamation directing that such products of said country as he shall deem the public interests may require shall be excluded from importation into the United States.

(d) That any proclamation issued by the President under the authority of this section shall, if he deems it consistent with the interests of the United States, extend to the whole of any foreign country or may be confined to any subdivision or subdivisions thereof; and the President shall, whenever he deems the public interests require, suspend, revoke, supplement, or amend any such proclamation.

(e) The President shall find as a fact the burdens placed on the commerce of the United States by the discriminations aforesaid, and when issuing any such proclamation shall declare therein the new or additional customs duties determined by him as aforesaid to be equivalent to such burdens, not to exceed 50 per cent ad valorem or its equivalent, and shall specify the date upon which such proclamation and any new or additional customs duties declared therein shall take effect, and from and after such date there shall be levied, collected, and paid on the products enumerated in such proclamation when imported into the United States such new or additional customs duties; or in case of products declared subject to exclusion from importation into the United States under the provisions of subsection (c) hereof, such products shall be excluded from importation.

(f) That whenever the President shall find as a fact that any foreign country enforces upon the exportation of any product any export duty, restriction, or prohibition, or grants any bounty, on production or exportation, any rebate of duties or any preferential allowance upon exports which unduly or unfairly discriminates against the United States, any products thereof, or consumers therein, he shall by proclamation specify and declare new or additional duties as provided in subsections (b), (d), and (e) upon importation from any foreign country into the United States of the products of any industry which

receives any benefit from any such discriminatory provisions aforesaid; and said new or additional duties shall be levied, collected, and paid as provided in such proclamation.

(g) All articles of merchandise imported contrary to the provisions of this section shall be forfeited to the United States and shall be liable to be seized, prosecuted, and condemned in like manner and under the same regulations, restrictions, and provisions as may from time to time be established for the recovery, collection, distribution, and remission of forfeitures to the United States by the several revenue laws. Whenever the provisions of this act shall be applicable to importations into the United States of the products of any foreign country, they shall be applicable thereto whether such products are imported directly or indirectly.

(h) It shall be the duty of the United States Tariff Commission to ascertain and at all times to be informed whether any of the discriminations against the commerce of the United States enumerated in subsections (b), (c), and (f) of this section are practiced by any country; and if and when such discriminatory acts are disclosed it shall be the duty of the commission to bring the matter to the attention of the President, together with recommendations.

(i) The Secretary of the Treasury with the approval of the President shall make such rules and regulations as are necessary for the execution of such proclamations as the President may issue in accordance with the provisions of this act.

(j) That when used in this section the term "foreign country" shall mean any empire, country, dominion, colony, or protectorate, or any subdivision or subdivisions thereof (other than the United States and its possessions), within which separate tariff rates or separate regulations of commerce are enforced.

APPENDIX 3

LIST OF COMMERCIAL AGREEMENTS IN FORCE BETWEEN THE UNITED STATES AND OTHER COUNTRIES ON MARCH 1, 1924

In preparing the following list of arrangements with other countries the word "commercial" is strictly construed and limited to those instruments which have as their *chief* purpose the facilitation of international trade and the regulation of commercial and general intercourse.

This list does not include arrangements relating primarily to the Panama Canal, to patents, to trade-marks, to copyrights, to property rights or to fisheries; nor does it include arrangements which have grown out of and which relate to the settlement of the World War. The Treaties Restoring Friendly Relations with Germany (signed August 25, 1921; proclaimed November 14, 1921) and Establishing Friendly Relations with Austria (signed August 24, 1921; proclaimed November 17, 1921) and with Hungary (signed August 29, 1921; proclaimed December 20, 1921), by incorporating portions of the Treaties of Versailles, Saint-Germain-en-Laye and Trianon, reserve for the United States important rights of a commercial nature; but they could hardly be called commercial treaties.

The arrangements here listed are all bi-lateral. The convention concerning Samoa, signed December 2, 1899, included as parties the United States, Great Britain and Germany. The German rights and privileges under it were, however, terminated by the Treaty of Versailles. (Article 288).

The texts of all the instruments in the following list which were in force prior to January 1, 1923, are published in the volumes entitled *Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and Other Powers* (Three volumes; the first two,

compiled by Wm. M. Malloy, Senate Documents No. 357, 61st Congress, 2d Session; the third, Senate Document No. 348, 67th Congress, 4th Session). The texts of all agreements with other countries are published currently by the Department of State as separate pamphlets in the *Treaty Series*.

Reference is made to the *Statutes at Large of the United States* (Stat.) whenever the text of one of the instruments has been there included. The date of signature (S.) is given in every case. The dates when ratifications were exchanged (R.E.) and when proclamation was made by the President of the United States (P.) are also stated except in those cases, few in number, where these formalities were not observed.

Those instruments which contain most-favored-nation clauses affecting customs tariffs are marked with an asterisk (*) and the numbers of the articles (except in case of exchanges of notes, not divided into articles) containing such clauses are stated in parenthesis. Certain articles in some of the instruments here listed were abrogated under the La Follette Seaman's Act, referred to as the Act of March 4, 1915 (38 Stat. 1164).

Argentina. Treaty for the Free Navigation of the Rivers Parana and Uruguay. S., July 10, 1853. R.E., December 20, 1854. P., April 9, 1855. 10 Stat. 1001.

* Argentina. Treaty of Friendship, Commerce and Navigation. S., July 27, 1853. R.E., December 20, 1854. P., April 9, 1855. 10 Stat. 1005. (Articles III and IV.)

* Belgium. Treaty of Commerce and Navigation. S., March 8, 1875. R.E., June 11, 1875. P., June 29, 1875. 19 Stat. 628. (Article XII).

* Bolivia. Treaty of Peace, Friendship, Commerce and Navigation. S., May 13, 1858. R.E., November 9, 1862. P., January 8, 1863. Article XXXIV abrogated under the Act of March 4, 1915. 12 Stat. 1003. (Articles II and VI).

* Borneo. Convention of Amity, Commerce and Navigation. S., June 23, 1850. R.E., July 11, 1853. P., July 12, 1854. 10 Stat. 909. (Article II).

* Brazil. Agreement Effected by Exchange of Notes, According Mutual Unconditional Most-favored-nation Treatment in Customs Matters. S., October 18, 1923.

China. Treaty of Peace, Amity and Commerce. S., July 3, 1844. R. E., December 31, 1845. P., April 18, 1846. In force except as modified by subsequent treaties. 8 Stat. 592.

China. Treaty of Peace, Amity and Commerce. S., June 18, 1858. R. E., August 16, 1859. P., January 26, 1860. In force except as modified by subsequent treaties. Second sentence of Article XVIII abrogated under the Act of March 4, 1915. 12 Stat. 1023.

China. Additional Articles to the Treaty between the United States and China, of June 18, 1858. S., July 28, 1868. R. E., November 23, 1869. P., February 5, 1870. In force except as modified by subsequent treaties. 16 Stat. 739.

China. Treaty as to Commercial Intercourse and Judicial Procedure. S., November 17, 1880. R. E., July 19, 1881. P., October 5, 1881. In force except as modified by subsequent treaties. 22 Stat. 828.

* China. Treaty on Commercial Relations. S., October 8, 1903. R. E., January 13, 1904. P., January 13, 1904. 33 Stat. 2208. (Article V).

China. Treaty Confirming Application of a five per centum ad valorem Rate of Duty to Importations of Goods into China by Citizens of the United States. S., October 20, 1920. R. E., November 5, 1921. P., November 7, 1921. 42 Stat. 1955.

* Colombia. (New Grenada). Treaty of Peace, Amity, Navigation and Commerce. S., December 12, 1846. R. E., June 10, 1848. P., June 12, 1848. Article XXXIII conflicts with the Act of March 4, 1915. 9 Stat. 881. (Articles II and V).

* Costa Rica. Treaty of Friendship, Commerce and Navigation. S., July 10, 1851. R. E., May 26, 1852. P., May 26, 1852. 10 Stat. 916. (Articles III and IV).

Cuba. Commercial Convention. S., December 11, 1902. R. E., March 31, 1903. P., December 17, 1903. 33 Stat. 2136.

* Czechoslovakia. Agreement Effected by Exchange of Notes, According Mutual Unconditional Most-favored-nation Treatment in Customs Matters. S., October 29, 1923. Effective November 5, 1923.

* Denmark. Treaty of Friendship, Commerce and Navigation. S., April 26, 1826. R. E., August 10, 1826. P., October 14, 1826. 8 Stat. 340. (Articles I and IV).

Denmark. Convention discontinuing Sound Dues. S., April 11, 1857. R. E., January 12, 1858. P., January 13, 1858. 11 Stat. 719.

* Egypt. Agreement concerning Commercial and Customs Regulations. S., November 16, 1884. P., May 7, 1885. 24 Stat. 1004. (Most-favored-nation treatment unilateral, to the United States. Article I of incorporated Greece-Egypt convention).

* Ethiopia. Treaty of Commerce. S., June 27, 1914. P., August 9, 1920. 41 Stat. 1711. (Article III).

France. Treaty of Commerce and Navigation. S., June 24, 1822. R. E., February 12, 1823. P., February 12, 1823. Article VI abrogated under the Act of March 4, 1915. 8 Stat. 278.

France. Agreement Modifying the Provisions of Article VII of the Convention of June 24, 1822. S., July 17, 1919. R. E., January 10, 1921. P., January 12, 1921. 41 Stat. 1723.

* Great Britain. Convention to Regulate Commerce. S., July 3, 1815. R. E., December 22, 1815. P., December 22, 1815. 8 Stat. 228. (Article II).

Great Britain. Commercial Convention, Extending indefinitely the Convention of July 3, 1815. S., August 6, 1827. R. E., April 2, 1828. P., May 15, 1828. 8 Stat. 361.

Great Britain. Convention to Adjust the Question between the United States, Germany and Great Britain in Respect to the Samoan Islands. S., December 2, 1899. R. E., February 16, 1900. P., February 16, 1900. 31 Stat. 1878. (National treatment, Article III).

Great Britain. Treaty concerning the Establishment of import duties in Zanzibar. S., May 31, 1902. R. E., October 17, 1902. P., October 17, 1902. 32 Stat. 1959.

Great Britain. Treaty concerning Light and Harbor Dues in Zanzibar. S., June 5, 1903. R. E., December 24, 1903. P., December 24, 1903. 33 Stat. 2172.

Great Britain. Declarations exempting Commercial Travelers' Samples from Customs Inspection. S., December 3 and 8, 1910. Effective January 1, 1911.

Guatemala. Convention Facilitating the Work of Traveling Salesmen. S., December 3, 1918. R. E., August 25, 1919. P., August 27, 1919. 41 Stat. 1669.

* Honduras. Treaty of Friendship, Commerce and Navigation. S., July 4, 1864. R. E., May 5, 1865. P., May 30, 1865. 13 Stat. 699. (Articles III and IV).

* Italy. Treaty of Commerce and Navigation. S., February 26, 1871. R. E., November 18, 1871. P., November 23, 1871. 17 Stat. 845. (Articles VI and XXIV).

Italy. Treaty Amending Article III of the Treaty of Commerce and Navigation of February 26, 1871. S., February 25, 1913. R. E., July 3, 1913. P., July 3, 1913. 38 Stat. 1669.

* Japan. Treaty and Protocol on Commerce and Navigation. S., February 21, 1911. R. E., April 4, 1911. P., April 5, 1911. 37 Stat. 1504. (Article XIV).

* Japan. Treaty Regarding Rights of the Two Governments and their Respective Nationals in Former German Islands in the Pacific Ocean North of the Equator, and in Particular the Island of Yap. S., February 11, 1922. R. E., July 13, 1922. P., July 13, 1922. 42 Stat. 2149. (Article II (3), making applicable to the mandated islands existing treaties between the United States and Japan).

* Liberia. Treaty of Commerce and Navigation. S., October 21, 1862. R. E., February 17, 1863. P., March 18, 1863. 12 Stat. 1245. (Article VI).

* Morocco. Treaty of Peace and Friendship. S., September 16 and October 1, 1836. P., January 30, 1837. 8 Stat. 484. (Most-favored-nation treatment unilateral, to the United States. Article XIV).

* Muscat. Treaty of Amity and Commerce. S., September 21, 1833. R. E., September 30, 1835. P., June 24, 1837. 8 Stat. 458. (Most-favored-nation treatment unilateral, to the United States. Article IV. See also Article VI).

The Netherlands. Commercial Convention. S., August 26,

1852. R. E., February 25, 1853. P., February 26, 1853. 10 Stat. 982.

* Norway. Treaty of Commerce and Navigation. With Sweden and Norway. No longer in effect as to Sweden. S., July 4, 1827. R. E., January 18, 1828. P., January 19, 1828. By note of December 7, 1905, the Norwegian Chargé d'Affaires notified the Secretary of State that, as a result of the dissolution of the union between Sweden and Norway, the latter would deem itself responsible only for those obligations which concerned Norway. Articles XIII and XIV abrogated under the Act of March 4, 1915. 8 Stat. 346. (Article IX; Article XVII, reviving Article II of Treaty of April 3, 1783, between the United States and Sweden).

* Ottoman Empire. Treaty of Commerce and Navigation. S., May 7, 1830. R. E., October 5, 1831. P., February 4, 1832. 8 Stat. 408. (Article I).

Panama. Convention Facilitating the Work of Traveling Salesmen. S., February 8, 1919. R. E., December 8, 1919. P., December 10, 1919. 41 Stat. 1696.

* Paraguay. Treaty of Friendship, Commerce and Navigation. S., February 4, 1859. R. E., March 7, 1860. P., March 12, 1860. 12 Stat. 1087. (Articles III and IV).

Paraguay. Convention Facilitating the Work of Traveling Salesmen. S., October 20, 1919. R. E., March 22, 1922. P., April 28, 1922. 42 Stat. 2128.

* Persia. Treaty of Friendship and Commerce. S., December 13, 1856. R. E., June 13, 1857. P., August 18, 1857. 11 Stat. 709. (Article IV).

Portugal. Commercial Agreement effected by Exchange of notes. S., June 28, 1910.

Salvador. Convention Facilitating the Work of Traveling Salesmen. S., January 28, 1919. R. E., January 18, 1921. P., January 22, 1921. 41 Stat. 1725.

Samoa: see Great Britain.

* Serbia. (Kingdom of the Serbs, Croats and Slovenes). Treaty for Facilitating and Developing Commercial Relations. S., October 2/14, 1881. R. E., November 15, 1882. P., December 27, 1882. 22 Stat. 963. (Article VI).

* Siam. Treaty and Protocol Revising hitherto existing Treaties. S., December 16, 1920. R. E., September 1, 1921. P., October 12, 1921. 42 Stat. 1928. (Most-favored-nation treatment unilateral, to the United States, Article VII; see also Article VI.)

Spain. Treaty of Friendship and General Relations. S., July 3, 1902. R. E., April 14, 1903. P., April 20, 1903. Articles XXIII and XXIV abrogated in so far as in conflict with the Act of March 4, 1915. 33 Stat. 2105.

* Spain. Arrangement Effected by Exchange of Notes, agreeing to the enforcement, from November 5, 1923, to May 5, 1924, of the provisions of the commercial agreement concluded on August 1, 1906, under section 3 of the Tariff Act of July 24, 1897, without, however, providing for the extension to the United States of any change or advantage which might be established between Spain and other countries after November 5, 1923. S., October 6/22, 1923. Extended until May 5, 1925, by exchange of notes effected April 26/27, 1924. See subdivisions 37 (g) and 65, *supra*.

Switzerland. Convention of Friendship, Commerce and Extradition, etc. S., November 25, 1850. R. E., November 8, 1855. P., November 9, 1855. Articles VIII to XII, inclusive, terminated on March 23, 1900, upon notice given by the United States on March 23, 1899. Articles XIII to XVII, inclusive, were superseded on March 29, 1901, by the Extradition Treaty signed on May 14, 1900. 11 Stat. 587.

Uruguay. Convention Facilitating the Work of Traveling Salesmen. S., August 27, 1918, R. E., August 2, 1919. P., August 11, 1919. 41 Stat. 1663.

Venezuela. Convention Facilitating the Work of Traveling Salesmen. S., July 3, 1919. R. E., August 18, 1920. P., October 15, 1920. 41 Stat. 1719.

APPENDIX 4

LIST OF MULTI-LATERAL CONVENTIONS TO WHICH THE UNITED STATES WAS A PARTY ON MARCH 1, 1924

The texts of the following instruments are, with one exception, as noted, published in the second (prior to 1910) and third (1910 and since) volumes of the collection entitled *Treaties, Conventions, International Acts, Protocols and Agreements between the United States and Other Powers* (Senate Documents, no. 357, 61st Congress, 2d Session; and no. 348, 67th Congress, 4th Session). They are also published in the *Statutes at Large of the United States*.

Convention for the establishment of an international bureau of weights and measures. Signed at Paris, May 20, 1875. Proclaimed by the President of the United States September 27, 1878.

Convention amending the convention relating to weights and measures, signed at Paris, May 20, 1875, and the regulations annexed thereto. Signed at Sevres, October 6, 1921. Proclaimed by the President of the United States October 27, 1923.

Convention for protection of submarine cables. Signed at Paris, March 14, 1884. Proclaimed by the President of the United States May 22, 1885.

Declaration respecting the interpretation of Articles II and IV of the convention of March 14, 1884, for the protection of submarine cables. Signed at Paris, December 1, 1886. Proclaimed by the President of the United States May 1, 1888.

Final protocol of agreement fixing May 1, 1888, as the date of effect of the convention for the protection of submarine cables. Signed at Paris, July 7, 1887. Proclaimed by the President of the United States May 1, 1888.

Convention for international exchange of official documents, scientific and literary publications. Signed at Brussels, March

15, 1886. Proclaimed by the President of the United States January 15, 1889.

Convention for the immediate exchange of official journals, parliamentary annals and documents. Signed at Brussels, March 15, 1886. Proclaimed by the President of the United States January 15, 1889.

Convention concerning the formation of an international Union for the publication of customs tariffs. Signed at Brussels, July 5, 1890. Proclaimed by the President of the United States December 17, 1890.

General act for the repression of African slave trade. Signed at Brussels, July 2, 1890. Proclaimed by the President of the United States April 2, 1892.

Convention for the regulation of the importation of spirituous liquors into certain regions of Africa. Concluded at Brussels, June 8, 1899. Declaration of adhesion of the United States, February 1, 1901. Proclaimed by the President of the United States February 6, 1901.

Convention relative to the exchange of official, scientific, literary and industrial publications. Signed at Mexico City, January 27, 1902. Ratified by the President of the United States June 23, 1902. Signatory states informed July 16, 1902. (Not published).

Convention for the pacific settlement of international disputes. Signed at The Hague, July 29, 1899. Proclaimed by the President of the United States November 1, 1901.

Declaration as to the launching of projectiles and explosives. Signed at The Hague, July 29, 1899. Proclaimed by the President of the United States November 1, 1901.

Agreement respecting the unification of the pharmacopoeial formulas for potent drugs. Signed at Brussels, November 29, 1906.

General act of the international conference at Algeciras. Signed April 7, 1906. Proclaimed by the President of the United States January 22, 1907.

Convention for the exemption of hospital ships in time of war from the payment of all dues and taxes imposed for the

benefit of the state. Signed at The Hague, December 21, 1904. Proclaimed by the President of the United States May 21, 1907.

Convention for the amelioration of the condition of the wounded of armies in the field. (International Red Cross Convention). Signed at Geneva, July 6, 1906. Proclaimed by the President of the United States August 3, 1907.

Convention revising the duties imposed by the Brussels Convention of June 8, 1899, on spirituous liquors imported into certain regions of Africa. Concluded at Brussels, November 3, 1906. Declaration of adhesion of the United States, February 19, 1907. Proclaimed by the President of the United States December 2, 1907.

Convention for the creation of an international institute of agriculture. Signed at Rome, June 7, 1905. Proclaimed by the President of the United States January 29, 1908.

Convention on literary and artistic copyrights. Signed at Mexico City, January 27, 1902. Proclaimed by the President of the United States April 9, 1908.

Agreement for the repression of the trade in white women. Signed at Paris, May 18, 1904. Proclaimed by the President of the United States June 15, 1908.

Arrangement for the establishment of the international office of public health. Signed at Rome, December 9, 1907. Proclaimed by the President of the United States November 17, 1908.

Inter-American sanitary convention. Signed at Washington, October 14, 1905. Proclaimed by the President of the United States March 1, 1909.

Convention for the pacific settlement of international disputes. Signed at The Hague, October 18, 1907. Proclaimed by the President of the United States February 28, 1910.

Convention respecting the limitation of the employment of force for the recovery of contract debts. Signed at The Hague, October 18, 1907. Proclaimed by the President of the United States February 28, 1910.

Convention relative to the opening of hostilities. Signed at The Hague, October 18, 1907. Proclaimed by the President of the United States February 28, 1910.

Convention respecting the laws and customs of war on land. Signed at The Hague, October 18, 1907. Proclaimed by the President of the United States February 28, 1910.

Convention respecting the rights and duties of neutral powers and persons in war on land. Signed at The Hague, October 18, 1907. Proclaimed by the President of the United States February 28, 1910.

Convention relative to the laying of automatic submarine contact mines. Signed at The Hague, October 18, 1907. Proclaimed by the President of the United States February 28, 1910.

Convention respecting bombardment by naval forces in time of war. Signed at The Hague, October 18, 1907. Proclaimed by the President of the United States February 28, 1910.

Convention for the adaption to naval war of the principles of the Geneva Convention of July 6, 1906. Signed at The Hague, October 18, 1907. Proclaimed by the President of the United States February 28, 1910.

Convention relative to the right of capture in naval war. Signed at The Hague, October 18, 1907. Proclaimed by the President of the United States February 28, 1910.

Convention concerning the rights and duties of neutral powers in naval war. Concluded at The Hague, October 18, 1907. Adherence advised by United States Senate (Except Article 23) April 17, 1908. Proclaimed by the President of the United States February 28, 1910.

Declaration prohibiting the discharge of projectiles and explosives from balloons. Signed at The Hague, October 18, 1907. Proclaimed by the President of the United States February 28, 1910.

Arrangement relative to the repression of the circulation of obscene publications. Signed at Paris, May 4, 1910. Proclaimed by the President of the United States April 13, 1911.

Convention for the preservation and protection of fur seals. Signed at Washington, July 7, 1911. Proclaimed by the President of the United States December 14, 1911.

Convention establishing an international law commission.

Signed at Rio de Janeiro August 23, 1906. Proclaimed by the President of the United States May 1, 1912.¹

International wireless telegraph convention. Signed at Berlin November 3, 1906. Proclaimed by the President of the United States May 25, 1912.

International wireless telegraph convention. Signed at London, July 5, 1912. Proclaimed by the President of the United States July 8, 1913.

Convention establishing the status of naturalized citizens who again take up their residence in the country of their origin. Signed at Rio de Janeiro, August 13, 1906. Proclaimed by the President of the United States January 28, 1913.

Convention for the unification of certain rules of law with respect to assistance and salvage at sea. Signed at Brussels September 23, 1910. Proclaimed by the President of the United States February 13, 1913.

Convention for the protection of industrial property. Signed at Washington, July 2, 1911. Proclaimed by the President of the United States April 29, 1913.

Convention concerning literary and artistic copyrights. Signed at Buenos Aires, August 11, 1910. Proclaimed by the President of the United States July 13, 1914.

Convention for the arbitration of pecuniary claims. Signed at Buenos Aires, August 11, 1910. Proclaimed by the President of the United States July 29, 1914.

Convention for the protection of inventions, patents, designs and industrial models. Signed at Buenos Aires, August 20, 1910. Proclaimed by the President of the United States July 29, 1914.

Convention for the suppression of the abuse of opium and other drugs. Signed at The Hague, January 23, 1912 and July 9, 1913. Proclaimed by the President of the United States March 3, 1915.

¹ With the object of continuing the work started by the Commission of Jurists established under this convention, and of adding to its program, the Fifth International Conference of American States (Santiago, Chile, 1923) adopted a resolution reorganizing the Commission and requesting each government to appoint two delegates.

Convention for the protection of trade marks. Signed at Buenos Aires, August 20, 1910. Proclaimed by the President of the United States September 16, 1916.

International sanitary convention. Signed at Paris, January 17, 1912. Proclaimed by the President of the United States December 11, 1920.

Treaty relating to insular possessions and insular dominions in the region of the Pacific Ocean. (The Four-Power Treaty). Signed at Washington, December 13, 1921. Proclaimed by the President of the United States August 21, 1923.

Agreement supplementary to the treaty of December 13, 1921, relating to insular possessions and insular dominions in the region of the Pacific Ocean. Signed at Washington, February 6, 1922. Proclaimed by the President of the United States August 21, 1923.

Treaty providing for the limitation of naval armament. Signed at Washington, February 6, 1922. Proclaimed by the President of the United States August 21, 1923.

The Postmaster General is authorized by Section 398 of the Revised Statutes to enter into agreements with other countries relating to the postal service. The United States is, in this way, a party to the following multilateral postal conventions. They are published in the *Statutes at Large of the United States*.

Universal Postal Union: Universal Postal Convention and Regulations signed at Madrid, November 30, 1920. Ratified with reservations by the Postmaster General, December 31, 1921. Approved by the President, January 23, 1922.

Spanish-American Postal Convention. Signed at Madrid, November 13, 1920. Ratified by the Postmaster General May 1, 1922. Approved by the President, May 8, 1922.

Pan American Postal Union: Principal Convention of Buenos Aires and Regulations, signed at Buenos Aires, September 15, 1921. Ratified by the Postmaster General, February 24, 1922. Approved by the President, February 28, 1922.

Pan American Postal Union: Parcel Post Convention and Regulations. Signed at Buenos Aires, September 15, 1921. Ratified by the Postmaster General, February 24, 1922. Approved by the President, February 28, 1922.

APPENDIX 5

CERTAIN PROVISIONS ANALOGOUS TO SECTION 317 IN THE LAWS OF OTHER COUNTRIES

(Such a provision in the law of Canada is quoted *supra* in subdivision 32. An analogous Russian decree is referred to in the first footnote of subdivision 23).

CHILE

Article 23 of Customs Tariff Law

The existing tariff rates shall be considered as the minimum rates applicable to the products of the countries which allow to Chilean imports the privileges of the most-favored-nation legislation. The President of Chile is authorized to increase the tariff duties up to 25 per cent when they apply to the importation of the products of countries not granting favored nation privileges to Chile.

GERMANY

Paragraph 10 Customs Law of December 25, 1902

Dutiable goods proceeding from States that treat German ships or products less favorably than those of other nations may, in addition to the duties provided for in the tariff, be burdened with a surtax not exceeding twice the amount of the tariff rate imposed on such goods or even with a surtax equivalent to the total value of the goods themselves. Goods free of duty according to the tariff may, under the same conditions, be taxed with a duty not exceeding 50 per cent ad valorem. . . .

The measures provided for in this section shall be put in force by imperial ordinance after being approved by the Bundesrath.

Any provisions enacted in the matter shall be communicated

to the Reichstag forthwith, or, if not assembled, at its next session. The same shall be cancelled if not assented to by the Reichstag.

GREAT BRITAIN

Customs Consolidation Act, 1853; CCCXXIV, CCCXXV and CCCXXVI

If it shall be made to appear to Her Majesty that British vessels are subject in any foreign country to any prohibitions or restrictions as to the voyages in which they may engage, or as to the articles which they may import into or export from such country, it shall be lawful for Her Majesty (if she think fit) by Order in Council, to impose such prohibitions or restrictions upon the ships of such foreign country, either as to the voyages in which they may engage or as to the articles which they may import into or export from any part of the United Kingdom or of any British possession in any part of the world, as Her Majesty may think fit, so as to place the ships of such country on as nearly as possible the same footing in British ports as that on which British ships are placed in the ports of such country.

If it shall be made to appear to Her Majesty that British ships are either directly or indirectly subject in any foreign country to any duties or charges of any sort or kind whatsoever from which the national vessels of such country are exempt, or that any duties are imposed upon articles imported or exported in British ships which are not equally imposed upon the like articles imported or exported in national vessels, or that any preference whatsoever is shown either directly or indirectly to national vessels over British vessels, or to articles imported or exported in national vessels over the like articles imported or exported in British vessels, or that British trade and navigation is not placed by such country upon as advantageous a footing as the trade and navigation of the most favored nation, then and in any such case it shall be lawful for Her Majesty (if she think fit), by Order in Council, to impose such duty or duties of tonnage upon the ships of such nation

entering into or departing from the ports of the United Kingdom, or of any British possession in any part of the world, or such duty or duties on all goods or on any specified classes of goods imported or exported in the ships of such nation as may appear to Her Majesty justly to countervail the disadvantages to which British trade or navigation is so subjected as aforesaid.

And in every such Order Her Majesty may, if she so think fit, specify what ships are to be considered as ships of the country or countries to which such Order applies, and all ships answering the description contained in such Order shall be considered to be ships of such country or countries for the purposes of such Order.

At the Imperial Economic Conference, 1923, the Representatives of the British Empire Declared

(1) That it is their established practice to make no discrimination between the flags of shipping using their ports, and that they have no intention of departing from this practice as regards countries which treat ocean-going shipping under the British flag on a footing of equality with . . . national shipping.

(2) That in the event of danger arising in future to the overseas shipping of the Empire through an attempt by a foreign country to discriminate against the British flag, the governments of the Empire will consult together as to the best means of meeting the situation.

ITALY

Article 5 of the Customs Tariff

Goods proceeding from countries in which Italian vessels and products are subject to a differential régime, may be burdened with an increase of frontier duties up to 50 per cent of the duty inscribed in the General Tariff.

In the case of goods duty-free under the tariff, the same may be burdened with an import duty up to 25 per cent of their official market value.

These dispositions shall be issued by Royal decree describing the goods liable to the surtax and the extent to which such increase of duty shall be applied.

The decree in question must immediately be submitted to Parliament to be converted into law.

JAPAN

Article IV of Customs Tariff Law of April 15, 1910

With respect to articles, the produce or manufacture of a country in which vessels, or produce or manufacture of Japan are subjected to less favorable treatment than those of other countries, the articles of such country may be designated by Imperial Ordinance, which shall be liable to customs duties not exceeding in amount the value of such articles in addition to the duties prescribed in the annexed tariff.

THE NETHERLANDS

The Law of August 8, 1850, S. No. 47, Article 8, Specifies as Follows

Be it resolved, That, in regard to the ships of those nations where Netherland ships, or goods shipped into or from such country in Netherland ships, are subjected to a higher tax or duty of whatsoever sort, than the ships, or goods of like nature transported in the ships of other nations, or where the importation or exportation of goods of any sort permitted in ships of other nations is forbidden in Netherland ships; whenever in such circumstances it shall seem necessary, or to the advantage of Netherland commerce and navigation, to resort to retaliatory measures, either by preventing importation of certain goods in ships of such nations, by subjecting the ships of such nation to a higher tonnage fee, or by imposing an increased duty on goods imported in ships of such nation, by whatever means this is done, in the application of such retaliatory measures, an absolute reciprocity shall be maintained as far as possible.

The retaliatory measures taken shall be reported at once to the States General if assembled, or as soon as it shall convene if not in session.

(Article 8 was amended in the law of July 14, 1855, by replacing in the clause, "by subjecting the ships of such nation to a higher tonnage fee," the phrase, "a higher," by the words "by us to be determined.")

NORWAY

Paragraph 11 of the General Customs Tariff

Foreign vessels and goods imported and exported on them shall not be subject to other or higher dues than those imposed on Norwegian vessels and on goods imported or exported on them, unless the King should order the assessment of higher dues on goods or vessels of some foreign nation.

PERU

Article 44a of the Tariff Law of July 1, 1923

The present tariff rates shall be considered as the minimum rates applicable to the products of the countries which concede most-favored-nation treatment to Peruvian exports.

PORTUGAL

Article 5 of the Decree Establishing Customs Tariff

In the following cases, the Government will be at liberty to increase fivefold the navigation and import taxes or fix rates upon duty-free goods, when the ships or goods arrive from, or originate in countries not extending to Portugal their minimum Customs Tariff rates:

1. When such countries levy "surtaxes d'entrepot" upon Portuguese Colonial products re-exported from Portugal, and generally, upon the whole re-export trade of Portugal.
2. When they impose restrictive or special measures on importation which are in any way prejudicial to Portuguese exports or when their Customs Tariffs are such as to specially affect any particular product or class of products exclusively originating in Portuguese regions or colonies, or any other goods being or capable of becoming an important Portuguese export.

SWITZERLAND

Article 4 of Customs Tariff Law

It shall be lawful for the Federal Council to increase at any time to such an extent as they may deem fit, the rates of the general tariff applicable to products of states levying excessive

rates of duty on Swiss goods, or treating them less favorably than the goods of other countries. In cases where the present law provides for exemption from duty, the Federal Council may establish duties.

In cases where any measures adopted in a foreign country are likely to interfere with the trade of Switzerland, and also in cases where the application of the Swiss Customs duties proves inoperative owing to export bounties or like grants, the Federal Council are empowered in a general way, to take measures deemed fit to meet the circumstances.

VENEZUELA

Article 15 of Customs Tariff Law

The Executive Power is authorized to increase up to 25 per cent the import duties on merchandise from foreign countries which in their treaties with Venezuela have no favored nation clause concerning their treatment.

LEAGUE OF NATIONS

Second General Conference on Communications and Transit, Geneva, 1923. First eight articles of Statute on the International Régime of Maritime Ports:

Article 1

All ports which are normally frequented by seagoing vessels and used for foreign trade shall be deemed to be maritime ports within the meaning of the present statute.

Article 2

Subject to the principle of reciprocity and to the reservation set out in the first paragraph of article 8, every contracting State undertakes to grant the vessels of every other contracting State equality of treatment with its own vessels, or those of any other State whatsoever, in the maritime ports situated under its sovereignty or authority, as regards freedom of access to the port, the use of the port, and the full enjoyment of the benefits as regards navigation and commercial operations which it affords to vessels, their cargoes, and passengers.

The equality of treatment thus established shall cover facilities of all kinds, such as allocation of berths, loading and unloading facilities, as well as dues and charges of all kinds levied in the name or for the account of the Government, public authorities, concessionaries, or undertakings of any kind.

Article 3

The provisions of the preceding article in no way restrict the liberty of the competent port authorities to take such measures as they may deem expedient for the proper conduct of the business of the port, provided that these measures comply with the principle of equality of treatment as defined in the said article.

Article 4

All dues and charges levied for the use of maritime ports shall be duly published before coming into force.

The same shall apply to the by-laws and regulations of the port.

In each maritime port, the port authority shall keep open for inspection by all persons concerned a table of the dues and charges in force, as well as a copy of the by-laws and regulations.

Article 5

In assessing and applying customs and other analogous duties, local octroi, or consumption duties, or incidental charges, levied on the importation or exportation of goods through the maritime ports situated under the sovereignty or authority of the contracting States, the flag of the vessel must not be taken into account, and accordingly no distinction may be made to the detriment of the flag of any contracting State whatsoever as between that flag and the flag of the State under whose sovereignty or authority the port is situated, or the flag of any other State whatsoever.

Article 6

In order that the principle of equal treatment in maritime ports laid down in article 2 may not be rendered ineffective in

practice by the adoption of other methods of discrimination against the vessels of a contracting State using such ports, each contracting State undertakes to apply the provisions of articles 4, 20, 21, and 22 of the statute annexed to the Convention on the International Régime of Railways, signed at Geneva on December 9, 1923, so far as they are applicable, to traffic to or from a maritime port, whether or not such contracting State is a party to the said Convention on the International Régime of Railways. The aforesaid articles are to be interpreted in conformity with the provisions of the protocol of signature of the said convention.¹

¹ ANNEX: Text of the articles of the Statute on the International Régime of Railways and of the provisions relating thereto contained in the protocol of signature:

Article 4.—Recognizing the necessity of granting sufficient elasticity in the operation of railways to allow the complex needs of traffic to be met, it is the intention of the contracting States to maintain unimpaired full freedom of operation while insuring that such freedom is exercised without detriment to international traffic.

They undertake to give reasonable facilities to international traffic and to refrain from all discrimination of an unfair nature directed against the other contracting States, their nationals, or their vessels.

The benefit of the provisions of the present article is not confined to traffic governed by a single contract; it extends also to the traffic dealt with in articles 21 and 22 of the present statute, subject to the conditions specified in the said articles.

Article 20.—The contracting States, recognizing the necessity in general of leaving tariffs sufficient flexibility to permit of their being adapted as closely as possible to the complex needs of trade and commercial competition, retain full freedom to frame their tariffs in accordance with the principles accepted by their own legislation, provided that this freedom is exercised without detriment to international traffic.

They undertake to apply to international traffic tariffs which are reasonable as regards both their amounts and the conditions of their application, and undertake to refrain from all discrimination of an unfair nature directed against the other contracting States, their nationals, or their vessels.

These provisions shall not prevent the establishment of combined rail and sea tariffs which comply with the principles laid down in the previous paragraphs.

Article 21.—The benefit of the provisions of article 20 shall not be

Article 7

Unless there are special reasons justifying an exception, such as those based upon special geographical, economic, or technical conditions, the customs duties levied in any maritime port situated under the sovereignty or authority of a contracting State may not exceed the duties levied on the other customs frontiers of the said State on goods of the same kind, source, or destination.

If, for special reasons as set out above, a contracting State grants special customs facilities on other routes for the importation or exportation of goods, it shall not use these facilities as a means of discriminating unfairly against importation or exportation through the maritime ports situated under its sovereignty or authority.

Article 8

Each of the contracting States reserves the power, after giving notice through diplomatic channels, of suspending the benefit of equality of treatment from any vessel of a State which does not effectively apply, in any maritime port situated under its sovereignty or authority, the provisions of this statute to the

confined to transport based on single contracts. It shall extend equally to transport made up of successive stages by rail, by sea, or by any other mode of transport traversing the territory of more than one contracting State and regulated by separate contracts, subject to the fulfillment of the following conditions:

Each of the successive contracts must specify the initial source and final destination of the consignment; during the whole duration of carriage the goods must remain under the supervision of the carriers and must be forwarded by each carrier to his successor direct and without delay other than that necessary for the completion of the transport operations and the customs, octroi, police, or other administrative formalities.

Article 22.—The provisions of article 20 shall be equally applicable to internal as well as to international traffic by rail as regards goods which remain temporarily at the port, without regard to the flag under which they have been imported or will be exported.

Protocol of signature.—It is understood that any differential treatment of flags based solely on the consideration of the flag should be considered as discrimination of an unfair nature in the sense of articles 4 and 20 of the Statute on the International Régime of Railways.

vessels of the said contracting State, their cargoes and passengers.

In the event of action being taken as provided in the preceding paragraph, the State which has taken action and the State against which action is taken shall both alike have the right of applying to the Permanent Court of International Justice by an application addressed to the registrar ; and the court shall settle the matter in accordance with the rules of summary procedure.

Every contracting State shall, however, have the right, at the time of signing or ratifying this convention, of declaring that it renounces the right of taking action as provided in the first paragraph of this article against any other State which may make a similar declaration.

APPENDIX 6

AGREEMENT OF APRIL 11, 1922, BETWEEN AUSTRALIA AND NEW ZEALAND PROVIDING FOR RECIPROCAL TARIFF CONCESSIONS

(As officially published by the Commonwealth of Australia.)

AGREEMENT made this eleventh day of April, One thousand nine hundred and twenty-two Between the COMMONWEALTH OF AUSTRALIA (hereinafter called "the Commonwealth") of the one part and the DOMINION OF NEW ZEALAND (hereinafter called "the Dominion") of the other part:

WHEREAS with a view to the arrangement of more equitable trade relations between the Commonwealth and the Dominion, the Ministers of Customs for the said countries have agreed to recommend to their respective Parliaments Customs duties in accordance with the Schedule attached hereto:

NOW THEREFORE IT IS HEREBY AGREED as follows:

1. The said Schedule shall come into force on a date to be proclaimed by the Governor-General of the Commonwealth and the Governor-General of the Dominion, after the Parliaments of both countries have signified their acceptance thereof, and shall (subject to the provisions of this Agreement) remain in force until six months' notice of the termination thereof has been given by either party.

2. The Commonwealth shall not impose any customs duty or increase the rate of any customs duty on any article entering the Commonwealth from the Dominion, and the Dominion shall not impose any customs duty or increase the rate of any customs duty on any article entering the Dominion from the Commonwealth (whether such article is or is not specifically enumerated in the Schedule hereto, and whether such article is or is not dutiable at the date of this Agreement), except by

mutual agreement, until after six months' notice to the other party to this Agreement.

3. Nothing in this Agreement shall be construed to affect the right of the Commonwealth or of the Dominion to impose new duties upon any articles for the protection of any new industry established or proposed to be established in the Commonwealth or the Dominion as the case may be; provided that such new duties do not exceed the duties imposed on the importation of similar articles from the United Kingdom into the Commonwealth or the Dominion as the case may be.

4. Nothing in this Agreement shall be construed to affect the right of the Commonwealth or the Dominion to bring into force suspended or deferred duties, or to collect or impose dumping duties, or analogous special duties to meet abnormal trading conditions.

5. Nothing in this Agreement shall be construed to affect the right of the Commonwealth to impose primage or other general duties, provided that such duties on goods imported from New Zealand do not exceed the duties imposed on similar goods imported from the United Kingdom.

6. All goods enumerated in the Schedule hereto shall be liable to such primage duty, if any, upon entry into the Dominion, as shall for the time being be in force, provided that such duty does not exceed the primage duty on similar goods imported from the United Kingdom.

7. Goods imported into the Commonwealth, and thereafter transhipped to the Dominion, which if they had been imported direct from the country of origin to the Dominion would have been entitled to be entered under the British Preferential Tariff in the Dominion, shall, upon production of a certificate from the Customs Department of the Commonwealth stating the country of origin of the goods and such other information as is required, be entitled to be entered under the British Preferential Tariff in the Dominion.

8. Goods imported into the Dominion, and thereafter transhipped to the Commonwealth, which if they had been imported direct from the country of origin to the Commonwealth

would have been entitled to be entered under the British Preferential Tariff in the Commonwealth, shall, upon production of a certificate from the Customs Department of the Dominion stating the country of origin of the goods and such other information as is required, be entitled to be entered under the British Preferential Tariff in the Commonwealth.

9. The provisions of the last two preceding clauses of this Agreement shall operate from the first day of May One thousand nine hundred and twenty-two, notwithstanding that this Agreement may not at that date have been ratified by the Parliament of either country.

10. No special rebate or bounty shall be granted by the Commonwealth or the Dominion in respect of the sugar contained in any goods exported from the Commonwealth or the Dominion, as the case may be, to the Dominion or the Commonwealth.

FIRST NINE ITEMS OF THE TARIFF SCHEDULE

NOTE.—(1) Where any item bears after it the letters n. e. i., these letters shall be interpreted in the same sense as when applied to the Tariff Items from which the Items of this Schedule are derived.

(2) Goods entering Australia from New Zealand at present fall under the General Tariff, and goods entering New Zealand from Australia are treated in the same manner.

[See table on next page.]

Consecutive No.	Tariff Item Nos.— A.—Australian B.—New Zealand C.—Special		ITEM	AUSTRALIA				NEW ZEALAND			
				Present Duties Tariff			Proposed Duties against New Zealand	Present Duties Tariff			Proposed Duties against Australia
				British Preferential	Intermediate	General		British Preferential	Intermediate	General	
AGRICULTURAL PRODUCTS AND GROCERIES—											
			Animals, living:—								
2	1	B.	Cattle, horned, other than for stud purposes	Free	Free	Free	Free	ca. 10s.	10s.	10s.	Free
3	3	B.	Horses, other than for stud purposes	Free	Free	Free	Free	ca. 6s.	6s.	6s.	Free
3	37	A.	Bacon and Hams, partly or wholly cured... per lb.	3d.	4d.	4d.	ad.	ad.	3d.	4d.	Free
4	386	B.	Beeswax	1d.	1d.	1½d.	Free	Free	Free	Free	Free
5	....	C.	Butter and Cheese (except cheese pastes and tinned or potted cheese)	3d.	3d.	3d.	ad.	20% ad. val.	30% ad. val.	35% ad. val.	2d. per lb.
6	43 (B)	A.	Coffee, roasted or ground; in liquid form; or mixed with milk or other substance	6d.	6d.	6d.	6d.	3d.	4d.	5d.	5d.
7	28	B.	Coffee, roasted .....	..	..	..	..	3d.	4d.	5d.	5d.
8	29	B.	Coffee, essence of, and Essence of Coffee with milk or any other food substance .....	..	..	..	..	20%	30%	35%	25%
9	41	B.	Confectionery <i>n. e. i.</i> , including medicated lozenges, medicated confectionery, boiled sugars, liquorice <i>n. e. i.</i> , sugared or crystallised fruits	3d.	3½d.	3½d.	ad.	ad.	2½d.	3d.	ad.
			whichever rate returns the higher duty	35%	45%	45%	per lb.	per lb.	per lb.	per lb.	per lb.
								<i>including internal containing packages (other than plain bottles and plain trade packages).</i>			

APPENDIX 7

TEXT OF SECTIONS 301, 302 and 303 OF THE FORDNEY BILL AS PASSED BY THE HOUSE OF REPRESENTATIVES

(H. R. 7456, 67th Congress, 1st and 2d Sessions. From Senate Document, no. 187, 67th Congress, 2d Session, pp. 100 *et seq.*)

SEC. 301 That whenever the President of the United States, with a view to securing reciprocal trade with any foreign country, dependency, colony, province, or other political subdivision of government, shall enter into a commercial treaty therewith concerning the admission into any such country, dependency, colony, province, or other political subdivision of government, of the goods, wares, and merchandise of the United States and their use and disposition therein, deemed to be for the interests of the United States, and in such treaty, in consideration of the advantages accruing to the United States therefrom, shall provide for the reduction of the duties imposed by this Act upon such goods, wares, or merchandise as may be designated therein of the country, dependency, colony, province, or other political subdivision of government with which such treaty shall be made as in this section provided; or shall provide for the transfer from the dutiable list of this Act to the free list thereof of such goods, wares, and merchandise, being the natural products of such foreign country, dependency, colony, province, or other political subdivision of government and not of the United States; or shall provide for the retention upon the free list of this Act of such goods, wares, and merchandise now included in said free list as may be designated therein; and when any such treaty shall have been duly ratified by the Senate and approved by Congress, and public proclamation made accordingly, then and thereafter the duties which shall be collected by the United States upon any of the

designated goods, wares, and merchandise from the foreign country, dependency, colony, province, or other political subdivision of government with which such treaty has been made shall be the duties specified and provided for in such treaty, and none other.

SEC. 302 That with a view to securing reciprocal trade and regulating the commerce of the United States with countries, dependencies, colonies, provinces, or other political subdivisions of government, producing and exporting to the United States any article or merchandise upon which a duty is imposed by the laws thereof and for these purposes, whenever and so often as the President shall be satisfied that the government of any country, dependency, colony, province, or other political subdivision thereof, imposes duties or other exactions, limitations, or embargoes upon like or similar products of the United States, which, in view of the duties imposed thereupon when imported into the United States, he may deem to be higher and reciprocally unequal and unreasonable, he shall have the power, and it shall be his duty, to suspend by proclamation said provisions of the laws of the United States imposing the duties upon such article or merchandise of such country, dependency, colony, province, or other political subdivision of government, when and for such time as he shall deem just, and in such cases and during such suspension, upon the importation of any such or similar article or merchandise into the United States whether the same is imported in the same condition as when exported from the country of exportation or has been changed in condition by manufacture or otherwise and whether the same has been imported directly from the country of production or otherwise, duties shall be levied, collected, and paid upon such article or merchandise the product of such designated country, which shall by the President be ascertained and proclaimed to be equal to the duties or other exactions, limitations, or embargoes imposed thereupon when exported from the United States to such country, dependency, colony, province, or other political subdivision of government.

SEC. 303 That whenever the President of the United States,

with a view to securing reciprocal trade with foreign countries shall, within the period of three years from and after the passage of this Act, conclude an agreement with any other country or countries concerning the admission into any such country or countries of the goods, wares, and merchandise of the United States, deemed to be for the interests of the United States, and in such agreement, in consideration of the advantages accruing to the United States therefrom shall provide for the reduction during a specified period not exceeding five years, of the duties imposed by this Act, to the extent of not more than 20 per centum thereof, upon such goods, wares, or merchandise as may be designated therein of the country or countries with which such agreement shall be made as in this section provided for, and when proclamation by the President of such agreement shall have been made, then and thereafter the duties which shall be collected by the United States upon any of the designated goods, wares, and merchandise from the foreign country with which such agreement has been made shall during the period provided for be the duties specified and provided for in such agreement.

To secure information to assist the President in the negotiation of such agreements as are provided for in such section, and to estimate the amount by which the duties specified in the agreement shall be lower than the duties provided for in other sections of this Act, in order to be a fair equivalent of the concessions granted by any other country or countries under the terms of the agreement, the President shall direct the United States Tariff Commission to make such investigations and to prepare such reports as may be deemed necessary.

APPENDIX 8

TEXT OF SECTIONS 315 AND 316 OF THE TARIFF ACT OF 1922

(As officially published.)

SEC. 315. (a) That in order to regulate the foreign commerce of the United States and to put into force and effect the policy of the Congress by this Act intended, whenever the President, upon investigation of the differences in costs of production of articles wholly or in part the growth or product of the United States and of like or similar articles wholly or in part the growth or product of competing foreign countries, shall find it thereby shown that the duties fixed in this Act do not equalize the said differences in costs of production in the United States and the principal competing country he shall, by such investigation, ascertain said differences and determine and proclaim the changes in classifications or increases or decreases in any rate of duty provided in this Act shown by said ascertained differences in such costs of production necessary to equalize the same. Thirty days after the date of such proclamation or proclamations such changes in classification shall take effect, and such increased or decreased duties shall be levied, collected, and paid on such articles when imported from any foreign country into the United States or into any of its possessions (except the Philippine Islands, the Virgin Islands, and the islands of Guam and Tutuila): *Provided*, That the total increase or decrease of such rates of duty shall not exceed 50 per centum of the rates specified in Title I of this Act, or in any amendatory Act.

(b) That in order to regulate the foreign commerce of the United States and to put into force and effect the policy of the Congress by this Act intended, whenever the President, upon investigation of the differences in costs of production of articles

provided for in Title I of this Act, wholly or in part the growth or product of the United States and of like or similar articles wholly or in part the growth or product of competing foreign countries, shall find it thereby shown that the duties prescribed in this Act do not equalize said differences, and shall further find it thereby shown that the said differences in costs of production in the United States and the principal competing country can not be equalized by proceeding under the provisions of subdivision (a) of this section, he shall make such findings public, together with a description of the articles to which they apply, in such detail as may be necessary for the guidance of appraising officers. In such cases and upon the proclamation by the President becoming effective the ad valorem duty or duty based in whole or in part upon the value of the imported article in the country of exportation shall thereafter be based upon the American selling price, as defined in subdivision (f) of section 402 of this Act, of any similar competitive article manufactured or produced in the United States embraced within the class or kind of imported articles upon which the President has made a proclamation under subdivision (b) of this section.

The ad valorem rate or rates of duty based upon such American selling price shall be the rate found, upon said investigation by the President, to be shown by the said differences in costs of production necessary to equalize such differences, but no such rate shall be decreased more than 50 per centum of the rate specified in Title I of this Act upon such articles, nor shall any such rate be increased. Such rate or rates of duty shall become effective fifteen days after the date of the said proclamation of the President, whereupon the duties so estimated and provided shall be levied, collected, and paid on such articles when imported from any foreign country into the United States or into any of its possessions (except the Philippine Islands, the Virgin Islands, and the islands of Guam and Tutuila). If there is any imported article within the class or kind of articles, upon which the President has made public a finding, for which there is no similar competitive

article manufactured or produced in the United States, the value of such imported article shall be determined under the provisions of paragraphs (1), (2), and (3) of subdivision (a) of section 402 of this Act.

(c) That in ascertaining the differences in costs of production, under the provisions of subdivisions (a) and (b) of this section, the President, in so far as he finds it practicable, shall take into consideration (1) the differences in conditions in production, including wages, costs of material, and other items in costs of production of such or similar articles in the United States and in competing foreign countries; (2) the differences in the wholesale selling prices of domestic and foreign articles in the principal markets of the United States; (3) advantages granted to a foreign producer by a foreign government, or by a person, partnership, corporation, or association in a foreign country; and (4) any other advantages or disadvantages in competition.

Investigations to assist the President in ascertaining differences in costs of production under this section shall be made by the United States Tariff Commission, and no proclamation shall be issued under this section until such investigation shall have been made. The commission shall give reasonable public notice of its hearings and shall give reasonable opportunity to parties interested to be present, to produce evidence, and to be heard. The commission is authorized to adopt such reasonable procedure, rules, and regulations as it may deem necessary.

The President, proceeding as hereinbefore provided for in proclaiming rates of duty, shall, when he determines that it is shown that the differences in costs of production have changed or no longer exist which led to such proclamation, accordingly as so shown, modify or terminate the same. Nothing in this section shall be construed to authorize a transfer of an article from the dutiable list to the free list or from the free list to the dutiable list, nor a change in form of duty. Whenever it is provided in any paragraph of Title I of this Act, that the duty or duties shall not exceed a specified ad valorem rate upon the articles provided for in such paragraph, no rate determined

under the provision of this section upon such articles shall exceed the maximum ad valorem rate so specified.

(d) For the purposes of this section any coal-tar product provided for in paragraphs 27 or 28 of Title I of this Act shall be considered similar to or competitive with any imported coal-tar product which accomplishes results substantially equal to those accomplished by the domestic product when used in substantially the same manner.

(e) The President is authorized to make all needful rules and regulations for carrying out the provisions of this section.

(f) The Secretary of the Treasury is authorized to make such rules and regulations as he may deem necessary for the entry and declaration of imported articles of the class or kind of articles upon which the President has made a proclamation under the provisions of subdivision (b) of this section and for the form of invoice required at time of entry.

SEC. 316. (a) That unfair methods of competition and unfair acts in the importation of articles into the United States, or in their sale by the owner, importer, consignee, or agent of either, the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States, or to prevent the establishment of such an industry, or to restrain or monopolize trade and commerce in the United States, are hereby declared unlawful, and when found by the President to exist shall be dealt with, in addition to any other provisions of law, as hereinafter provided.

(b) That to assist the President in making any decisions under this section the United States Tariff Commission is hereby authorized to investigate any alleged violation hereof on complaint under oath or upon its initiative.

(c) That the commission shall make such investigation under and in accordance with such rules as it may promulgate and give such notice and afford such hearing, and when deemed proper by the commission such rehearing with opportunity to offer evidence, oral or written, as it may deem sufficient for a full presentation of the facts involved in such investigation; that the testimony in every such investigation shall be reduced

to writing, and a transcript thereof with the findings and recommendation of the commission shall be the official record of the proceedings and findings in the case, and in any case where the findings in such investigation show a violation of this section, a copy of the findings shall be promptly mailed or delivered to the importer or consignee of such articles; that such findings, if supported by evidence, shall be conclusive, except that a rehearing may be granted by the commission, and except that, within such time after said findings are made and in such manner as appeals may be taken from decisions of the United States Board of General Appraisers, an appeal may be taken from said findings upon a question or questions of law only to the United States Court of Customs Appeals by the importer or consignee of such articles; that if it shall be shown to the satisfaction of said court that further evidence should be taken, and that there were reasonable grounds for the failure to adduce such evidence in the proceedings before the commission, said court may order such additional evidence to be taken before the commission in such manner and upon such terms and conditions as to the court may seem proper; that the commission may modify its findings as to the facts or make new findings by reason of additional evidence, which, if supported by the evidence, shall be conclusive as to the facts except that within such time and in such manner an appeal may be taken as aforesaid upon a question or questions of law only; that the judgment of said court shall be final, except that the same shall be subject to review by the United States Supreme Court upon certiorari applied for within three months after such judgment of the United States Court of Customs Appeals.

(d) That the final findings of the commission shall be transmitted with the record to the President.

(e) That whenever the existence of any such unfair method or act shall be established to the satisfaction of the President he shall determine the rate of additional duty, not exceeding 50 nor less than 10 per centum of the value of such articles as defined in section 402 of Title IV of this Act, which will offset such method or act, and which is hereby imposed upon articles

imported in violation of this Act, or, in what he shall be satisfied and find are extreme cases of unfair methods or acts as aforesaid, he shall direct that such articles as he shall deem the interests of the United States shall require, imported by any person violating the provisions of this Act, shall be excluded from entry into the United States, and upon information of such action by the President, the Secretary of the Treasury shall, through the proper officers, assess such additional duties or refuse such entry; and that the decision of the President shall be conclusive.

(f) That whenever the President has reason to believe that any article is offered or sought to be offered for entry into the United States in violation of this section but has not information sufficient to satisfy him thereof, the Secretary of the Treasury shall, upon his request in writing, forbid entry thereof until such investigation as the President may deem necessary shall be completed: *Provided*, That the Secretary of the Treasury may permit entry under bond upon such conditions and penalties as he may deem adequate.

(g) That any additional duty or any refusal of entry under this section shall continue in effect until the President shall find and instruct the Secretary of the Treasury that the conditions which led to the assessment of such additional duty or refusal of entry no longer exist.

APPENDIX 9

TEXT OF SECTIONS 3 AND 4 OF THE TARIFF ACT OF 1897

(Passed July 24, 1897; effective same day.)

SEC. 3 That for the purpose of equalizing the trade of the United States with foreign countries, and their colonies, producing and exporting to this country the following articles: Argols, or crude tartar, or wine lees, crude; brandies, or other spirits manufactured or distilled from grain or other materials; champagne and all other sparkling wines; still wines, and vermouth; paintings and statuary; or any of them, the President be, and he is hereby, authorized, as soon as may be after the passage of this Act, and from time to time thereafter, to enter into negotiations with the Governments of those countries exporting to the United States the above-mentioned articles, or any of them, with a view to the arrangement of commercial agreements in which reciprocal and equivalent concessions may be secured in favor of the products and manufactures of the United States; and whenever the Government of any country, or colony, producing and exporting to the United States the above-mentioned articles, or any of them, shall enter into a commercial agreement with the United States, or make concessions in favor of the products, or manufactures thereof, which, in the judgment of the President, shall be reciprocal and equivalent, he shall be, and he is hereby, authorized and empowered to suspend, during the time of such agreement or concession, by proclamation to that effect, the imposition and collection of the duties mentioned in this Act, on such article or articles so exported to the United States from such country or colony, and thereupon and thereafter the duties levied, collected, and paid upon such article or articles shall be as follows, namely:

Argols, or crude tartar, or wine lees, crude, five per centum ad valorem.

Brandies, or other spirits manufactured or distilled from grain or other materials, one dollar and seventy-five cents per proof gallon

Champagne and all other sparkling wines, in bottles containing not more than one quart and more than one pint, six dollars per dozen; containing not more than one pint each and more than one-half pint, three dollars per dozen; containing one-half pint each or less, one dollar and fifty cents per dozen; in bottles or other vessels containing more than one quart each, in addition to six dollars per dozen bottles on the quantities in excess of one quart, at the rate of one dollar and ninety cents per gallon.

Still wines, and vermouth, in casks, thirty-five cents per gallon; in bottles or jugs, per case of one dozen bottles or jugs containing each not more than one quart and more than one pint, or twenty-four bottles or jugs containing each not more than one pint, one dollar and twenty-five cents per case, and any excess beyond these quantities found in such bottles or jugs shall be subject to a duty of four cents per pint or fractional part thereof, but no separate or additional duty shall be assessed upon the bottles or jugs.

Paintings in oil or water colors, pastels, pen and ink drawings, and statuary, fifteen per centum ad valorem.

The President shall have power, and it shall be his duty, whenever he shall be satisfied that any such agreement in this section mentioned is not being fully executed by the Government with which it shall have been made, to revoke such suspension and notify such Government thereof.

And it is further provided that with a view to secure reciprocal trade with countries producing the following articles, whenever and so often as the President shall be satisfied that the Government of any country, or colony of such Government, producing and exporting directly or indirectly to the United States coffee, tea, and tonquin, tonqua, or tonka beans, and vanilla beans, or any such articles, imposes duties or other ex-

actions upon the agricultural, manufactured, or other products of the United States, which, in view of the introduction of such coffee, tea, and tonquin, tonqua, or tonka beans, and vanilla beans, into the United States, as in this Act hereinbefore provided for, he may deem to be reciprocally unequal and unreasonable, he shall have the power and it shall be his duty to suspend, by proclamation to that effect, the provisions of this Act relating to the free introduction of such coffee, tea, and tonquin, tonqua, or tonka beans, and vanilla beans, of the products of such country or colony, for such time as he shall deem just; and in such case and during such suspension duties shall be levied, collected, and paid upon coffee, tea, and tonquin, tonqua, or tonka beans, and vanilla beans, the products or exports, direct or indirect, from such designated country, as follows:

On coffee, three cents per pound.

On tea, ten cents per pound.

On tonquin, tonqua, or tonka beans, fifty cents per pound; vanilla beans, two dollars per pound; vanilla beans, commercially known as cuts, one dollar per pound.

SEC. 4 That whenever the President of the United States, by and with the advice and consent of the Senate, with a view to secure reciprocal trade with foreign countries, shall, within the period of two years from and after the passage of this Act, enter into commercial treaty or treaties with any other country or countries concerning the admission into any such country or countries of the goods, wares, and merchandise of the United States and their use and disposition therein, deemed to be for the interests of the United States, and in such treaty or treaties, in consideration of the advantages accruing to the United States therefrom shall provide for the reduction during a specified period, not exceeding five years, of the duties imposed by this Act, to the extent of not more than twenty per centum thereof, upon such goods, wares, or merchandise as may be designated therein of the country or countries with which such treaty or treaties shall be made as in this section provided for; or shall provide for the transfer during such period from

the dutiable list of this Act to the free list thereof of such goods, wares, and merchandise, being the natural products of such foreign country or countries and not of the United States; or shall provide for the retention upon the free list of this Act during a specified period, not exceeding five years, of such goods, wares, and merchandise now included in said free list as may be designated therein; and when any such treaty shall have been duly ratified by the Senate and approved by Congress, and public proclamation made accordingly, then and thereafter the duties which shall be collected by the United States upon any of the designated goods, wares, and merchandise from the foreign country with which such treaty has been made shall, during the period provided for, be the duties specified and provided for in such treaty, and none other.

APPENDIX 10

TEXT OF SECTION 2 OF AN ACT TO AMEND THE CUSTOMS TARIFF, 1907, OF CANADA, ASSENTED TO JUNE 30, 1923, AUTHORIZING RECIPROCITY NEGOTIA- TIONS WITH THE UNITED STATES

(From Memorandum, no. 32 (revised), July 5, 1923, Department of
Customs and Excise.)

2. *The Customs Tariff, 1907*, is amended by inserting the following sections immediately after section eight A thereof, as enacted by section two of chapter twenty-seven of the statutes of 1921:—

“8B. The Governor in Council may authorize any Minister of the Crown to enter into negotiations with any authorized representative of the Government of the United States with a view to the making of a commercial agreement between the two countries on terms that may be deemed mutually beneficial. Any agreement so made shall be subject to the approval of the Parliament of Canada.

“8c. If the President of the United States, under authority of the United States Tariff Act of 1922, determines to reduce the duties imposed by such Act on the following articles, that is to say:—

Cattle; wheat; wheat flour; oats; barley; potatoes; onions; turnips; hay; fish as enumerated in paragraphs 717, 718, 719 and 720 of the said Tariff Act of 1922, the Governor in Council may by Order in Council make such reductions of duties on such articles imported into Canada from the United States as may be deemed reasonable by way of compensation for such reductions on Canadian products imported into the United States.”

INDEX

Reference numbers are to pages of "A New American Commercial Policy."

Abbreviations: n, footnote; q, quoted; U. S., United States.

- Additional duties. See Defensive duties.
- Agriculture, U. S. See United States.
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VITA

The present writer was born July 30, 1890, at Knoxville, where he received his earlier education at the Baker-Himmel School and the University of Tennessee. After being awarded at the latter, in 1910 and 1911, the degrees of Bachelor of Arts and Bachelor of Laws, he attended for brief periods Harvard University and the University of Wisconsin before entering the Graduate School of Political Science at Columbia University in time for the beginning of the second semester of 1912-1913. He received the Master of Arts degree at Columbia in 1915 and was appointed Cutting Travelling Fellow for 1915-1916. Meanwhile he had become a candidate for the degree of Doctor of Philosophy, with the major subject of economics and with history, sociology and politics as minor subjects.

After serving as secretary to a special tax commission appointed by the Governor of Tennessee early in 1915, he commenced active work under the fellowship, travelling extensively in Tennessee and other states in search of material pertaining to the constitutional development of Tennessee and to the state's system of taxation. In 1916 he published a volume of 374 pages on *State Constitution-Making*, with especial reference to Tennessee. This book was written in expectation of the early assembling of a state constitutional convention; the proposition was, however, defeated at the polls. Before the close of the term of the fellowship he had collected most of the material necessary for the preparation of a monograph on the history of taxation in Tennessee, but has not yet been able to complete the text for publication.

After practicing law for a year as a member of the firm of Sansom and McClure he entered the Second Reserve Officers Training Camp in August, 1917, at the conclusion of which he was appointed a second lieutenant in the field artillery. Following the Armistice he again entered upon the practice of law at Knoxville. In the early part of 1919 he served for a month as an expert under the legislative committee which framed the New York State income-tax law and afterwards he gave courses in history and political science at the University of Tennessee. At present he is employed for special work under the Federal Government.