DISSENTING OPINION OF JUDGES HACKWORTH, BADAWI, LEVI CARNEIRO AND SIR BENEGAL RAU

We feel bound to dissent from the Court on the conclusions relating to consular jurisdiction, fiscal immunity and the interpretation of Article 95 of the Act of Algeciras.

Consular jurisdiction

The Court has found that the United States is not entitled to exercise, as of right, consular jurisdiction in the French Zone of Morocco in cases other than those expressly provided for in the Treaty of 1836 (Articles 20 and 21) and in the Act of Algeciras.

There is hardly anyone to-day who will question the general proposition that what is known as the capitulatory regime is an anachronism which should be brought to a speedy end, wherever it exists. In fact the United States Government itself has at all times been ready to negotiate with both France and Morocco a new arrangement or agreement "to replace and recast in a form more properly adapted to present circumstances the treaty bounds originally contracted with the State of Morocco". (Rejoinder, page 43.)

The question in the present case is not whether the capitulatory regime is good or bad, but whether and to what extent it subsists on a legal basis in respect of United States nationals in Morocco. This is the issue raised in the first Submission of the French Government and the third Submission of the United States Government. In both Submissions the reference is to Morocco.

The judgment of the Court is concerned with consular jurisdiction only in the French Zone.

The Court holds that except for the limited consular jurisdiction aforesaid, the United States claim to such jurisdiction came to an end with the termination of the capitulatory rights and privileges of Great Britain in that Zone by virtue of the Anglo-French Convention of 1937. We cannot accept this view.

By Article 10 of the Anglo-French Convention of 1937, the United Kingdom agreed that henceforth it could not invoke that Article or Article 20 (a most-favoured-nation clause) of the Anglo-Moroccan General Treaty of 1856 for the purpose of claiming the "jurisdictional privileges accorded on the basis of existing treaties concluded by His Majesty the Sultan of Morocco and the United States of America". Article 16 of the same Convention contains a similar provision referring to "jurisdictional privileges enjoyed by the United States under treaties at present in force". It mentions

Article 20 of the General Treaty of 1856 and also Article 13, another most-favoured-nation clause. From these provisions it appears that in the opinion of the parties to the Convention, that is to say, in the opinion of the French Government and the British Government, the United States would continue to enjoy "jurisdictional privileges", as of right, in Morocco, even after the Anglo-French Convention of 1937 came into force.

After the signature of the Convention, the French Ambassador in Washington wrote to the Secretary of State on August 26th, 1937: "The United States enjoys in Morocco the capitulatory regime by virtue of the Treaty concluded between the two Powers on September 16th, 1836." He then referred to Article 25 of the Treaty of 1836 and continued: "The above-mentioned Convention between the United States and Morocco not having been denounced, the United States continues to benefit by the capitulatory regime in Morocco. In fact, following the conclusion of the Franco-Britannic Agreement (of 1937), it remains to-day the last Power in a position to avail itself of that regime. In advising Your Excellency of the desire of my Government to conclude with the American Government an agreement which would put an end to this regime, I take the liberty of recalling to Your Excellency that during the Conference of Montreux, which ended the regime of the capitulations in Egypt, the representative of the American Government made declarations indicating the conciliatory spirit in which the American Government intended to settle this question .... These declarations have given my Government reason to think that, like the British Government, the American Government will be willing to consent to the abolition of the regime of capitulations in Morocco."

In the light of these statements, it seems clear that in 1937, the French Government regarded the United States as entitled to avail itself of the capitulatory regime even after the Anglo-French Convention of 1937. We concur in this view and consider that the "jurisdictional privileges" referred to in Articles 10 and 16 of the Anglo-French Convention of 1937 can mean nothing else than full consular jurisdiction. According to those Articles, these jurisdictional privileges rested "on the basis of existing treaties". This brings us to the most important of these treaties, viz., the Act of Algeciras.

We regard the Act of Algeciras as so fundamental that "every article and clause thereof must be observed and fulfilled with good faith". These were the words addressed to the United States and its citizens by President Theodore Roosevelt when causing the Act to be made public in 1907. The importance of the Act and of the principles which it embodies has been acknowledged by all. We

therefore consider that in interpreting the Act due effect must be given not only to its express provisions but also to the underlying implications which lend coherence and meaning to the express provisions. Otherwise the entire structure of the Act may be undermined. So far as the United States is concerned, none of its provisions have been abrogated or renounced.

The Act of Algeciras is a great multilateral convention directly binding upon Morocco and the United States as well as the other signatory Powers. Its status in regard to the old bilateral treaties, as an independent and superior act, is formally expressed in its last Article 123. The scheme of rights and obligations which it established, whether expressly or by necessary implication, as between Morocco and the United States can not, therefore, be allowed to be impaired by any transactions concluded between any of the other signatories without the concurrence of both Morocco and the United States. This appears to us to be fundamental.

At the date of the Act of Algeciras, all the foreign signatory States had acquired, by usage or by treaty and usage, full consular jurisdiction in Morocco. The system in its entirety had been well established for at least fifty years, as shown by the Anglo-Moroccan General Treaty of 1856. The Act adopted the system as it stood and, far from seeking to end it or to modify it in any way, extended it to the new criminal prosecutions and civil suits that might arise under the Act. We need not enumerate all the articles of the Act in which this has been done, but shall mention only the salient ones. Article 29 extends the consular system to prosecutions for violations of the Regulations in Chapter II of the Act, and Articles 101 and 102 to those of the Regulations in Chapter V. Article 45 extends the system to actions instituted by the State Bank of Morocco against foreign nationals. The extent to which the capitulatory system, with all its implications, is embedded in the Act is indicated by the fact that when Great Britain renounced the system in the French Zone by the Convention of 1937, the effect was declared in the Protocol of Signature of the Convention to be "to involve the renunciation by His Majesty the King of the right to rely upon" no less than 78 articles out of the 123 articles of the Act.

We consider that the Act has adopted the system. It was the natural thing to do at that date and it was an obvious inducement to the foreign signatory Powers not only to assent to all the laws and regulations made by or under the Act, but to uphold what was of paramount importance to the ruler of Morocco at that time, namely, "the triple principle of the sovereignty and independence of H.M. the Sultan, the integrity of his domains and economic liberty without any inequality", which was declared in the Preamble of the Act to be the foundation of a new order.

The consular system has been adopted in the Act, not so much by express provision as by necessary implication. It would have occurred to no one to do so except by implication, because the system was part of the established order at that time. To give effect to the bare provisions of the Act and ignore this basic implication in respect of all other cases of the exercise of consular jurisdiction would result in curious anomalies. For example, it is admitted that actions against a United States national by the State Bank of Morocco must, under Article 45 of the Act, be brought before the United States consular court ; but not any other civil action by a Moroccan or a foreigner. What is there peculiar to the Bank's actions that they and they alone should be tried by the consular court ? Similarly, what is the special feature of prosecutions for breach of customs and arms regulations that they and they alone should be dealt with by the consular court under Chapters II and V of the Act ? Furthermore, what is there peculiarly onerous about the taxes mentioned in Chapter IV of the Act that they and only they should be leviable from foreign nationals subject to the safeguards provided in that Chapter, while other and perhaps heavier taxes may be freely levied ? It is difficult to find a satisfactory answer to these questions.

It seems to us that if the Act of Algeciras is to be maintained as a logical and coherent structure, the full consular system embedded in it must be adopted.

There is no danger that this adoption would confer upon the system any longer lease of life than it would otherwise have had. For, even without the Act, the system, being based *inter alia* upon long-established usage, which is only another name for agreement by conduct, can only be terminated in the way in which international agreements can be terminated ; and its adoption in the Act makes no difference in this respect.

We now come to the implications of another important multilateral treaty, the Convention of Madrid. Article 5 of the Convention makes special provision for the trial of civil suits against protégés commenced before protection is granted and against ex-protégés before protection is withdrawn ; it also provides that the right of protection shall not be exercised towards protégés under prosecution for a crime before they have been tried by the authorities of the country or before their sentence has been executed. These provisions necessarily imply that civil suits and prosecutions against the protégés of any foreign Power that signed the Convention are normally to be tried by the consular courts of that Power ; otherwise the Article, which prescribes special rules for pending cases, would be unintelligible. Amongst the protégés are not only

Moorish subjects employed by the legation and the consular officers of the foreign Power, but also a certain number of Moorish factors, brokers, or agents employed by foreign merchants for their business affairs. Articles 1 and 10 of the Convention maintain the position of these factors, brokers and agents unchanged.

The Convention in still in force, so far as the United States is concerned, so that United States protégés are still entitled to its benefits. If such is the position of United States protégés, who are Moroccan subjects, *a fortiori* must it be the position of United States nationals, who are in some cases their employers in business. This was the view of the French Government itself in 1905, as evidenced by a despatch dated August 21st, 1905, addressed by the President of the French Cabinet to the French Diplomatic Representatives in London, Petrograd, Berlin, Rome, Vienna, Washington, Brussels, The Hague, Copenhagen, Stockholm and Lisbon.

> "Our Minister at Tangier informs me that the Shereefian Government has imprisoned one of our Algerian subjects .... and made known its intention to remove him from our jurisdiction.
>
> This fact is a violation of treaties.
>
> . . . . . .
>
> All the Powers signatories with Morocco to the Madrid Convention of July 3, 1880, or having adhered to it, have an interest in the respect of the principles which are put in issue. By virtue of a rule recognized by this international instrument, Moroccan protégés are removed from Moroccan jurisdiction ; *a fortiori* the foreigners, subjects of the Powers, must benefit of the same advantage.
>
> I would appreciate your indicating to the Government to which you are accredited the point of view of the Government of the [French] Republic...." (Rejoinder, p. 34.)

At the date of the Madrid Convention, the signatory Powers were, independently of the Convention, entitled to claim full consular jurisdiction for their nationals, and therefore it was not necessary to mention this right separately in the Convention itself. But even where the external sources of the right have ceased, the right continues to flow from the express provisions which have been inserted in the Convention itself in respect of protégés.

The Court has rejected the contention of the United States Government basing its claim to consular jurisdiction and other capitulatory rights in Morocco on "custom and usage". The rejection appears to proceed on the ground that sufficient evidence has

not been produced in support of the claim. We consider that the evidence available is sufficient.

Usage is an established source of extraterritorial jurisdiction and has, for example, been enumerated as a lawful source in the Preamble to the British Foreign Jurisdiction Act, 1890, which recites that "by treaty, capitulation, grant, usage, sufferance and other lawful means, Her Majesty the Queen has jurisdiction within divers foreign countries". Usage and sufferance are only different names for agreement by prolonged conduct, which may be no less binding than agreement by the written word. The full consular jurisdiction which the United States in fact exercises in Morocco to this day has been in existence for nearly a hundred years, if not longer ; and during this long period both treaties and usage, in the broad sense of these terms, have contributed to the total result in varying measure. It is not possible, nor is it of any practical interest, at this distance of time, to isolate and assess separately the contribution made by each of these sources. Both were at work supplementing each other.

The first treaty in which full consular jurisdiction was conceded by the ruler of Morocco to a foreign Power appears to be the Anglo-Moroccan General Treaty of 1856. It is admitted in the French Government's Reply to the Counter-Memorial of the United States Government that this Treaty incorporated existing usages, which necessarily implies that usage was at work even before 1856. It is true that the admission has been made for the purpose of contending that after incorporation the usages shared the fate of the Treaty, a contention with which we do not agree ; nevertheless, there is the admission that the Treaty incorporated prior usage.

Article XIV of that Treaty and Article XVI of the Treaty of 1861 between Morocco and Spain are, equally, evidence that usage was at work before, as well as during, the period of these two Treaties. These Articles provide that litigation between British subjects or Spanish subjects and other foreigners shall be decided solely in the tribunal of the foreign consuls without the interference of the Moorish Government "according to the established usages which have *hitherto* been acted upon or may *hereafter* be arranged between such consuls", or "could according to established forms, or according to those which may be agreed upon among the said consuls". This shows that usage was operating and was supplementing treaties both before and after 1856 and 1861.

It is also significant that United States Congressional legislation has, ever since 1860, invested the consular courts in Morocco with jurisdiction in both criminal and civil matters "so far as the same is allowed by treaty, and in accordance with the usages of the countries in their intercourse with the Franks or other Christian nations". In other words, the United States has been openly relying

on usage as one of the sources of its jurisdiction ever since 1860.

Even after 1937, when, according to the French Government, the benefits of the capitulatory provisions of the Treaties of 1856 and 1861 were no longer available to the United States, the French Government has been transmitting Moroccan taxation and other laws to the United States Government in order to have them made applicable to United States nationals in the French Zone. The assent of the United States to taxation laws was sought in this way some twenty-three times in the period 1938-1948. This could only be on the ground that jurisdiction to enforce these laws against United States nationals lay with the United States consular courts.

The conduct of the French Government was not due merely to what was described during the hearings as "gracious tolerance". As early as October 1937, the Secretary of State of the United States wrote as follows to the French Ambassador in Washington :

> "I observe that in your Note [of August 26, 1937], reference is made to Article 25 of the American-Moroccan Treaty of September 16, 1836, which provides for the termination of the Treaty upon one year's notice given by either party. In order that there may be no misunderstanding, I think it is pertinent to point out that American capitulatory rights in Morocco are derived not only from the American-Moroccan Treaty of 1836, but also from other treaties, conventions, or agreements and confirmed by long-established custom and usage."

Thus the French Government knew in 1937 that the United States was asserting usage as at least one legal basis of its rights, and in spite of this knowledge, the French Government continued the old practice without any reservation. It was not, therefore, a case of mere "gracious tolerance". As we have shown, usage has been continuously at work, in varying measure, during a period of nearly a hundred years, if not longer, and, therefore, what has been happening since 1937 is evidence of a continuous process which began nearly a century before that date.

It is significant that during the years 1914-1916, France negotiated a series of agreements with foreign States by which they renounced claiming their "rights and privileges arising out of the regime of capitulations" in the French Zone. Some of these States, such as Switzerland, Greece and Japan, had never entered into treaty relations of any sort with Morocco. Only through usage could these States have acquired the rights which they undertook not to claim. The position of the United States can not be worse merely because it had treaties with Morocco containing most-favoured-nation clauses.

It has often been said in the course of this case that the United States is now the only Power that has not renounced its capitulatory rights in Morocco. This is hardly accurate. The renunciation by Great Britain in the Anglo-French Convention of 1937 is confined to the French Zone ; so too is the renunciation (such as it is) by Spain in the Franco-Spanish Declaration of 1914. Neither of these renunciations extends to the whole of Morocco which the United States still treats as a single country. Moreover, there are still "French tribunals" in the French Zone and "Spanish tribunals" in the Spanish Zone. These, it may be noted, are the names used in the Franco-Spanish Declaration of 1914. Technically, the French tribunals are not consular courts ; but in fact they exercise, as part of their functions, the jurisdiction formerly exercised by the French consular courts. The United States is not therefore claiming a unique position. Such inequality as may appear to exist is the result, not of the claim of the United States, but of attempts to secure piecemeal renunciation, from each signatory Power, of rights which had accrued to all of them equally through usage and treaties, particularly the Convention of Madrid and the Act of Algeciras. This appears to be admitted in the Memorial of the French Government :

> "Moreover, in Morocco especially, the disappearance of capitulatory privileges in general had logically to result from *simultaneous* action *by all* foreign Powers. Otherwise, inequalities of status would have resulted which would have been in contradiction with the general contractual principles governing the international status of the Shereefian Empire." (Memorial, p. 47.)

Our conclusion, upon this part of the case, is that the third Submission of the Government of the United States, which relates to its jurisdictional privileges, must be accepted, even apart from the effect of the most-favoured-nation clauses in its Treaty of 1836 with Morocco.

Fiscal Immunity

The right to tax necessarily implies the right to take coercive measures in case of non-payment. It follows from what we have said on the issue of consular jurisdiction that no coercive measures can be taken against the person or property of nationals of the United States except with the aid of the consular courts of the United States, which, in the ultimate analysis, means the assent of the United States. In this sense, and to this extent, therefore, they enjoy a general immunity from Moroccan taxation, apart from the effect of any most-favoured-nation clause.

We need not repeat our arguments regarding consular jurisdiction based on the Convention of Madrid and the Act of Algeciras. But there are certain special provisions both in the Convention and the Act which relate to taxes on foreigners and to which we would invite attention.

The Convention of Madrid provides for the levy of two taxes on foreigners, the agricultural tax and the gate tax. Article 12 deals with the agricultural tax and is in the following terms :

> "Foreigners and protected persons who are the owners or tenants of cultivated land, as well as brokers engaged in agriculture, shall pay the agricultural tax. They shall send to their Consul annually, an exact statement of what they possess delivering into his hands the amount of the tax.
>
> He who shall make a false statement shall be fined double the amount of the tax that he would regularly have been obliged to pay for the property not declared. In case of repeated offense this fine shall be doubled.
>
> The nature, method, date and apportionment of this tax shall form the subject of a special regulation between the Representatives of the Powers and the Minister of Foreign Affairs of His Shereefian Majesty."

Article 13 deals with the gate tax and runs thus :

> "Foreigners, protected persons and brokers owning beasts of burden shall pay what is called the gate-tax. The apportionment and the manner of collecting this tax which is paid alike by foreigners and natives, shall likewise form the subject of a special regulation between the Representatives of the Powers and the Minister of Foreign Affairs of His Shereefian Majesty.
>
> The said tax shall not be increased without a new agreement with the Representatives of the Powers."

Chapter IV of the Act of Algeciras provided for the levy of some additional taxes from foreigners. In the case of every one of these new taxes, as in the case of those provided for in the Convention of Madrid, special safeguards are prescribed. The "tertib" leviable under Article 59 is not to be applied to foreign subjects except under the conditions stipulated by the Regulations of the Diplomatic Body at Tangier on November 23rd, 1903. This Regulation provided, *inter alia*, that if a foreigner or protégé refused to pay the tax in time and coercive measures became necessary, these measures would be taken exclusively through the consular authorities. Safeguards are provided under Article 61 in respect of the building taxes ; under Article 64 in respect of certain taxes on trades, industries, and professions ; under Article 65 in respect of the stamp tax, the transfer tax on the sale of real estate, the statistical and weighing tax and the wharfage and lighthouse dues ; under Article 70 in respect of harbour dues ; under Article 71 in respect of customs-storage dues.

We would invite particular attention to the second paragraph of Article 64 :

> "If as the result of the collection of such taxes from Moorish subjects the Diplomatic Body at Tangier should deem it advisable to extend the same to those under foreign jurisdiction, it is hereby specified that the said taxes shall be municipal."

This should be read with Article 76, which implies that for the purposes of Article 64, the decision of even a majority of the Diplomatic Body would not suffice. Nothing could indicate more clearly that foreigners were not to be taxed except with the consent of their Government.

So long as the provisions of the Convention of Madrid and the Act of Algeciras to which we have referred are in force, as they undoubtedly are in force so far as the United States is concerned, a general immunity follows from those provisions by necessary implication. For it would be meaningless to enumerate certain special taxes and provide safeguards for their levy from foreign nationals, if the rest of the whole field of taxation were left open. At the time of the Convention of Madrid and the Act of Algeciras, foreign nationals enjoyed a general immunity from taxes. Therefore, the taxes enumerated in these treaties were exceptions to a prevailing general rule and they must now be read as if the general rule were embodied in the treaties.

Our conclusion on this subject is that United States nationals are entitled to a general immunity from taxes save those specifically recognized by the Convention of Madrid, the Act of Algeciras, and any other relevant treaty or agreement.

We are consequently of opinion that the consumption taxes provided for in the Dahir of February 28th, 1948, were wrongly levied from United States nationals up to August 15th, 1950, the date on which the United States consented to these taxes. But we have not sufficient data upon which to base a conclusion as to the refund of the taxes already paid.

Spanish Treaty of 1861

In view of the preceding considerations, the United States need not, in our opinion, rely on the Spanish Treaty of 1861 as one of "the existing treaties" of "the treaties at present in force" referred to in Articles 10 and 16 of the Anglo-French Convention of 1937, from which the United States derives its broader consular jurisdiction and fiscal immunity. (Articles 5 and 16.)

The United States having in its pleadings relied on this Treaty, the Court thought it necessary to adjudicate on the contention and reject it on the ground that the relevant part of the Treaty has

been abrogated by the Declarations of 1914 made by Spain and France on behalf of Morocco.

In view of the fact that Spain was not represented before the Court during the hearings, we think it inadvisable to base any conclusion upon a definite finding that any part of the Treaty of 1861 with Spain has been abrogated or that it has not been abrogated. Without pronouncing any definite opinion one way or the other, we may point out that the abrogation of the Treaty is more than doubtful.

Article 63 provides :

> "It is agreed that after 10 years have transpired from the day of the exchange of the ratifications of the present Treaty, either of the two contracting Parties shall have a right to demand the modification of the Treaty ; *but until such modification shall have taken place by mutual agreement, or a new treaty shall have been concluded and ratified, the present one shall continue in full force and vigour.*"

Neither the Convention of 1912 between France and Spain, nor the Declarations of 7th March and of 14th November 1914, seem to accomplish the modification of the Treaty by mutual agreement, since in neither of them did France purport to act on behalf of Morocco. The letter of the French Embassy of 10th January 1917 to the Department of State (see Annexes to Counter-Memorial, p. 277), referring to the Spanish rights mentioned in Article 1 of the Treaty of Fez, specifies expressly that they were defined "by an agreement between the Governments, not of Morocco, but of France and Spain".

On the other hand, these agreements do not seem to stipulate any renunciation by either of the two Governments of its capitulatory rights in the other zone, in the way the United Kingdom renounced its own rights by the 1937 Convention. The difference between the formula adopted in the Declarations of 1914 and that of the 1937 Convention is not without significance. To renounce claiming a right may be nothing more than the suspension of the exercise of that right.

The renunciation was made in view of the guarantees of judicial equality offered to foreigners by the French or Spanish tribunals respectively. It may therefore be considered as subject to a condition. In this case, each of the two Governments would be entitled to re-open the question of its rights in the event of the guarantees proving to be ineffective, or the tribunals ceasing to exist or being substantially modified, or in the event of a change in the political position of either of them.

It has been contended that there is no difference between the two formulas, that the choice of the wording of the Declarations of 1914 is merely due to considerations of diplomatic convenience, and

finally that it was the same formula which was used by France in more than 20 Declarations by which it obtained between 1914 and 1916 the renunciation of the Powers subscribing to these Declarations. It is asserted that France was entirely free to choose either of the two formulas, and that its choice must therefore be construed as evidence of their perfect equivalence.

In fact, these 20 Declarations which are posterior to the Spanish Declaration, have simply followed the pattern of that Declaration. They would not, by themselves, impair any conclusion which may be drawn from the wording of their model.

In these conditions, the most-favoured-nation clauses granted to the United States by the Treaty of 1836 [1], when applied to the Treaty of 1861, viewed in the light of the 1914 Declarations, may have the effect of extending to the United States all the rights and favours granted by that Treaty, notwithstanding the suspension of their exercise by Spain.

It is recognized that the failure by a Power, to which a favour has been granted, to exercise that favour does not affect or prejudice the right of any other Power entitled to that favour by virtue of a most-favoured-nation clause. For all useful purposes, suspending the exercise of a favour is equivalent to failure to exercise it. Therefore, nothing would or should preclude the United States from exercising the capitulatory rights granted by the Treaty of 1861.

This conclusion may be considered to be supported by a decision of 12th July 1924, delivered by the Court of Appeal of Rabat, the highest French judicial authority in Morocco (see Dalloz, *Recueil périodique*, 1925, Part II, p. 35).

By this decision the Court granted an *exequatur* (executory title) for the execution of a judgment by one of the national Moroccan tribunals in a case relating to a matter of real property, a matter which had always been considered in the capitulatory regime to be within their exclusive jurisdiction. This regime had, however, developed an indirect control on the exercise of that jurisdiction, by subjecting the execution of such judgments to an *exequatur* to be granted by the consul.

According to the decision of the Court of Rabat, this right for the consul derives from Article 5 of the Treaty of 1861 between Morocco and Spain and has been extended to all the other capitulatory Powers by virtue of the most-favoured-nation clause.

In exercising that right in 1924, the Court must therefore have held that at that period both the French and Spanish Capitulations were still in force in the French Zone of Morocco. The Spanish Capitulations continued then to be a source of that right in that

[1] The most-favoured-nation clause in Article 24 of the Treaty of 1936 runs as follows : " .... and it is further declared that whatever indulgence, in trade or otherwise, shall be granted to any of the Christian Powers, the citizens of the United States shall be equally entitled to them".

Zone, while the French Capitulations, by virtue of the most-favoured nation clause, made it possible for the French Court of Rabat, successor of the French consular court, to receive and exercise that right.

Article 95

Both France and the United States agree that Article 95 of the Act of Algeciras defines the value on the basis of which the *ad valorem* duties of 12½ % are to be liquidated. Each of them gives an interpretation of this provision, as regards imported goods, different from the other's and each disputes the other's interpretation.

That the two Governments are justified in considering that Article 95 defines that value is borne out by Article 96, which, while setting up a committee on valuations, requires that committee to appraise the value of the chief articles of merchandise dutiable in the Moorish customs *under the conditions specified in the foregoing article*. Article 95 must therefore be considered to have laid down the definition of that value.

Which, then, of the two interpretations is the correct one ?

France interprets the value in question to be the local market value, while the United States interprets it to be the export value plus freight, insurance and similar expenses.

Both methods of valuation have been and are known in Morocco as well as in other countries, either as exclusive or as combined methods. In Morocco, the local market value had been adopted by the German Treaty of 1890 (Article 2). The greater number of countries adopt, however, the other method of valuation. Sometimes, the local market value is adopted when the export or foreign market value can not be ascertained, or when it is desired to adopt protectionist measures or to conceal a higher customs duty under the guise of a moderate one.

The point which concerns us here is what the framers of the Act of Algeciras intended to establish by Article 95, and how this provision was understood by the Moroccan authorities from 1906 to 1912 and has been understood by the Protectorate authorities since.

In Article 95 two phrases are the subject of contention between the Parties. In the following sentence they are underlined :

> "The wholesale value of the merchandise *delivered in the custom-house* and *free from customs duties and storage dues.*"

If the natural sense of these two phrases yields a coherent and reasonable proposition, then this proposition can only be set aside

if sufficient evidence is adduced to prove that it could not have been contemplated.

The first phrase refers to transportation of merchandise from the place of origin to the custom-house and thereby conveys an indication of the two elements of the value inseparably connected, viz., export value and expenses of transportation.

The second phrase describes, in the technical language of customs, an article of merchandise without or before the levy of customs dues. This description excludes any connection with local market value, since the latter includes customs dues and can only be used as a basis for valuation after these dues have been deducted. The usual expression in this case would be "after deduction of customs duties" (see below Treaty of Commerce of 1938 between the United Kingdom and Morocco, signed but not ratified).

Both phrases, therefore, point to the export or foreign market value of country of origin plus freight and insurance.

It is true that Article 95 applies to exports and imports, but this double function must imply that the terms employed refer equally to both operations. In fact, local market value for exports would correspond perfectly to market value of the country of origin.

It must be noted that Article 95 does not provide for the whole procedure of valuation. To ascertain this procedure, Article 95 must be read in conjunction with Article 96. This last provision sets up a committee on customs valuations to appraise annually the chief articles of merchandise dutiable in the Moorish customs. This appraisal is, however, to be made *under the conditions specified in Article 95*. Article 96 does not prescribe the establishment of minimum and maximum values, but the schedule referred to in that Article has contained both, either to allow for the different qualities or for the different countries of origin of goods, or for any other reason.

In any case, two methods of valuation have been adopted in the execution of the Act of Algeciras, one for the chief articles of merchandise and another for others. Both these methods have a common basis.

In our view, this common basis is the market value of the country of origin. Any necessary guidance for verifying declared values is provided for by the Schedule of Values fixed under Article 96.

This brings us to the provisions relating to declarations contained in Articles 82 to 86.

Article 82 of the Act requires importers to file in the custom-house a declaration stating, *inter alia*, the value of the merchandise.

Articles 83 to 86 provide penalties for inaccurate statements by the importer concerning the kind, quality or value of imported goods.

As to value, Article 85 states that if the declaration should be found to be inaccurate as to the "declared value" and the declarant should be unable to prove his good faith, certain results shall follow.

Now it would be reasonable to suppose that had it been intended that the market value in Morocco should be the basis for determining the customs duty, there could have been little purpose in attaching such importance to a declaration by the importer.

Moreover, the market value in Morocco would reflect many charges attaching to the goods after leaving the custom-house, such as transportation, warehousing, handling, commissions and other expenses incident to placing the goods on the market, and the profit realized by the importer and by any brokers or middlemen. Obviously, there is room for a wide difference between the local market value of goods and the value at the time of delivery to the custom-house. Local market values may fluctuate, depending upon the plenitude or scarcity of the goods at a given time.

In conclusion, the text of Article 95 presents no ambiguity, unless we do violence to the word *"rendue"* to find therein a reference to the local market or to the word *"franche"* by making it synonymous with *"déduction faite"*.

Assuming that the text is ambiguous, the examination of the *travaux préparatoires* might throw some light on its interpretation.

The original draft (Art. 19) submitted to the Conference of Algeciras provided :

> "Les droits *ad valorem* seront liquidés et payés d'après la valeur en gros et au comptant de la marchandise au port de débarquement ou au bureau d'entrée s'il s'agit d'importation."
>
> *[Translation]*
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> "The *ad valorem* duties shall be liquidated and paid according to the wholesale value of the merchandise at the port of landing, or at the bureau of entry, in the case of imports."

The provision contrasts with that in the older treaties, especially the Treaty between Morocco and Germany (1890). It does not make the *market value* either of the port of landing or the bureau of entry the basis of liquidation of customs duties. The reference to the port or to the bureau relates simply to the destination of the merchandise and is clearly made with a view to including the expenses incurred in transporting the merchandise up to the port or to the bureau. This reference naturally implies the adoption of the market value of the country of origin.

To this draft an amendment was proposed by the delegate of Great Britain at the 8th sitting of the Conference and was accepted. It simply replaced "at the port of landing or at the bureau of entry, in the case of imports," by the words "*au bureau de douane et franche des droits de douane*". (*[Translation]*—"At the custom-house and free from customs duties".) Later, at the 15th sitting, the German and British delegates deposited amendments, not to Article 19 but to Article 20, which has become Article 96 of the Act of Algeciras.

The German amendment reads as follows :

[Translation]

"The duties *ad valorem* levied in Morocco on imports shall be calculated on the value which the imported article has in the place of loading or buying, increased by expenses for transportation and insurance to the port of unloading in Morocco.

In order to fix for a specified period the value in the port of entry of the more important articles which are taxed, the Moroccan Customs Administration will invite the principal merchants interested in the import trade to proceed in agreement with it, to the establishment of a tariff for a period not to exceed twelve months. The tariff so established shall be communicated by the Moroccan Customs to the Diplomatic Body and shall at the same time be officially published.

It will be considered officially recognized so far as concerns the products of the ressortissants of signatory States, in so far as no member of the Diplomatic Body will have formally opposed it during the two weeks which will follow the official publication and the communication addressed to the Diplomatic Body."

The amendment not only provides for a procedure for establishing a tariff for a specified period, which was the subject-matter of the provisions of the original Article 20, but takes up again the question of fixation of value, which had already been decided at the 8th sitting.

This amendment raised the objection of the French delegate, not as regards the method of fixation of value, which no one opposed, but as regards the composition of the body or commission for the establishment of the tariff. The two amendments were referred to the Drafting Committee, which adopted a text based on the British amendment to the same Article (Art. 20). Therefore, all that can be said in respect of the first paragraph of the German amendment is that it was not maintained by the Drafting Committee. But the reason for this lies in the fact that the question raised in that paragraph had already been adopted as Article 19, which has become Article 95. It can not then be said that it has been rejected on the ground that it stated a rule which the Conference was unwilling to adopt. In fact, it repeated in more detailed form the purport of the British proposal presented at the 8th sitting.

In short, the German amendment was not adopted, not because it was controverted on the point with which we are now concerned, but because of its other unsatisfactory features.

In the final draft, Articles 19 and 20 of the draft of Customs regulations (which became in the final Act of Algeciras Articles 95 and 96) were slightly modified, the first by the addition of the word *"rendue"* before the words *"au bureau"* and the second by the addition of the phrase *"dans les conditions spécifiées à l'article précédent"*, thus linking the two provisions.

* * *

As regards the practice followed in the period subsequent to the Act of Algeciras, the evidence resulting from the documents filed by the Parties is in favour of the interpretation put forward by the United States in respect of the measures adopted during the period of 1908-1912. It is even decisive in respect of the period following the Protectorate up to 1928. The letter of 1912 of M. Luret, the chief representative in Morocco of French bondholders in control of the Moroccan Customs Administration [1], as well as the Regulations published by the Customs Administration in 1928 [2], relevant extracts of which are reproduced below, can leave no doubt in this respect.

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[1] "Following a complaint from the American Minister concerning customs duties assessed against imports of the Vacuum Oil Company, he wrote to the American Minister that the Company had failed to furnish the *original invoices* which could be checked against quotations on the *market of origin* and defined the dutiable value of imported merchandise under Article 95 of the Act of Algeciras thus :

[*Translation*]

"This value comprises the purchase price of the petroleum f.o.b. New York increased by all expenses subsequent to the purchase, such as outgoing dues paid at foreign custom-houses, transportation, packing, freight, insurance, manipulation, landing, et cetera, in a word, everything that contributes to constitute, at the moment of presentation at the custom-house, the cash wholesale value of the product, on the basis of which, according to Article 95 of the Act of Algeciras, the duties must be paid." (Translation ; quoted in the Note dated November 13, 1947, from the American Consul General at Casablanca to the Diplomatic Counsellor of the French Residency ; Annex 59.)

[2] [*Translation*] " (81) Merchandise taxed on value :

By the terms of Article 95 of the Act of Algeciras, the duties *ad valorem* are liquidated according to the cash wholesale value of the merchandise delivered to the custom-house and free from customs duties and storage fees. The value of this merchandise for the application of the tariff is consequently that which it has in the place and at the moment it is presented for payment of duties. It comprises, therefore, in addition to the purchase price in the

However, since 1930 a new policy of valuation based, more or less, on the local market value has been asserted by draft regulations prepared by the Protectorate authorities. They have given rise to protests from various foreign Powers and bodies. As evidenced by the documents filed by the Parties, the same policy was equally asserted in the proceedings of the Committee on Valuation instituted by Article 50 of the Statute of Tangiers to replace that provided for by Article 96 of the Act of Algeciras. It gave rise to conflicting attitudes by the member representing the International Zone of Tangier and the two other members representing the French and Spanish Zones. The two sides sustained the two interpretations put forward in the present instance, without the issue being settled in one way or the other. The Committee had no authority to decide the issue, but the concrete decisions on valuation were generally taken by a majority vote of the French and Spanish members.

This part of the history of Article 95, revealed by the documents filed at the end of the oral proceedings, brings no contribution to the interpretation of that provision. It merely shows that the conflict goes as far back as 1930. However, a document referred to in the annexes of the Counter-Memorial throws great light on this matter of interpretation. It is the Treaty of Commerce of 1938 between Morocco and the United Kingdom, signed but not ratified. It had been communicated to the United States in order to be considered with the 1937 Anglo-French Convention as models for a double convention of the same nature between Morocco and the United States (Annexes to Counter-Memorial, p. 322).

There was an exchange of Notes between the French and British Governments at the time of the signature of the Convention on July 18th, 1938. In its Note (No. 5) of that date, the British Government states that it has been informed by the French Government that the provisions contained in Chapter V of the Act of Algeciras (which includes Article 95) are, in the opinion of that Government, incompatible with modern conditions and that the said Government has communicated to it certain provisions which it intends to incorporate in the customs legislation. It also states that the Government of the United Kingdom is prepared to give its consent to the *abrogation* of the provisions contained in the said Chapter. A new text is annexed to this Note which is intended to be substituted for the provision of Article 95 and which sets out

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foreign country, the expenses following the purchase such as the export duties paid to foreign customs, the transportation or freight, insurance, expenses for unloading, in a word all which contributes to form upon arrival in Morocco the wholesale value of the merchandise (excepting customs duties and storage fees), that is the current price of the merchandise in the place where the customs duties are assessed."

the view now put forward by France. (*Command* 5823 (1938), pp. 49-54.)

All this shows that the view now put forward by France as an interpretation of Article 95 was described by France and the United Kingdom in 1938 as an abrogation of that Article.

Accordingly we find that, in applying Article 95 of the Act of Algeciras, the only value to be taken account of is the value in the country of origin plus expenses incident to transportation to the custom-house in Morocco.

(Signed) Green H. HACKWORTH.

(Signed) A. BADAWI.

(Signed) LEVI CARNEIRO.

(Signed) B. N. RAU.