of correction should prove to be of real benefit. It offers a practical means of conciliating the imperative need of states in their mutual relations for reliable, non-subversive, non-incendiary news, with the democratic principle of freedom of information. More than once states have protested against hostile articles appearing in the press of a foreign state, only to be met by the response that the defendant government was powerless to intervene because of constitutional guarantees of freedom of the press.[25] With the right of correction in operation, this excuse could no longer be invoked, and both governments concerned, in their own interest, should welcome the chance to invoke this new remedy. Looking to American experience alone, the anti-Spanish campaigns in certain newspapers at the turn of the century, and the anti-British attacks in the same or similar organs between the two world wars, might have been checkmated if, in both cases, the aggrieved state had been able to make an official reply through accepted, highly authoritative channels.

JOHN B. WHITTON

"TREATY-MERCHANT" CLAUSES IN COMMERCIAL TREATIES OF THE UNITED STATES

It is commonplace to say that customary international law imposes no legal duty upon any state to permit aliens to enter and reside in its territory.[1] That there will be, however, in the case of every member of the family of nations, some admission of aliens, may be taken for granted, although in the case of certain totalitarian states the entry of persons, at least those of particular nationalities, may be strictly curtailed. As is well known, numerous bilateral treaties provide, either in specific terms or through the operation of most-favored-nation clauses, for entry that is not given as a matter of obligation under customary law. The treaties make possible a wide variety of arrangements for admission, usually on a basis of mutuality, of natural persons who may acquire thereby a status less definitive than that afforded to full-fledged immigrants but more permanent than that enjoyed by temporary visitors whose visas are valid for a relatively short time.

The United States has provided such a basis for "treaty traders" or "treaty merchants" under Section 3(6) of the Immigration Act of 1924, as amended.[2] At a time when the United States is leading in an effort for the promotion of international trade and for its facilitation through reasonable freedom of international movement for persons engaging in it, the provisions of this legislation may merit special examination. For

[25] British answer to protests from Napoleon, Annual Register, Vol. 45 (1803), p. 665. For response of U. S. Government to protests by Mexico against hostile propaganda in this country, see Hackworth, Digest, Vol. II, p. 142.

[1] See, for example, C. C. Hyde, International Law Chiefly as Interpreted and Applied by the United States (1945 ed.), Vol. I, pp. 216–217.

[2] 8 U. S. C. (1948), Sec. 203. See wording as reproduced in note 10, *infra*.

students of treaty law and administration the plan involved would seem to have special interest by reason of the manner in which, by express provision, statute and treaties are related. The history of the development, the construction and application of statutory and treaty clauses over a quarter of a century, and possible further or wider uses of the method employed, seem deserving of comment.

When, early in the third decade of the twentieth century, the United States adopted the policy of quantitatively restricting immigration, there arose the question of respecting treaty commitments previously made, and, more particularly, that of providing for special categories of non-immigrants whose admission to the country would not be covered by the basic principle applicable to immigrants. When the matter of a comprehensive immigration statute was before Congress in 1924, draft legislation that was under consideration seemed to the Department of State to be in conflict with treaties already made, and the Secretary of State proposed that exceptions be made for persons admitted under provisions of a treaty.[3] In the Senate, a proposed amendment which would have made special provision (by creating a distinct category of non-immigrants) for "an alien entitled to enter the United States under the provisions of a treaty or agreement relating solely to immigration" was defeated by an overwhelming vote,[4] after the "Gentleman's Agreement," concluded with Japan less than two decades earlier, had been brought into the discussion.[5] As finally passed by Congress the bill provided non-immigrant status for "an alien entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of a present existing treaty of commerce and navigation,"[6] the suggestion having been made in discussion that in this form the legislation would prevent the continued operation of the "Gentleman's Agreement" and would prevent the making of any later agreement of that kind.[7]

The reference to "present existing treaty" was soon to prove objectionable, particularly from the point of view of making new commercial treaties. In 1929 in a communication to the British Ambassador concerning the entry of Australian business men into the United States, Secretary Kellogg stated that Section 3(6) "would not apply to a treaty concluded subsequently."[8] It was for the purpose, among others, of permitting benefits to be enjoyed under post-1924 treaties as well as those in effect in

[3] 65 Cong. Rec. 5811 (letter from Secretary of State Hughes to Representative Albert Johnson). The letter stated that Sec. 3(2) of the proposed bill, under which non-immigrant status could be given to aliens entering temporarily for business or pleasure, would not meet the treaty requirements.

[4] *Ibid.*, p. 6315.

[5] Senator Shortridge said that the so-called understanding of 1907 had failed of its purpose and had ceased to be operative (*Ibid.*, p. 6303).

[6] H. Rept. No. 350, 68th Cong., 1st Sess., p. 2.

[7] 65 Cong. Rec. 6304.

[8] U. S. Foreign Relations, 1927, Vol. I, p. 439.

that year, that the law was amended on July 6, 1932. In the House of Representatives there was a reference to effort that had extended over several years looking to a legislative definition of "merchants."[9] The new wording of Section 3(6)[10] not only accomplished the purpose of liberalizing the provisions by making them apply to treaties that had been made since 1924 or might be made in the future, but also made it clear that the "trade" referred to was trade between the United States and the country of which the trader was a national,[11] and made possible the admission as non-immigrants of the wife of such a trader and his unmarried children under twenty-one years of age.[12] The Senate at first passed—apparently through inadvertence—and then reconsidered and struck out, a House-approved provision whereby treaties were to accord no greater rights of entry than those which had been given before July 1, 1924. The feeling expressed in the Senate was that such a clause would limit the treaty-making powers of the President and the Senate in the future.[13] It was noted that treaty commitments to which the amended statutory rule would be applicable had (as of the date of the passage of the 1932 amendment) been made to twenty-seven foreign countries.

The actual operation of the "treaty-merchant" clauses has proceeded through administrative regulation and determination as well as judicial interpretation. From the first, the Department of State took the position that Section 3(6) was not intended to open the doors to any aliens entering to engage in business of a purely local character.[14] On the other hand, the word "solely" has been interpreted to mean "principally,"[15] and a

[9] 75 Cong. Rec. 13841.

[10] ". . . an alien entitled to enter the United States solely to carry on trade between the United States and the foreign state of which he is a national, under and in pursuance of the provisions of a treaty of commerce and navigation, and his wife and his unmarried children under twenty-one years of age, if accompanying or following to join him."

[11] That the Department of State had taken this construction as the proper one even under the earlier wording of the statute is indicated by a communication on the point from the Department of State to the Department of Labor on Jan. 24, 1925 (Hackworth, Digest, Vol. III, pp. 769–770).

[12] There was some debate on the question of excluding from the benefits of the section children adopted since 1924. A proposal to change the language by insertion of the words "including legally adopted children" was defeated in the Senate. 75 Cong. Rec. 13423.

[13] 75 Cong. Rec. 13841. See also, on the point, House Rept. No. 431, 72nd Cong., 1st Sess.

[14] The Department of State took this position in 1929 (despite the apparently contrary decision of a Federal court, four years earlier, in the case of Weedin *v.* Wong Tat Hing *et al.*, 6 Fed. (2nd) 201), "in order to keep faith with Congress and to carry out what was evidently the intent of Congress when it passed the Act." Hackworth, Digest, Vol. III, pp. 766–767.

[15] Irving Appleman, "Treaty Trader Status under the Immigration Laws," Department of Justice, Immigration and Naturalization Service, Monthly Review, Vol. VI, No. 1 (July, 1948), pp. 3, 5.

treaty merchant with a Section 3(6) visa has been permitted to engage "incidentally" in other transactions, provided the international ones could be shown to predominate.[16] The limitations of a brief comment preclude more than illustrative indication of the liberal construction given to the statutory provisions. Administrative regulation, for example, has included in the category of those engaged in "trade" within the meaning of Section 3(6) persons serving as foreign correspondents, those operating transportation lines in furtherance of international travel, and those carrying on banking or insurance activities on an international scale.[17] The editor (not proprietor or publisher) of a Japanese newspaper published in San Francisco was held to be engaged in "trade" within the meaning of the statute (in relation to the 1911 commercial treaty with Japan) so that his wife could be admitted as a non-immigrant under Section 3(6).[18] The possession of a particular skill, or competence to exercise discretionary judgment in connection with international trade, may enable an alien applicant to come within the classification, it being necessary to show, in this as in the cases generally, that the trade is presently existing and is substantial in volume.[19] In 1935 the Department of State took the position that a Japanese national was entitled to the benefits of Section 3(6) by reason of his handling cable correspondence that required technical knowledge; in 1941 it decided favorably with respect to clerical employees of a firm engaged in international trade.[20]

Traders may lose their status and become subject to deportation as a result of their changing to purely local activity, or as a consequence of a treaty's ceasing to be in force. Thus the status of Japanese merchants who had enjoyed privileges in the United States under the Treaty of Commerce and Navigation signed February 21, 1911, was affected by the termination of that treaty.[21]

In its negotiation of general commercial treaties since 1924 the United States has, in conformity with the reservation which the Senate attached to its approval of the Treaty of Friendship, Commerce and Consular Rights with Germany, signed December 8, 1923,[22] made it clear that commitments as to entry are not to be construed to affect existing laws relating to immigration or the right to enact laws relating to immigration. However, beginning with the Treaty of Friendship, Commerce and Consular Rights with Poland, signed June 15, 1931,[23] there has commonly been inserted, as an exception to this rule, provisions for the admission of treaty merchants

[16] *Idem.*

[17] 22 C. F. R. 61.140 (d), cited by Appleman, *loc. cit.*, p. 4.

[18] Hackworth, Digest, Vol. III, p. 767. [19] Appleman, *loc. cit.*, pp. 5, 6.

[20] Hackworth, *op. cit.*, Vol. III, pp. 771, 772.

[21] New York Times, March 27, 1948, p. 12. A bill (H. R. 3566) was then before Congress to effect a stay of deportation for some two thousand persons who were reported to have become subject to deportation with the termination of the treaty.

[22] 44 Stat. 2132. [23] 48 Stat. 1507.

on a most-favored-nation basis.[24] It may be noted that there is nothing in the express instruction of Congress, or in Section 3(6), which directs that such clauses shall rest on a contingent basis. It is obvious that while the treaty clauses referred to are not of such great interest to traders coming from other Western Hemisphere countries (to which quantitative restrictions upon immigration to the United States do not apply), they hold very substantial advantages for business men from outside this Hemisphere who are nationals of countries having relatively small immigration quotas, and especially for traders from populous Asiatic countries.

Over the twenty-four-year period beginning with 1925 and ending with 1948, more than seventeen thousand non-immigrant aliens were admitted to the United States to carry on trade under treaty provisions, the greatest number in any one year (1,622) being admitted in 1929, and the smallest (49) in the year 1943.[25] While there is no statutory limit upon the number of treaty merchants who may be admitted, the status is a regulated one,[26] especially in the sense that qualitative tests for admission may be applied. There would, therefore, seem to be no occasion for fear that security regulations might be circumvented under the plan, and no necessity for frequent renewals of the treaty traders' visas, such as are required in the case of temporary visitors admitted under Section 3(2) of the Immigration Act. The method used in Section 3(6) does not mark the first instance of a reference, in national legislation, to commercial treaties.[27] If the United States is to move forward with a broad program for technical assistance to undeveloped areas of the world, there might be justification for further experimentation with the general method utilized in the "treaty-merchant" clauses. The going of American business men to foreign countries for relatively long periods of time to build up and develop enterprises within such countries (as distinct from their going to carry on trade between these countries and their own) might conceivably be arranged on the basis of treaties which, in the legal sense, would mark no deviation from the fundamental principle of mutuality.

[24] The treaty with Poland refers to nationals of one party "entering, traveling or residing in the territory of the other Party in order to carry on international trade or to engage in any activity related to or connected with the conduct of international trade. . . ." More recent treaties, *e.g.*, that signed with China on Nov. 4, 1946 (Department of State, Treaties and Other International Acts Series, No. 1871, this JOURNAL, Supp., Vol. 43 (1949), p. 27, and that signed with Italy on Feb. 2, 1948 (S. Ex. E, 80th Cong., 2nd Sess.), when referring to nationals of one party entering, traveling and residing in the territories of the other, specifically mention the two countries as those between whose territories the international trade, or "commercial activity related thereto or connected therewith" is to be carried on.

[25] For the statistics (with classification by years and by countries), the writer is indebted to the U. S. Bureau of Immigration and Naturalization.

[26] For recently promulgated regulations applicable to the subject matter, see Fed. Reg., Vol. 14, No. 184 (Sept. 23, 1949), p. 5805.

[27] See this writer's article, "Postwar Commercial Treaties of the United States," in this JOURNAL, Vol. 43 (1949), pp. 262, 264 note.

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