national law was a universal system, argued for a single standard and for its support. The Soviet Government saw greater effectiveness in operation of the Covenant if decisions under Article 16 should be made on a three-quarters vote, not including the two parties involved in the controversy. The government of neighboring Latvia saw grave difficulties in establishing collective security while many important states were not bound to coöperate in the measures prescribed. Norway pointed out that the growth of national armaments made the problem of enforcing the Covenant more difficult and that regional pacts for mutual assistance might easily become new alliances. Peru refers to the distinction between the intention to act upon the maxim *pacta sunt servanda* and the capacity to keep international engagements.

A large number of the members of the League hope for some universalizing of the League or for a coöperative scheme with non-member states. Democratization of the Council is often demanded. The separation of the Covenant from the other parts of the Treaty of Versailles is also mentioned, though it is admitted that to a considerable extent this has already occurred.

That such a pact as the Covenant of the League of Nations, revolutionary in many of its provisions, should, after a period of years, need reconsideration would seem inevitable, and China refers to the action of the Assembly as "opportune and of great significance."

Doubtless it would have been advantageous if the Covenant of the League of Nations had made some provision for periodic reconsideration of its articles. Weaknesses in the Covenant could to a degree have been discovered and remedied in advance and misleading confidence in the operation of the League machinery could have been avoided. A periodic consideration with view to adaptation of the Covenant to changing conditions might have resulted in strengthening international organization and order, while delayed regard for changing conditions has resulted in the weakening of an organization upon which the world had placed so much hope. GEORGE GRAFTON WILSON

THE ANTI-SMUGGLING ACT OF 1935

The "Anti-Smuggling Act" was passed on August 5, 1935.[1] Its principal purpose was to facilitate the more adequate enforcement of the revenue laws of the United States, particularly against vessels smuggling liquor from the sea into the United States. Extensive hearings were held on the bill before the Committee on Ways and Means of the House.[2] The bill was sponsored by the Treasury Department, and despite repeated efforts on the part of the House Committee to obtain a statement of the views of the Department of State, no statement was made on behalf of that Department. A letter to the Chairman of the Committee from Secretary of State Hull was read into the record. This letter declared that "Such communications as this Department

[1] Public No. 238, 74th Congress.

[2] 74th Congress, First Session, Hearings on H. R. 5496, March 8–13 and May 1–2, 1935.

has seen fit to make regarding the bill have been brought to the attention of the Secretary of the Treasury, who is charged with the duty of enforcing anti-smuggling legislation, and I assume that such of those comments as may be deemed pertinent to you here will be brought to the attention of the Committee by officials of the Treasury Department." Although the representative of the Treasury who appeared in defense of the bill before the Committee was asked to obtain from the Secretary of the Treasury authorization to communicate to the Committee the comments which had been made by the State Department, the Treasury representative reported that he was authorized to state only "that the State Department has advised the Treasury Department that it will not oppose the enactment of this bill." There seems to be considerable justification for the view of several members of the Committee who read between the lines of Secretary Hull's letter a desire to avoid becoming involved in the matter in any way. There is an inescapable implication that the State Department had some reservations regarding the legislation.

Whether or not the Anti-Smuggling Act will result in diplomatic controversies will probably depend upon the way in which it is enforced. There are provisions in the Act which are open to grave question and which may cause serious international complications, but, as the Government of the United States learned in the course of a long series of negotiations with the Mexican Government, it is usually futile to enter into a controversy with a foreign government regarding the terms of legislation before the legislation is applied in any particular case. It is understood that one foreign government, however, has indicated that it questions whether this legislation is in accord with recognized principles of international law.

Only certain provisions of the Act can be treated within the scope of this comment; attention will be called to aspects which are of particular interest from the international standpoint.

The Act contemplates the existence of four different zones in the waters adjacent to the coasts of the United States. First, there is the zone of territorial waters extending three miles from the shore. Second, there is the old customs administration zone which extends twelve miles from the coast and which has been a familiar feature of American legislation since 1790. Third, there is the treaty zone extending one hour's sailing distance from the coast; this is the zone established by the liquor treaties which have been concluded with sixteen foreign nations.[3] It will be recalled that the hour's sailing distance may be measured either by the speed of the principal smuggling vessel or by the speed of contact boats. "Customs waters" are defined by Sec. 201 and Sec. 401 of the Act to include waters within the distance specified by a treaty, and in case of vessels of non-treaty Powers, the waters within four leagues of the coast. The fourth zone is entirely new. It is called a "customs-enforcement area." The extent of this zone varies from time to

[3] Great Britain, France, Germany, Spain, Norway, Denmark, Sweden, Panama, The Netherlands, Cuba, Belgium, Greece, Japan, Poland, Italy and Chile.

time and from place to place. Customs-enforcement areas are fixed by the President upon the basis of information supplied to him by the Coast Guard to the effect that a smuggling vessel or vessels are hovering or are being kept near the coasts of the United States for the purpose of unlawfully introducing merchandise into the United States.[4] The possible spatial extent of such customs-enforcement areas is thus described in Section 1 (a) of the Act:

> No customs-enforcement area shall include any waters more than one hundred nautical miles from the place or immediate area where the President declares such vessel or vessels are hovering or are being kept and, notwithstanding the foregoing provision, shall not include any waters more than fifty nautical miles outwards from the outer limit of customs waters.

To illustrate: if the Coast Guard informs the President that a foreign vessel suspected of intending to smuggle goods into the United States is hovering forty-five miles off the northerly tip of Long Island, the President may proclaim a customs-enforcement area extending one hundred nautical miles north and south from that point and including all of the waters sixty-two miles from the coast within that stretch of two hundred miles. If the vessel belongs to a treaty-state, the zone may extend fifty miles plus the hour's sailing distance, say eighty or ninety miles in all. When the President finds that the circumstances which gave rise to the declaration of such an area have ceased to exist, "he shall so declare" and that particular customs-enforcement area thereupon ceases to exist. The presence of a particular suspected vessel is necessary in order to have an area declared, but once it is declared, *any vessel* may be boarded in that area. It should be made clear, however, that the Act is scrupulously careful to respect the treaty obligations of the United States, and in no case may a vessel be boarded or seized in contravention of a treaty, notwithstanding any proclamation of a customs-enforcement area. Many sections of the Act are merely designed to make the powers of the customs officers and provisions of penal statutes coextensive with the limits within which the treaty assures the acquiescence of the foreign government whose flag a boarded vessel flies; the liquor treaties were not self-executing in these respects.[5] There is a hopeful proviso that even treaty vessels may be boarded beyond the hour's sailing distance if that is permitted "under special arrangement with such foreign government." Special executive agreements with respect to individual vessels which are notorious smugglers are contemplated.

The Act contains detailed provisions describing the circumstances under which vessels may be boarded and seized. Briefly, it may be said that these provisions are far reaching, apparently allowing the customs officers to act upon the basis of any suspicion as to the character and intentions of the vessel. Under the broad terms of Sec. 3 (a), for example, a foreign vessel which had

[4] It is understood that several such presidential proclamations have been issued since the Act was passed.

[5] See Jessup, The Law of Territorial Waters and Maritime Jurisdiction (1927), p. 301 ff.

been fitted out or "held" for the purpose of being employed to smuggle goods into the United States, may be seized and forfeited with its cargo if found later in a customs-enforcement area. Under Sec. 203 (a) of the Act (amending Sec. 581 of the Tariff Act of 1930) boarding officers may use "all necessary force to compel compliance." One may also note in the same section this further provision suggesting a broadened base for the right of hot pursuit: [6]

> Any vessel or vehicle which, at any authorized place, is required to come to a stop by any officer of the customs, or is required to come to a stop by signal made by any vessel employed in the service of the customs displaying the ensign and pennant prescribed for such vessel by the President, shall come to a stop, and upon failure to comply, a vessel so required to come to a stop shall become subject to pursuit and the master thereof shall be liable to a fine of not more than $5,000 nor less than $1,000. It shall be the duty of the several officers of the customs to pursue any vessel which may become subject to pursuit, and to board and examine the same, and to examine any person or merchandise on board, without as well as within their respective districts and at any place upon the high seas or, if permitted by the appropriate foreign authority, elsewhere where the vessel may be pursued as well as at any other authorized place.

But this provision is also specifically made subject to compliance with the liquor treaties except as foreign governments agree to special rules. Note also that under Sec. 207, the testimony of a boarding customs officer is made "prima facie evidence of the place where the act in question occurred."

In the hearings before the House Committee a great deal of time was devoted to examining the question whether, under international law, the United States had a right to assert such jurisdiction at such distances from the coast. It was on this point particularly that the Committee desired but failed to secure the views of the Department of State. The case of the Treasury Department was ably supported before the Committee by Professor H. E. Yntema, of the University of Michigan Law School. Professor Yntema's argument, which was presented orally and in a written memorandum, rested principally upon the theory evidenced by Chief Justice Marshall's well-known dictum in the case of Church *v.* Hubbart. It will be recalled that in that case Marshall declared that the right of a nation to protect itself and its revenues from injury was not limited to its own territory, but that the nation had a right to protect itself upon the high seas. The means which could be employed for that purpose, he said "do not appear to be limited within any certain marked boundaries, which remain the same at all times and in all situations. If they are such as unnecessarily to vex and harass foreign lawful commerce, foreign nations will resist their exercise. If they are such as are reasonable and necessary to secure their laws from violation, they will be submitted to." Professor Yntema supported this opinion by an imposing array of authorities, among which, naturally, special importance was attached

[6] The "hot pursuit" question involved in the *I'm Alone* case was not decided by the tribunal; see this JOURNAL, Vol. 29 (1935), p. 298.

to the British Hovering Acts. Considerable stress was also laid upon the fact that in recent times there is evidence that many nations agree upon the reasonableness of the exercise of jurisdiction upon the high seas to curb smuggling, as is shown not only by the liquor treaties of the United States but by the similar group of treaties concluded by the Baltic States. In short, Professor Yntema and the Treasury Department argued that the only test of the extent to which a nation may extend its jurisdiction in proximate areas of the high seas is the test of reasonableness. It is believed that this is a sound position under international law. We then have a mixed question of fact and law as to whether enforcement of this Act will meet the test of reasonableness.

In view of the evidence submitted by the Treasury Department to the House Committee, it can not be doubted that existing legislation and the provisions of the liquor treaties are inadequate successfully to combat the liquor smugglers. There is strength in the argument that the larger vessels engaged in legitimate commerce are in general not those participating in smuggling activities and that the enforcement of the Act against vessels of small tonnage will not interfere with legitimate commerce.[7]

Some question might be raised about the reasonableness of the provisions in Section 7 of the Act. Under that section, every vessel not exceeding five hundred net tons, which comes from a foreign port or place "or which has visited a hovering vessel, shall carry a certificate for importation into the United States of any spirits, wines, or alcoholic liquors on board thereof (sea stores excepted), destined to the United States, said certificate to be issued by a consular officer of the United States or other authorized person pursuant to such regulations as the Secretary of State and the Secretary of the Treasury may jointly prescribe." [8] If any such goods are found or are "discovered to have been" on any such vessel at any place in the United States "or within the customs waters," that is, within the twelve-mile limit or the treaty limit, without such a certificate, they shall be seized and forfeited unless they are shown to have a *bona fide* destination outside the United States, and in the latter case a bond shall be required conditioned upon the delivery of the merchandise at the foreign destination, such delivery to be certified by a consular officer. It would appear that under this section a vessel under five hundred tons, if found within the twelve-mile zone anywhere along the coast of the United States, could be compelled to give bond even though the voyage were between two foreign ports. The argument in support of this section would be that vessels of this size found in such areas are usually smugglers and it is reasonable to stop and search them.

One might also anticipate the possibility of international complications arising from the enforcement of the following provision of Sec. 205 (amending Sec. 586 of the Tariff Act of 1930):

[7] See Hearings, *op. cit.*, p. 38.

[8] These joint regulations have been issued.

(b) The master of any vessel from a foreign port or place who allows any merchandise (including sea stores), the importation of which into the United States is prohibited, or which consists of any spirits, wines, or other alcoholic liquors, to be unladen from his vessel *at any place upon the high seas adjacent to the customs waters of the United States* to be transshipped to or placed in or received on any vessel of any description, with knowledge, or under circumstances indicating the purpose to render it possible, that such merchandise, or any part thereof, may be introduced, or attempted to be introduced, into the United States in violation of law, shall be liable to a penalty equal to twice the value of the merchandise but not less than $1,000, and the vessel from which the merchandise is so unladen, and its cargo and such merchandise, shall be seized and forfeited. [*Italics inserted.*]

Section 2 (a) of the Act contains an interesting provision looking toward reciprocity in the enforcement of anti-smuggling laws. It was argued on behalf of the Treasury Department that these and other provisions were offered as an inducement to foreign governments to enact reciprocal legislation, and it was pointed out that such reciprocal legislation already existed in the Norwegian law of June 25, 1926, upon which this section is based.[9] In brief summary, Section 2 (a) provides for the punishment of persons engaged in smuggling goods into the territory of any foreign government in violation of the laws of that government "if under the law of such foreign government any penalty or forfeiture is provided for violation of the laws of the United States respecting customs revenue . . ." Sections 3 and 4 contain further provisions of this character. According to the Report of the Senate Committee on Finance: "Reciprocal legislation of this character is analogous to that enacted under certain international conventions, notably the International Opium Convention of 1912, whereby each signatory power bound itself to enact legislation which would be reciprocally coöperative in the suppression of the illicit drug traffic in the other countries which were parties to that convention." [10]

If the courts have occasion to interpret this Act, they will undoubtedly take cognizance of the fact that both the Hearings and the Committee Report lay great stress upon the intent that no jurisdiction should be asserted outside the limits authorized by international law. PHILIP C. JESSUP

[9] The Norwegian law, in providing for the punishment of persons smuggling goods into foreign countries declares, in Section 2: "Smuggling trade under this Law shall be deemed to include also the case of any ship whose cargo is unloaded beyond the customs boundary of another country under conditions which make it overwhelmingly probable that the intention is to smuggle such cargo."

[10] 74th Cong. 1st Sess. Senate Report No. 1036, Calendar No. 1083.