6. REJOINDER SUBMITTED BY THE GOVERNMENT OF THE UNITED STATES OF AMERICA

This Rejoinder is in answer to the Reply filed by the French Government in this case on February 15, 1952.

The proceeding was instituted by the French Government as a result of difficulties between the Parties which followed the enactment by Morocco on December 30, 1948, of a decree re-establishing in full force and effect previous Moroccan legislation absolutely prohibiting the import into Morocco of all foreign goods and merchandise, excepting French imports.

The legal issues placed before the Court by the Government of France in the Application, and by the Government of the United States by way of counterclaim, are, in the order followed in both the Counter-Memorial and the Reply :

The economic issue, involving :

The validity of a treaty right to freedom of importation,
The proper method of customs valuation of imports under the Act of Algeciras,
The application of taxes to American imports in Morocco ;

The issue of extraterritorial jurisdiction, and the corollary immunity of American citizens, in the absence of assent by this Government, from the application of the local law.

The arguments presented in the Reply on these various points will now be examined and answered in the order indicated.

CHAPTER I

ECONOMIC RIGHTS

A. RIGHT TO IMPORT FREELY INTO MOROCCO
(Reply, pp. 17-31)

In establishing in the Counter-Memorial its claim to a regime of free trade barring prohibitions on imports, the Government of the United States relied, through the most-favored-nation clause, upon the provisions of the British Treaty of 1856, the Spanish Treaty of 1861 and the Act of Algeciras (pp. 327-343, Vol. I). In the Reply, the French Government contends that these provisions do not support the claim.

The argument of the French Government is twofold. It denies on the one hand the existence in the British Treaty of 1856 and the Spanish Treaty of 1861 of provisions barring generally prohibitions on imports. These treaties, according to the argument, while recognizing the principle of liberty and equality in matters of commerce, reserved the right for Morocco to decree any prohibitions on imports as long as the prohibitions were not discriminatory nor vexatious (Reply, pp. 18-19). Even if these treaties barred prohibitions on imports, moreover, the Act of Algeciras modified and transformed their meaning and effect by introducing a regime of liberty and equality which clearly did not bar Morocco from enacting such prohibitions (Reply, p. 20). It asserts on the other hand that the right to impose any prohibitions for the purpose of *l'ordre public*, was already included in the Treaties of 1856 and 1861 and was indeed recognized in the Act of Algeciras; Morocco, the argument states, was required by the Act to become a modern State; thus it was authorized to enact all prohibitions the purpose of which is to maintain *l'ordre public*, all previous treaty provisions to the contrary notwithstanding. Measures of control of imports are measures based on considerations of *l'ordre public*, and are, therefore, measures permitted by the Treaties (Reply, pp. 20-26).

(1) Consideration must first be given to the side of the French argument which denies the existence in the treaties and the Act of Algeciras of a regime of free trade without prohibitions on imports. The British Commercial Treaty of December 9, 1856, establishes freedom of commerce as its controlling principle in Article I:

> "There shall be reciprocal freedom of commerce between the British dominions and the dominions of the Sultan of Morocco...." (Counter-Memorial, Annex 21.)

The scope of the principle is defined with respect to the two-fold aspect of trade—exportation and importation—and in terms which are striking precisely because of their general character. With respect to exportation, Article 5 of the Treaty reserves to the Sultan the right to prohibit exports from Morocco :

> "Should the Sultan of Morocco at any time think proper to prohibit the exportation of any kind of grain or other article of commerce from his dominions...." (Counter-Memorial, Annex 21.)

With respect to importation, on the contrary, the Sultan expressly undertakes in Article 6 not to prohibit imports, exception made for enumerated products :

> "Merchandise or goods, except the articles enumerated in Article II, imported by British subjects in any vessel, or from any country, shall not be prohibited in the territories of the Sultan of Morocco...." (Counter-Memorial, Annex 21.)

The general character of the undertaking is emphasized in Article 2, which lists the products referred to in Article 6 :

> "The Sultan of Morocco engages to abolish all monopolies or prohibitions on imported goods, except tobacco, pipes of all kinds used for smoking, opium, sulphur, powder, saltpetre, lead, arms of all kinds, and ammunition of war...." (Counter-Memorial, Annex 21.)

According to the Reply, however, the general character of this bar against prohibitions on imports would be negated by other articles of the treaty where the Sultan is recognized by implication, it is asserted, to possess a discretionary right to prohibit *all* imports (Reply, p. 18). Such is, according to the Reply, the case of Article 5, *in fine :*

> ".... No prohibition, either as to the exportation or importation of any article, shall apply to British subjects, unless such prohibition shall apply to subjects of every other nation." (Counter-Memorial, Annex 21.)

The argument is that since Article 5 *in fine* does not specify what prohibitions on imports are involved, the prohibitions refer to any imports and any exports. This argument ignores the rules of construction ordinarily applicable in the matter. If there is doubt as to the meaning or the scope of the prohibitions referred to in Article 5 *in fine*, it is enough to look to Article 5 as a whole, and to Articles 2 and 6, to perceive readily that the Sultan had retained a right to prohibit some imports and all exports. The Sultan, as a result, could at any time grant in respect to both some specific imports and all exports more advantageous rights to other foreigners. British citizens, therefore, were guaranteed by Article 5 *in fine* that the prohibitions applicable under the treaty in respect to some specific imports and all exports would not be applied to them unless they applied equally to all others.

At no time do the texts give rise to the implication that all imports were subject to prohibition. It should be noted, moreover, that the French argument is predicated to a very large extent upon a misleading translation of the English text of Article 5 *in fine* which changes the meaning and effect of the words "*any* article" by changing their relationship in the sentence to the words "exportation and importation". In the English text, "any article" clearly refers to both "exportation and importation". In the French text, the clause is divided and the words "any article" are thus made to appear to refer only to the word "importation" :

> "No prohibition, either as to the exportation or importation of any article, shall...."
>
> "Aucune prohibition, soit quant à l'exportation, soit quant à l'importation d'aucun article ne s'appliquera...."

The Spanish Treaty of November 20, 1861, like the British Treaty of 1856, reserves to the Sultan the right to prohibit exports in Articles 48 and 50, and bars generally prohibitions on imports in Article 49 :

> "The merchandise and produce imported into ports of Morocco by Spanish subjects, from any place or country, shall not be prohibited in the territory of the Sultan of Morocco...." (Counter-Memorial, Annex 22.)

It also contains, like the British Treaty, references to "articles not prohibited" or "articles the importation and exportation of which are not prohibited" (Articles 44 and 45). The Reply, accordingly, also draws in the case of this treaty the inference that the Sultan thereby reserved a discretionary right to prohibit any import, and emphasizes that there is no mention in this treaty of a specific list of imports over which the Sultan reserved a right to prohibition (Reply, p. 19). This reasoning, however, is open to objections. Whether there be or not a specific list of prohibited imports, the French Government reaches the same conclusion ; if the existence of the list were a controlling factor, the French Government should reach opposite conclusions with respect to the two treaties. The French Government reaches in the Reply conclusions which contradict its analysis of the British and Spanish treaties in the Memorial ; there it emphasized the general character of the commercial freedom afforded by these treaties and the strictly limited character of the exceptions to this freedom :

> "*(a)* Commercial freedom.
>
> The principle of reciprocal freedom of commerce is asserted between Great Britain and Spain, on the one hand, and Morocco, on the other hand. The entire freedom of commercial transactions carried out by foreigners on Moroccan territory is also guaranteed (Great Britain, Art. 1, 2, 4, 6 ; Spain, Art. 44, 45, 47, 49).

> *The only* [seules] *exceptions to this principle* concern, on the one hand, certain products limitatively enumerated (Great Britain, Art. 2), and, on the other hand, an eventual right which the Sultan reserves unto himself to prohibit the exportation of certain products, especially that of cereals (Great Britain, Art. 5 and 7; Spain, Art. 48 and 50)." (Italics added; translation; Memorial, p. 40, Vol. I.)

The argument, finally, is not based on reasonable rules of construction. Article 49 deals specifically with imports. Articles 44 and 45 deal with local commercial transactions in Morocco, not with imports or exports. Such references as they contain to "prohibited" articles are incidental and subsidiary to their purpose. They do not justify, therefore, giving to Article 49 a meaning precisely opposite to the one it has by its plain terms. Article 49 accordingly should not be construed as reserving to the Sultan a discretionary right to prohibit any import but should retain its plain meaning of a general obligation not to prohibit imports. The explanation for the references to prohibited imports in Articles 44 and 45 is that the import of certain products had always and traditionally been prohibited in Morocco. Whether expressly stated, as in the British Treaty, or tacitly expressed as in the Spanish Treaty, those prohibitions always remained in force. The point has been noted by a French authority on Moroccan treaties who commented with respect to the regime of free importation provided by both the Spanish and the British Treaties:

> "The importation has always been prohibited of the following products: arms of all types, ammunition of war, powder, saltpetre, sulphur, lead, tobacco and other herbs for smoking...." Rouard de Card, *Les Traités de Commerce conclus par le Maroc* (1907) 9, note 4, 61, note 1 (translation).

With respect to the Act of Algeciras, the French Government contends that the regime of commercial freedom established by the British and Spanish Treaties was not in any event incorporated in the Act. All the Act contains, according to the French Government, is the affirmation of a vague principle of economic liberty which does not bar prohibitions on imports. The mere fact of having recourse to prior treaties to establish the meaning of this principle is, according to the Reply, an admission that the Act *per se* does not bar prohibitions on imports (Reply, pp. 20-21).

Beyond these assertions, the French Reply presents no arguments and proceeds to determine the meaning of the principle of economic liberty by reference to international agreements concluded after World War II. At no time does it answer the fully documented argument of the Counter-Memorial which, it is believed, clearly established that the inclusion of the principle of economic liberty in the Act was intended precisely to guarantee to the parties their traditional right to a regime of commercial freedom without prohibitions on imports. There is no need to

repeat this argument (see Counter-Memorial, pp. 330-335, Vol. I), except to the extent of noting that, for the purpose of establishing the intent of the parties at the time, the recourse made in the Counter-Memorial to the history of the diplomatic negotiations leading to the conclusion of the Act of Algeciras was proper and in conformity with accepted principles of interpretation.

It is submitted that the French Reply fails in its contention that the British and Spanish Treaties and the Act of Algeciras did not establish a regime of free trade without prohibitions on imports.

(2) Consideration must now be given to the other aspect of the French argument according to which the Act of Algeciras, as well as previous treaties, must be interpreted as authorizing all prohibitions motivated by a desire to maintain *l'ordre public*, including prohibitions on imports (Reply, p. 23).

Prior to dealing with the substance of this argument, the Government of the United States notes that the problem, as presented and developed by the French Government, is strictly a problem of interpretation of treaties. In the circumstances, the argument presented in the Reply calls for two preliminary observations.

According to generally accepted principles of interpretation, treaty provisions must be construed in the manner most likely to reflect the intent of the parties *at the time the treaty was concluded*. The principle is practically axiomatic in international law. While not expressly admitting as much, the French Reply obviously proceeds on the theory that the Act of Algeciras should be interpreted as though it were being concluded today. This reasoning, it is submitted, does not meet the issue, since the issue is the intent of the parties to the Act in 1906, and not their intent if they were to conclude the same agreement today.

In order to justify the absolute prohibition on imports re-established in effect by the Decree of December 30, 1948, the French Reply puts a great deal of emphasis on the motivation of so-called *ordre public* which inspired such prohibition (see Reply, p. 24). The motives which induced an act may not be entirely irrelevant to the determination of its legality. Yet treaty provisions may be violated, and are indeed frequently violated, for good motives as well as bad. To predicate a treaty violation on good motives instead of bad ones does not make it the less a violation. The issue here is not whether the absolute prohibition on imports of December 30, 1948, was induced by a good motive, but, rather, whether it violated the principle of economic liberty, as interpreted in the light of the intent of the parties to the Act of Algeciras at the time of its drafting.

Turning now to the examination of the concept of *ordre public* which is the substance of the French argument, the Government of the United States submits that it is not an accepted principle of interpretation. Indeed, it does not appear to be a principle

of international law at all, so far as an examination of decisions by international bodies and the works of recognized authorities can establish. The principle is a principle of domestic law, and more specifically of civil law[1] where it is understood by this Government to fulfil in some respects purposes which are covered in the common law by the concept of public policy. Leaving aside the question whether the transposition of a principle of interpretation from domestic law to international is a proper procedure, the manner in which the principle is utilized by the French Government in the present case gives rise to the most serious objections.

The French Government starts from the premise that measures for the protection of public health, protection of public morals, and control over trading with the enemy are measures designed to insure *l'ordre public* and involve some degree of prohibition on imports. They have been put into effect pursuant to international agreements in point or as a part of a program of reforms and modernization of the Moroccan State. If the Act of Algeciras establishes a regime of free trade without prohibitions on imports, the French Government states, Morocco must be deemed illegally to have concluded such international agreements or to have attempted to become a modern State. Or, in the alternative, the Act of Algeciras must be construed as permitting *any* prohibitions on imports based on the ground of *ordre public*, as contended by the French Government. Since all prohibitions based on financial and monetary considerations are based on the ground of *ordre public*, they are permitted under the Act of Algeciras (Reply, p. 23).

This argument, in the view of the United States Government, is specious because the problem of interpretation need not and does not arise in the terms imagined by the French Government. The first alternative set up by the argument is entirely artificial. It is not necessary to conclude that because the Act of Algeciras establishes a regime of free trade barring prohibitions on imports, international agreements concluded by Morocco for the protection of public health, public morals and the control of trade in time of war have been illegally concluded. No problem arises when the parties to the international agreements in point are also parties to the Act, since the later agreements prevail over the Act to the extent necessary for adaptation of its relevant provisions. No problem arises when, the measures being based entirely upon domestic legislation, the parties to the Act overtly or tacitly assent in the resulting modification. And if the problem of interpretation does arise, it is perfectly reasonable to interpret the principle of economic liberty as meaning that imports shall not be prohibited except those genuinely needed for the protection of public health and

[1] Meaning the systems of domestic law which derive from Roman law.

morals and control of trading with the enemy in time of war. The second alternative is equally artificial and is no more than an argument of dialectics directed to the establishment of an incorrect syllogism. Assuming as a premise that measures for the protection of public health and morals and control over trading with the enemy are designed to insure *l'ordre public*, it reaches the conclusion that all prohibitions based on *l'ordre public* are permitted under the Act. The strict conclusion of the syllogism, however, imposed by the very terms of the premise on which it is predicated, is that prohibitions in furtherance of measures which are assumed to insure *l'ordre public*—i.e. those for the protection of public health and morals and trading with the enemy—are permitted under the Act. In both cases, the French argument results in unwarranted generalizations.

The Government of the United States submits, moreover, that the theory of *ordre public* advanced in the argument is of a character so arbitrary as to clearly command its repudiation both as a general principle of international law and as a principle of specific application in this particular case.

The theory of *ordre public* advanced in the Reply is not a coherent and organized theory. The Reply does not even attempt to indicate its meaning in some general sense; much less does it attempt to suggest the limits of its application. The specific cases which are listed as being normal applications of the theory of *ordre public* are disparate cases among which there is little if any rational relationship, unless it be that any purpose in which the State has an interest is covered by the theory. Any doubt on this point cannot subsist in the face of the flat assertion of the Reply that all restrictions placed on imports on financial and monetary grounds are restrictions based on considerations *d'ordre public* because their purpose is to protect the financial or economic interests of the State. There are no import restrictions or prohibitions for which some financial or economic justification cannot be given. The theory of *ordre public* advanced by the Reply simply purports to vest such arbitrary justifications with the character of legitimacy.

It is hardly necessary to point to the threat to the stability of international relations which is implicit in this concept of *l'ordre public*. Besides being an innovation, the theory is a negation of the whole international treaty structure, since it permits States to avoid treaty obligations through the simple expedient of selecting, if not creating, a given internal condition and claiming that compliance with the obligation would create a danger, actual or threatened, to the amorphous whole known as *l'ordre public*. It is a rejection of the established procedures of negotiation and agreement between parties for modification or adjustment of treaty obligations in favor of a rule of interpretation based entirely on the unilateral and arbitrary action of one of them. The sweeping scope

of the theory can be best illustrated by pointing out that if Morocco may reject the obligations of the Act of Algeciras on the ground of *ordre public*, Morocco may just as well reject its obligations under the Treaty of Protectorate of 1912 on the ground that further compliance is prejudicial to its *ordre public*. Indeed, if the theory applied in this case, it would apply *a fortiori* to the Treaty of Fez, since the threat to *l'ordre public* resulting from lack of independence and self-government might conclusively be shown by Morocco to be direct and actual, while the threat to *l'ordre public* resulting from financial and economic difficulties under the Act is hypothetical, as will now be established.

The theory of *ordre public*, in the present instance, is predicated upon a misleading confusion between the interests of France and those of Morocco. According to the French Reply, import prohibitions are based on considerations *d'ordre public* when their purpose is to protect either the financial or the economic interests of the State enacting them. The import prohibitions in this case do not appear to be so motivated.

The French Zone of Morocco has been absorbed in the French franc area by making the currencies of the two areas freely convertible one into the other. The Moroccan franc, moreover, has been rigidly pegged to the value of the French franc. Thus, the Moroccan currency is not an independent currency seeking its own level, but a currency tied, as a result of an enforced parity, to the fortunes of the French monetary system, including its devaluations, shortages, and other difficulties. The financial considerations upon which France relies in this case, accordingly, are not really those concerning Morocco, but primarily those concerning France. It is significant in this connection that in adducing evidence to justify the imposition of the prohibitions of December 30, 1948, in Morocco, the French Memorial should present a chart of the rates of exchange of dollars on the French black market, and figures relating to the inflationary effect of free transactions on the French franc. Since the prohibitions at issue are primarily intended to protect the financial interests of France, the theory of *ordre public* advanced in the French Reply is utilized in a misleading and inaccurate manner. Correctly stated, the French argument is that import prohibitions enacted in Morocco are primarily intended to protect *l'ordre public* of France.

The subordination of the Moroccan financial system to the French system permits the channelling of trade between the two areas and the preferential development of French economic interests in Morocco while proportionally reducing the opportunity of the local State freely to select its sources of supply of goods and services. It permits France to circumvent the guaranty of equality of treatment of the Act of Algeciras by sweepingly denying entry to all foreign goods on grounds of balance of payment

difficulties, and excepting on the contrary all goods coming from France for which no payment difficulties can arise since the currencies are freely and artificially interconvertible. The economic considerations upon which France relies in this case, accordingly, are not so much those concerning Morocco as those concerning French interests in Morocco. It is significant in this connection that the French Government, while agreeable to liberalizing import prohibitions in France proper and the overseas territories of France pursuant to an agreement between the States parties to the Organization for European Economic Co-operation, failed similarly to liberalize the import prohibitions applicable in Morocco, a position which is indicative of a desire to maintain protection for French goods (Rejoinder, Annex 1). The economic considerations in point, like the financial considerations which predetermined them, do not support the contention that the prohibitions in this case are intended to protect *l'ordre public* of Morocco.

Any possible doubts about the true motivations of the import prohibitions established on December 30, 1948, and which *ordre public* they were intended to protect, are removed by the explanatory statement offered in this connection by the French Resident-General of Morocco in date of January 11, 1949. The prohibitions, he stated, were imposed on formal order from the French Government, and despite his own objections:

> "You know how this question arises. We supported last year [free] imports without exchange in order to ease the economy of this country, and we attached ourselves to the policy of opening the gates as wide as possible.... Then after a while we suddenly received a formal injunction signed by the hand of the President of the Council of Ministers which said you must absolutely return to the regime of control licenses in order to maintain the franc because of the disturbances which we have noted on the parallel market. It was not only a question of observations made at Tangier but of disturbances much more noticeable which were felt on the activity of the legal franc market and which had a capital importance as regards the Marshall Plan assistance for France. We raised strong objections in view of the liberty of action which had been granted to us and of the reactions which this change would provoke. Paris replied that this measure was necessary nevertheless and we therefore took it. I must add that we do not possess all the elements of analysis and we cannot measure here the effect noted on the franc market. We did not take these new measures without reflecting; in particular, placed before a list of products which was extremely limited, I, on my own authority, extended it widely to meet the needs of this country and so reported to the [French] Government." Conseil du Gouvernement, Section française, Séances du 10 au 15 janvier 1949 (1949) 27. (Translation.)

To retort that the distinction between *l'ordre public* of Morocco and *l'ordre public* of France is irrelevant because the financial

and economic interests of France and Morocco cannot be separated is not to provide a valid answer to the issue in this case. The assimilation of such financial interests, resulting in an assimilation of economic interests, has taken place indeed from the early days of the Protectorate. At the same time, however, no attempt, or no serious attempt, has ever been made by France to provide Morocco with an independent financial system of its own. The French Government has made a choice of policies. The Government of the United States does not need to consider the intrinsic validity of these policies. Indeed, it has conducted its program of Economic Co-operation on this very assumption and has left it to the French Government to utilize the financial aid extended under this program, within the framework of whatever financial policies France maintained with Morocco. But the French Government cannot rely on the fact that a financial assimilation exists to argue that it has become entitled to a right to disregard existing treaty obligations. It would be tantamount to arguing that the French Government may properly choose to impose upon the Moroccan financial system the vicissitudes which afflict its own in order to become entitled thereby to disregard restraining treaty obligations, instead of organizing or re-establishing the independent and separate financial system which will be needed by the Moroccan State when France has concluded the mission of trust which it assumed by the Treaty of Protectorate. The French Government cannot create an artificial situation, for which there are obvious alternatives, and rely on the situation so created to nullify the treaty rights of other Powers. Finally, to the argument that the protection of the financial interests of one is necessarily beneficial to the protection of the other, it is sufficient to answer that this opinion does not appear to be shared in Morocco. Thus, the Council of Government, a body elect, is on record as objecting to the harmful effect of artificial parities between the French franc and the Moroccan franc, and advocating separation of the two currencies :

> "In the present circumstances the monetary problem cannot pass unnoticed and the question of our franc presents itself in all its acuteness.
>
> Let us examine the factors which militate in favor of a legal dissociation of our currency.
>
> (1) Economic factors :
>
> If the importance of a currency is judged only by the purchasing power which it represents, on the internal plane as on the external plane, the Moroccan franc, in this regard, occupies a position favorable for the eventuality of its independence.
>
> It is said that the Moroccan franc does not have the means to sustain itself without foreign support, but this thesis is wrong since it is and can be established on unquestionably stable bases, such as

the riches of the subsoil, the agricultural production, and the intense vitality of its labor force.

Certainly a deficit trade balance and balance of payments does in no way induce the man on the street to advocate or encourage a dissociation from the French franc, but in examining the question thoroughly, one arrives at the conclusion that if our trade balance and the balance of accounts is unfavorable, it is precisely because our franc is tied to the French franc.

What then would happen in the event of dissociation? Our currency and above all our economic activity recovering their freedom of action, our payments and the value of our imports would diminish and our franc would thus be better stabilized. This is based on the fact that the major part of the deficit of our trade balance originates in the franc zone, precisely for the reason of the tying of our franc with the French franc since, out of 74 billions of imports during the first eight months of 1950, the franc zone shows 50 billions of imports against 20 billions of exports, that is a deficit of 30 billions.

(2) Inflationary factors:

The condition of our budget, if one excepts the several observations of a local nature on the direction to be given to it, is not in the least disturbing from the point of view of purely political economy. It threatens to be so if the sanctioning of our franc as an independent currency is not realized.

Now, we are today witnessing an inflationary trend which characterizes the French budgetary situation, which presents a deficit of hundreds of billions.

One of the means of solving this is to resort to the printing of bills and, in this event, increased monetary circulation will obviously result in rising prices and salaries, and, our franc following in the same wake, these same results will automatically have repercussions on our economy, as it has already produced in preceding years.

It is thus undeniable that the dissociation of the Moroccan franc is imperative." Conseil du Gouvernement, Section marocaine, Session de décembre 1950 (1950), 14-16.

The purposes of the French Government in advancing a theory of *ordre public* assimilating the interests of Morocco to those of France become abundantly clear when attention is given to the practical consequences which the French Government would derive from the theory. The right to maintain *l'ordre public*, the French Government states, is an absolute right, inherent to the very sovereignty of the State. Since it is absolute and unqualified, the French Government contends it invests the State with the unilateral and arbitrary right to impose any prohibitions based on considerations *d'ordre public*, irrespective of treaty obligations to the contrary. The other parties to the treaties creating the obligation have no right to request prior consultation or the conclusion of an agreement to suspend or modify the obligation. While they

cannot be prohibited from challenging the validity of the prohibitions, they must have resort to other legal remedies in international law if they wish to obtain the removal of such prohibitions (Reply, p. 25).

In the view of the United States Government, this is nothing but a thinly veiled claim on the part of the French Government to an absolute right to discard at will all fettering restraints attached by the treaties to its actions in Morocco, while preserving a color of legality through the expedient of the theory of *ordre public*. The French Government twice expressly disclaims that the principle of economic liberty without inequality of the Act of Algeciras has been in any sense abrogated (see Reply, pp. 24 and 27). At the same time it proposes to make of the principle an empty shell and render it devoid of any practical significance by subjecting its application in any given case to an arbitrary ruling by the French Government that *l'ordre public* requires its suspension. By itself, the claim is inconsistent with the obligations of the French Government as a party to the Act of Algeciras, and a repudiation of the specific promises to maintain and respect such treaty obligations which the French Government expressly assumed as a condition precedent to its assumption of political power in Morocco. It is inconsistent, moreover, with the mission which is incumbent upon it by virtue of its position of protecting Power, since it proceeds on a theory of *ordre public* which, while purporting to protect the interests of the protected State, in effect seems to be designed primarily to protect its own. The Government of the United States could not be a party to a course of action which purports to nullify treaty limitations which, properly assented to by the sovereign of Morocco, have become in effect its constitution and its charter and represent, in the peculiar relationship of a protectorate, the guaranties of its survival and progressive rehabilitation to a position of independence and self-government.

The Government of the United States has always been ready, on the other hand, to negotiate with both France and Morocco any temporary or permanent arrangement consistent with the existence of these guarantees. Contrary to the assertion of the Reply (p. 25), the Counter-Memorial of the United States has not introduced the slightest confusion in maintaining that the temporary waiver or suspension of its treaty right had to result from bilateral negotiations. The principle that mutual consent is legally necessary to suspend the operation of the treaty is valid at all times, independently and irrespective of any other consideration such as the practice of assent under extraterritorial jurisdiction, and the more so in a situation of this type where the treaties are the constitutional guaranties of the State of which the fundamental interests are at issue. Indeed, the modern treaties upon which the French Government relies, far from supporting its claim to a uni-

lateral power of abrogation or suspension of treaty obligations, uphold the principle of bilateral negotiations.

The International Monetary Fund Agreement in no way supports the contention that a State may unilaterally and arbitrarily impose import prohibitions on the basis of financial considerations. For one thing, the Reply specifically admits that the agreement does not abrogate anterior treaties. For another, Article VIII, Section 6, of the Agreement deals with the possibility that parties may have anterior engagements conflicting with the exchange restrictions contemplated in the special or temporary circumstances specified in the Agreement, and expressly provides :

> "Where under this Agreement a member is authorized in the special or temporary circumstances specified in the Agreement to maintain or establish restrictions on exchange transactions, and there are other engagements between members entered into prior to this Agreement which conflict with the application of such restrictions, the parties to such engagements will consult with one another with a view to making such mutually acceptable adjustments as may be necessary. The provisions of this Article shall be without prejudice to the operation of Article VII, Section 5."

The French Government, while ready to claim all the alleged benefits deriving from the agreement, declines to abide by the one obligation—the obligation of prior consultation—to which the benefits of the agreement are subject [1]. In the circumstances, all the arguments presented in the Reply concerning the construction of various other articles of the Agreement are irrelevant and superfluous. This constatation, of course, is not to be construed as an admission of their intrinsic validity by this Government ; the position taken in this respect in the Counter-Memorial is entirely maintained (see pp. 336-339, Vol. I).

The reliance on the Economic Co-operation Agreement is equally invalid to support the claim of the French Government. It would be a most peculiar result if the desire of the parties to establish policies appropriate to their mutual needs, including palliatives to French financial difficulties, should be carried out by bilateral agreement, but construed as permitting one of them unilaterally and arbitrarily to impose upon the other its understanding of the means by which such mutually-agreed policies should be implemented. The Government of the United States has always proceeded on the contrary assumption. The very statements from various officials of the Economic Co-operation Agreement cited in the Reply were all directed to the establishment in the Congress or in the courts of the United States of the fact that it was proper for this Government and the French Government mutually to agree to a temporary *suspension* of pre-existing treaty rights actually in

[1] The only exception concerns Article VII, Section 5, the scarce currency article (see Counter-Memorial, pp. 338-339, Vol. I).

conflict with their policies. To rely on these statements for the purpose of establishing on the contrary the unilateral and arbitrary right of the French Government to suspend the same treaty right is without justification of any sort, not to mention the provisions of Article VII, paragraph 1 :

> "The two Governments will, upon the request of either of them, consult regarding any matter relating to the application of this Agreement or to operations or arrangements carried out pursuant to the Agreement."

With regard to the French contention that the rights to a regime of commercial freedom without prohibitions on imports is dependent upon privileges of extraterritorial jurisdiction, it is sufficient to refer to the history of the negotiations conducted by France with foreign Powers before and after the establishment of the Protectorate for the purpose of guaranteeing to them the maintenance of their right to commercial freedom in exchange for the surrender of their rights of extraterritorial jurisdiction, to prove conclusively that the commercial rights had, and still have, an existence and validity in all respects independent and distinct from those of rights of extraterritorial jurisdiction.

It is submitted that the Reply fails in its contention that the Act of Algeciras, or later agreements, provided the French Government, acting for Morocco, with the unilateral and arbitrary right, based on the theory of *l'ordre public :*

(a) to depart from the regime of free trade without prohibitions on imports provided by the Act and previous treaties ;

(b) to impose the absolute prohibition on imports resulting from the Decree of December 30, 1948, without prior consultation and agreement with the Government of the United States.

B. Assessment of Customs Duties

(Reply, pp. 31-38)

In its Counter-Memorial, the Government of the United States maintained that, under Article 95 of the Act of Algeciras, customs duties on imported merchandise should be assessed on the basis of its value on the market of origin plus expenses incidental to its delivery to the custom-house, but not including customs duties and storage fees. (See Counter-Memorial, pp. 343-354, Vol. I.)

The French Government does not question as such this interpretation, and admits both the validity of the method and its use by the customs authorities in Morocco (see Reply, pp. 32, 33 and 37). The French Government contends, however, that Article 95 defines customs value as the value of the merchandise at the time and place it is presented for customs assessments and that, under this interpretation, Article 95 admits concurrently of two methods of valuation : the method supported by the United States, and an

additional method according to which customs duties on imported merchandise are calculated according to the prevailing price of similar merchandise on the Moroccan market on the day it is presented for customs assessment, deduction made of customs duties and storage fees.

The text of Article 95, in the view of this Government, does not admit of the concurrent existence of the two methods of valuation which the French Government advocates. The text provides the following clues to the calculation of *ad valorem* duties : the customs value is "the cash wholesale value" of the merchandise "delivered", *"rendue"*, at the customs house and "free", *"franche"*, from customs duties and storage dues. To support the co-existence of two methods of valuation, the French Government supplies a general principle of calculation which is not in the text of Article 95. The customs value, the Reply asserts, is always the value "at the place and *on the day*" the merchandise is presented for assessment (italics added ; Reply, p. 37). This element of *time*, according to the Reply, would be implicit in the word "delivered", *"rendue"*, since ".... it would appear to be a condition inherent in both men and things that they should never be in a particular place without being there at a particular time as well...." (Reply, p. 33). This pronouncement is true, but entirely irrelevant to the issue. The question is not whether the merchandise being "delivered",*"rendue"*, is there on a particular day. The question is why the customs value should be determined in relation to the local market price on the particular day of assessment. The Reply fails to supply any justification for the introduction of an element of calculation which cannot be found in the text of Article 95. The Reply does not explain, moreover, how the principle that the customs value is always calculated "at the time" of presentation of the import for assessment can lead to two entirely opposite constructions of the relevant elements of calculations provided by Article 95. Under the method of valuation advanced by this Government as exclusive, and admitted by the French Government to be a valid alternative method, "cash wholesale value" means the value of the import on the foreign market where it is bought. "Delivered", *"rendue"*, accounts for transportation and other costs incidental to completed delivery. "Free", *"franche"*, means that the customs duties are at no time included in the calculation of the customs value of the merchandise. Under the additional method which the French Government reads in Article 95, "cash wholesale value" becomes the sale value on the local market, "delivered", *"rendue"*, determines the day upon which the value of the merchandise is evaluated, and "free", *"franche"*, means that the customs duties are subtracted from the customs value.

The texts of Articles 82, 85 and 86, further, do not admit of the concurrent existence of the two methods of valuation which the French Government reads into Article 95. The method of valuation

upon which the French Government and the United States Government are in agreement leads to a reasonable and rational construction of Articles 82, 85 and 96. Since the primary consideration is the value of the merchandise on the market where it was bought, Article 82 properly requires the importer to file a declaration of value which is a personal estimate, based on variable factors within his own knowledge. The customs authorities must then independently estimate the value of the merchandise to check it against the declared value, but must be prevented from arbitrary assessments. To this end the Committee on Customs Valuations of Article 96, with the help of established traders selected in relation to the relative importance of the commerce of each nation, are supposed to determine from year to year, or at six months intervals when necessary, the minimum and maximum customs values of the principal merchandise. The estimate of the customs authorities is thus balanced against the value declared by the importer within the minimum and maximum limits fixed by the schedule. Since fraud in the declaration of value is still theoretically possible for the merchandise on the schedule, and obviously possible for those *not* on the schedule, Article 85 provides the penalties applicable in such a case. The additional method of valuation which the French Government supports leads on the contrary to inconsistencies and difficulties of interpretation. Article 82 loses its meaning. The importer must file a declaration of value, but the value of similar merchandise on the local market on the day of presentation to customs is readily obtainable as a matter of public knowledge, and the customs duties paid on these merchandises must be ascertained from the customs officials themselves. There is no need for the filing of a declaration of value. Nor is there room for fraud. Article 85 equally loses all meaning. The French Reply disposes of these inconsistencies by dismissing Articles 82 and 85 as articles of pure form without any real or practical purpose and by construing Article 96 as a provision which deprives the importer of the opportunity to calculate the customs value of his import, substitutes fixed and predetermined values, and obviates accordingly the possibility of either argument or fraud. This, however, is a clear misconstruction of Article 96 since it does not require a determination of a fixed and predetermined value for each item of merchandise, but rather permits of the establishment of a schedule of minimum and maximum values. Moreover, the argument in respect to Article 96, as well as the argument presented in respect to Articles 82 and 85, cannot remove the contradiction in which the duality of methods of valuation supported by the French Government results. Starting from the principle that, under Article 95, the determination of customs value is made at "the time" of assessment, the French Government obtains two constructions of Articles 82, 85 and 96 : one in which all the articles have a

reasonable meaning and show a logical correlation ; the other in which they have no meaning nor purpose.

The French Government attempts to explain the presence of a dual method of valuation thus : in normal circumstances of free competition the prices on the market of origin are close enough to those on the local market to be a matter of indifference and permit assessments based on the cost value of the import on the market of origin ; but in extraordinary circumstances, the competitive advantage enjoyed by the foreign importer over the local interests, i.e. French interests, must be nullified by adoption of the second method since, otherwise, the customs duties would not reflect the actual sale value of the import. This reasoning, in the view of the United States Government, can find no support in Article 95. The point becomes evident as soon as the normal rules of interpretation are applied which require a determination of the intent of the parties *at the time* the instrument was negotiated. At the time of the conclusion of the Act of Algeciras, there was no contemplation in the mind of the parties of the extraordinary circumstances to which the Reply refers. Only normal circumstances of full and open competition were envisaged, as was made clear by the inclusion in the Preamble of the Act of the controlling principle of economic liberty without inequality. Article 95, therefore, did not contemplate the use of a second method of assessment specially designed for extraordinary circumstances and based on the sale value of the import on the local market.

The argument that the *ad valorem* duties of Article 95 concerned export duties as well as import duties does not prove, as contended in the Reply, that imports were to be valued according to their sale price on the Moroccan market. Export duties in Morocco, except for very few exceptions, were *specific* duties, not *ad valorem* duties. To speak of *ad valorem* duties was equivalent to speaking of import duties. No difficulties would arise, in any event, under the single method of valuation supported by both this Government and acknowledged as a valid alternative method by the French Government, since the value on the market of origin in the case of exports would be the cost in Morocco.

In the circumstances, the method of valuation—supported by the United States and admitted as valid by the French Government—which determines customs value on the basis of value on the market of origin plus expenses incidental to delivery to the custom-house but not including customs duties, is the only proper method of valuation under Article 95 of the Act of Algeciras.

This interpretation is corroborated by the letter of M. Luret to the American Minister at Tangier dated July 16, 1912, of which a short excerpt was already quoted in the Counter-Memorial [1].

[1] The date of July 18, 1912, on page 352 of the Counter-Memorial, Vol. I, should read July 16.

As a statement of the proper construction of Article 95 of the Act of Algeciras given a few years after its drafting and originating from the representative of French financial interests in control of Moroccan customs for the purpose of securing repayment of large loans to the Sultan, it has a persuasiveness which warrants its full reproduction at this point :

"Copy.

Contrôle de la Dette.

No. 566.

Tangier, 16 July 1912.

Mr. Minister,

We have the honor to acknowledge receipt of your communication No. 300 of 6 July relative to custom assessment of petroleum products of the Vacuum Oil Co.

As we have already had the honor to make known to you, the Oumana of the ports apply for the appraisal of merchandise the rules established by the Act of Algeciras and by the customs regulation. They use market prices, bills of sale, their professional knowledge.

The bill of sale is an element of valuation, but it is not conclusive evidence.

Nevertheless, the Customs Service would have been interested in seeing the bills of sale relative to the petroleum of the Vacuum Oil Co. ; these bills would have been useful documentation, but the representatives of that Company have always declared that they do not have any bills of sale, that they take possession of petroleum products without troubling about the cost price, and that they sell them at the price fixed by the Company after deduction of their commission.

An agent has been willing to indicate to the Oumana that the Company debits him invariably in the statement of account for the shipments which are made to him, at the rate of 5 francs 50 the drum, irrespective of the market prices ; but these prices being essentially variable, this price of 5.50 cannot serve as the basis for the duty which must rest not on an average value fixed once for all, but on the current and exact [value] of the products delivered at the customs office.

You point out to us in your letter of 6 July that the Vacuum Oil, contrary to what we thought, neither produces nor refines its petroleum, that it buys it in the United States and is, in consequence, in a position to present to the customs some authentic bills of sale of its imports into Morocco.

Since this is the case, there would be every advantage in this Company's presenting these bills of sale since they would be a useful element of appreciation for the appraisal of the customs.

The customs has always proceeded as described above in regard to petroleum products imported from Fiume and from Trieste ; for these importers furnish means of appraisal by attaching to the

declarations the original bills of sale of which the prices are compared with the market prices of origin.

It [the customs] will proceed in the same fashion in regard to the petroleum products of Vacuum Oil whenever the Company furnishes the means of appraisal which permit comparison with the current price on the New York market for the purpose of establishing the precise taxable value of these petroleum products in drums or in casks delivered at the customs office.

This value includes the purchase price of the petroleum f.o.b. New York increased by all expenses subsequent to the purchase, such as export duties paid to foreign customs, transportation, packing, freight, insurance, handling, unloading, etc., in short all that contributes to make up, at the moment of presentation at the Customs office, the cash wholesale value of the product according to which, under Article 95 of the Act of Algeciras, the duties must be paid.

As regards the customs duties collected in error at Safi on a value higher than that assigned by the table of values, we have authorized on 25 June last the reimbursement of it to the agent of Vacuum Oil in this port, and we are ready to repay any other sum which this Company gives proof of having paid on a value higher than the maximum on the table of values.

Please accept, Mr. Minister, the assurances of our high consideration.

For the delegates to the Contrôle de la Dette,
G. LURET."

(Translation ; for French text, see Rejoinder, Annex 2.)

It is submitted that the French contention fails which interprets Article 95 as admitting not only of the method of valuation supported by the United States, but also of an additional method in which customs value is determined according to the price of similar merchandise on the local market on the particular day it is presented for assessment, deduction made of customs duties and storage fees.

C. COLLECTION OF TAXES

(Reply, pp. 38-44)

In the Counter-Memorial, the Government of the United States advanced the claim that consumption taxes created by the Dahir of February 28, 1948, were in contravention of the fiscal immunity provided by the treaties, were illegally collected from American nationals, and should be refunded to them upon presentation of adequately documented claims. This Government expressly disclaimed reliance on any capitulatory right of assent for the purpose of its argument. (Counter-Memorial, pp. 354-358, Vol. I.)

In answer, the French Reply contends that no treaty has ever conferred upon the United States any right to a tax immunity in

respect of its nationals in Morocco. In support of this contention, the French Government asserts first that the very claims made in the past by the United States in respect to fiscal immunity were always based, not on a specific treaty right to tax exemption, but on a refusal to recognize as applicable to its citizens legislation to which it had not assented. The Reply refers (p. 39) to a note from the American Diplomatic Agent at Tangier to the French Resident General of Morocco in date of December 3, 1928, which is quoted in the annexes to the Counter-Memorial on page 720, Vol. I. The reference, in the view of the Government of the United States, establishes beyond question the contrary. The note clearly and carefully proceeds on two separate grounds : first on the ground of an autonomous right to tax exemption ; second on the general ground that local legislation, no matter what its nature, fiscal or otherwise, does not apply to American citizens without the prior assent of the United States :

> "As Your Excellency is aware, the existing treaties, to which the Shereefian Empire and the United States are parties, categorically debar the former from imposing upon the nationals of the United States any taxation whatsoever, except the customs duties and certain other taxes which are specified in the said treaties. The previous consent of the United States Government is therefore essential before any fiscal innovation can be legally enforced upon its citizens and proteges. It is furthermore beyond dispute that the American Government enjoys the fullest liberty to grant or to withhold, as it may think fit, its assent to the application to American ressortissants in the Shereefian Empire of any legislation or fiscal enactments introduced by the Moroccan Government." (Counter-Memorial, Annex 49.)

The French Government next advances an analysis of treaties the purpose of which is to show that no *autonomous* right to fiscal exemption ever existed in Morocco. Such immunity as there existed, according to the Reply, always derived, not from a specific treaty right to tax exemption, but from a capitulatory right—the right to refuse to recognize as applicable to foreigners any local law, fiscal or otherwise, by virtue of the exercise of extraterritorial jurisdiction.

The text of the treaties does not support the contention. Article 4 of the General British Treaty of 1856, on which the Reply first relies, provides :

> "They [British citizens] shall be entitled to hire, on lease or otherwise, dwellings and warehouses.... They shall not be obliged to pay, under any pretence whatever, any taxes or impositions. They shall be exempt from all military service, whether by land or sea ; from forced loans, and from every extraordinary contribution...." (Counter-Memorial, Annex 20.)

There is nothing there to suggest that tax exemption is a capitulatory privilege unless it be assumed that the right to hire, on lease or otherwise, dwellings and warehouses is equally of a capitulatory

character. The same reasoning applies to the exemption from military service which, if it were a capitulatory privilege, should hardly have been granted again to British subjects by the French Government in Article 8 of the 1937 Franco-British Convention for the abrogation of capitulations in Morocco. The contention loses even more merit in the light of the fact that tax exemptions in commercial matters were granted in the British Commercial Treaty concluded on the same date as the General Treaty ; it could hardly be maintained that commercial tax exemptions should be deemed of a capitulatory character. The Memorial of the French Government, moreover, never intimated in its review of treaties, or in the arguments, that tax exemption in the Moroccan treaties were of a capitulatory nature ; nor did it ever indicate that it included under the definition of capitulatory privileges tax exemptions (see pp. 33, 39, 43, 52 and 53, Vol. I).

The repeated assertion that all tax exemptions in the Moroccan treaties, even the commercial ones, were of a capitulatory character are directed to establishing one point : the abrogation of the tax exemption provided in the British Commercial Treaty of 1856. Having asserted that all tax exemptions, including those in matters of commerce, are of capitulatory character, the Reply proceeds to demonstrate that all the tax exemptions of British citizens were terminated as a result of the termination of their rights of extraterritorial jurisdiction. The reasoning, however, has no validity. The renunciation to rights of extraterritorial jurisdiction, including the right to refuse to recognize as applicable to British citizens any local legislation, fiscal or otherwise, without the previous consent of the British Government resulted from the express terms of Article I of the 1937 Convention for the abrogation of capitulations and related articles. The abrogation of the specific right to tax exemption granted in Article 4 of the General British Treaty was specifically accomplished in Article 4 of the Protocol of Signature (Counter-Memorial, Annex 93).

The Franco-British Convention of 1937 abrogated only those articles of the General British Treaty of 1856, which are specified in Article 4 of the Protocol, but had no effect on the Commercial Treaty concluded on the same date. (See Protocol of Signature, Article 4, Minute, Article 4, and Exchanges of Notes, No. 9 ; Counter-Memorial, Annex 93.) The Commercial Treaty contains, in the terms of the Reply, a fiscal immunity for "commercial operations", meaning that no tax, in addition to import and export duties, may be imposed on the goods of British subjects (see Articles 3, 7, 8 and 9). Through the most-favored-nation clause, the Government of the United States is entitled to the same fiscal immunity. The Dahir of February 28, 1948, imposing consumption taxes on merchandise belonging to United States nationals, violated this right, independently of any question of assent under the regime of extraterritorial jurisdiction claimed in

this proceeding by this Government. The Counter-Memorial has developed already the arguments on this latter point (see pp. 355-358, Vol. I).

In the circumstances, this Government need not present at this time extensive comments on the other arguments advanced in the Reply, although it does not concede their validity. The Reply draws the inference from the terms of the Convention of Madrid that only certain protected persons enjoyed fiscal exemption properly speaking under the previous treaties, but not foreigners and protected persons as a whole (Reply, p. 41). This assertion flagrantly contradicts the statement of the Memorial concerning the same Convention :

> "*Foreigners and protected* persons who had hitherto enjoyed the fiscal exemption are henceforth subject to two taxes : the agricultural tax and the gate tax (Art. 12 and 13)." (Translation ; Memorial, p. 43, Vol. I.)

Articles 12 and 13 of the Convention, as the Memorial properly points out, substitute partial fiscal immunity for the general fiscal immunity previously in effect ; those articles thereby consecrated a fiscal regime with respect to taxes which is still in force, subject to the modifications introduced under, or pursuant to, the Act of Algeciras, and which cannot be abrogated without the consent of the parties to the Convention. This was the position of French diplomatic and consular officers prior to the establishment of the Protectorate. Thus the French Consul at Fez reported on May 28, 1909, to the French Chargé in Tangier :

> "The Sultan has ordered l'Amin Elmostafac to collect from European nationals and proteges the duties and taxes from which they were so far exempt.
>
> By virtue of the Convention of Madrid and various treaties of commerce, foreign nationals and proteges cannot be subject but to established taxes : agricultural taxes, taxes on cattle, and customs duties. *It is only with the consent of the Powers signatories to the Convention of Madrid that the Makhzen may subject foreigners or their proteges to new taxes....*" *Documents diplomatiques, Affaires du Maroc*, 1908-1912, 158. (Translation ; italics added.)

It is clear from further correspondence on the matter and from the transmittal of further reports by the Chargé to the French Minister for Foreign Affairs that the position taken by the French authorities was precisely the same as the one taken by this Government :

> ".... The exemptions from special taxes perceived at Fez on certain merchandises derive from the principle admitted in the British Treaty and consecrated by the Convention of Madrid that a tax [achour] could not be collected twice, and that consequently, *one could not collect at Fez a tax on merchandise which has already paid customs duties, or which, [if] destined for export, will pay them*

on going out of Morocco." Documents diplomatiques, Affaires du Maroc, 1908-1912, 182. (Translation ; italics added.)

So far as concerns the argument that the Act of Algeciras was abrogated, in respect of fiscal matters, by the establishment and recognition of the French Protectorate, the Government of the United States refers to the statements and arguments in point in the Counter-Memorial, pages 293-300, 391-396, Vol I. With respect to the propriety of an argument which alleges the necessity of disregarding restraining treaty limitations for the overt motive of modernization, reference is made to the arguments presented in Chapter I, A, of this Rejoinder.

It is submitted that the French Reply fails in its contention that the right of exemption from taxes is not an autonomous right based upon distinct treaty provisions.

So far as concerns the statement in the Reply that the French Government "has never recognized" the "existence" of the right of assent in fiscal matters, or otherwise, this Government notes that the French Resident-General has requested the assent of this Government to "tax legislation" no less than some 36 times in the period 1920-1937, and some 23 times from 1938-1948. In addition there is reproduced here the self-explanatory note addressed by M. Marchat, Diplomatic Counsellor of the Residency of the French Republic in Morocco, to the American Consul-General at Casablanca on August 14, 1948, following the latter's protest against the application of the consumption taxes of the Dahir of February 28, 1948, to the importation of an American national :

"Residency-General of the French Republic in Morocco.
Diplomatic Cabinet.
No. 458D.

NOTE

By a note No. 35 of 21 July last, the Consul-General of the United States at Casablanca called the attention of the Diplomatic Counsellor of the Protectorate to the dispute which has arisen between the Customs Service and the American citizen Clarence C. Nelson, regarding the internal consumption taxes applicable to a shipment of 10 tons of tires.

M. Marchat has the honor to inform Mr. Fletcher that the Dahir of February 28, 1948, modifying the rate for said taxes, has been submitted for the approval of the Department of State by a letter addressed on 20 April following to the Diplomatic Agent of the United States at Tangier.

No response having yet been received from Mr. Plitt, this Residency-General directs the Customs Service to calculate according to the former rates the taxes applicable to importation under reference.

> M. Marchat nonetheless takes this occasion to call the attention of Mr. Fletcher to the inconveniences of a procedure which permits American ressortissants to escape, often for considerable delays, the fiscal regulation of the Protectorate, and places them thus, in fact, in a privileged situation in relation to their competitors, which is contrary to the principle of economic equality proclaimed by the Act of Algeciras." (Translation; for French text see Rejoinder, Annex 3.)

Either M. Marchat recognized, *in 1948*, the capitulatory immunity of American citizens from the application of *any* local legislation, or else he recognized the specific right of American citizens to tax exemption under the treaties. This Government does not deem it necessary to determine which of the two the letter recognized, since either supports its contention that the taxes at issue were improperly collected from American citizens.

CHAPTER II

EXTRATERRITORIAL JURISDICTION

In its Counter-Memorial, the Government of the United States directed its arguments to establishing two points: the scope of the rights of extraterritorial jurisdiction which it received from Morocco; the continuing validity of these rights after the establishment of the Protectorate and up to the present date.

In order to establish the scope of the rights of jurisdiction received from Morocco, the Counter-Memorial relied on the principle of personality of law whenever a problem of interpretation so required; thus the scope of the specific rights of jurisdiction granted in the United States Treaty of 1836 was analyzed by reference to this principle. The meaning and effect of the most-favored-nation clause in the Moroccan treaties was also determined, to the extent possible, by reference to the special circumstances which prevailed at the time of its inclusion in treaties of capitulation.

In order to establish the continuing validity of the rights after the establishment of the Protectorate, the Counter-Memorial relied, among other things, on custom and usage and on the fact that the United States could still claim through the most-favored-nation clause the jurisdictional rights granted to Spain in 1861. The practice of the French authorities since the surrender of British jurisdiction in 1937 and the history of the negotiations for the United States recognition of the French Protectorate were also taken into consideration.

With respect to the arguments concerning the scope of the rights received by the United States, the Reply ignores the fact that the Counter-Memorial relies on the principle of personality

of law solely as a principle of interpretation. The United States Government, the Reply alleges, argues for the adoption of this principle in modern international law as a principle of general and absolute application always prevailing in Mohammedan countries, in place of the principle of territorial sovereignty normally applicable. Similarly, according to the Reply, the historical interpretation of the most-favored-nation clause advanced in the Counter-Memorial purports to establish with respect to Morocco and other Mohammedan States a special rule resulting in an inequality of treatment not permissible under modern international law.

With respect to arguments concerning the continuing validity of United States rights after the establishment of the Protectorate, the Reply alleges that the territorial sovereignty of the State of Morocco is incompatible with the maintenance of such rights. All other foreign States, according to the Reply, have surrendered to Morocco the special rights of jurisdiction which they commonly exercised in previous times ; the United States, therefore, cannot maintain against Morocco these special rights. To hold otherwise would be to advocate the continuance of a principle of inequality between Morocco and other nations, and to exclude Morocco from the benefit of the principles of equality and justice which are the foundation of modern international law.

The Government of the United States proposes to answer the French arguments within the general framework of the plan previously followed in the Counter-Memorial ; this will include consideration of arguments relating to the right of assent, since this right has been treated in the Counter-Memorial as a necessary corollary of extraterritorial jurisdiction. This examination of specific arguments will be followed by general conclusions and observations on the issue of extraterritorial jurisdiction.

A. Scope of the Rights of Jurisdiction granted in the United States Treaty of 1836 and in the British Treaty of 1856 (Reply, pp. 44-47)

The principle of personality of law, according to the Reply, is invoked by the United States Government as governing "today in the Islamic world" the relations between the State and foreigners (p. 45). No agreement, nor any general principle of international law, the Reply objects, sustains today such a doctrine. The objection is entirely predicated upon a part of a sentence of the Counter-Memorial which the French Reply translates and quotes as follows :

> ".... aujourd'hui [now] dans le monde de l'Islam, l'étranger *devrait* [should] être tenu en dehors de la vie de la société locale et de la protection juridictionnelle offerte par celle-ci et mener son existence selon sa propre loi". (Italics added ; Reply, p. 45.)

This quotation has been taken out of context. The tense of the controlling verb, moreover, has been changed[1]. The original passage of the Counter-Memorial is reproduced below :

> "*Such was the historical development of the practice of extraterritoriality at the beginning of the 16th century when the European States began to enter into regular treaty relations with the Mohammedan States.* The practice was embodied in those treaties. Treaties concluded with the Ottoman Empire, first by France (1528-1535) and thereafter by practically all European Powers—Great Britain, the Netherlands, Austria-Hungary, Sweden, Italy, Denmark, Russia, Spain, Belgium, Portugal, etc.—and with Algiers, Morocco, Tripoli, Tunis, Persia, Muscat and Zanzibar, Egypt, Ethiopia, etc., provided for extraterritorial jurisdiction ranging from exclusive jurisdiction of the foreign consuls in cases, civil and criminal, involving their nationals only, to jurisdiction in mixed cases, civil and criminal, in which their nationals were defendants. *The Mohammedan communities merely continued the precedents and practices which once in Europe and now in the Islamic world commanded that the foreigner be kept outside the life and jurisdictional protection of the local society and live instead according to his own law.* Differences between the Christian and Mohammedan civilizations, religious and otherwise, undoubtedly fostered the maintenance of relations according to the principle of extraterritoriality. While legal writers have given various explanations for the continuance of the system in Mohammedan countries at a time when in Europe the principle of personality of law had given way to the principle of territorial sovereignty, *they agree on the conclusion that the origin of the system of extraterritoriality in Mohammedan countries is to be found in the immemorial practice and respect of the principle of personality of law.*" (Italics added.)

The Government of the United States is aware of the difficulties attaching to problems of translation. These difficulties, it must be presumed, have led the French Government to interpret the statement at issue in a sense quite different from that obviously assigned to it by the Counter-Memorial. All possible error is removed, however, when the complete sentence is replaced in the context from which it is taken, the verbs are left in their original tense, and the conclusion to which the paragraph leads is taken into consideration. The Counter-Memorial clearly did not review the development of the principle of personality of law for the purpose of explaining the growth of capitulatory rights today, in 1952, but obviously invoked it as a principle of interpretation explaining the growth of capitulations in Mohammedan States "at the beginning of the 16th century when the European States began to enter into regular treaty relations with the Mohammedan States". The French objection is without validity.

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[1] The Government of the United States noted that the French translation of the Counter-Memorial prepared by the Court maintained the verb in its proper tense.

The Reply, moreover, declines to interpret the meaning of the United States Treaties of 1787 and 1836 by reference to the intent of the parties *at the time of their drafting*. The sole issue in this part of the argument, it should be noted, is whether or not the text of Article 20 of the United States Treaty of 1787, renewed in 1836, was intended to grant to the American Consul jurisdiction in civil and criminal cases arising between his nationals, or only in civil cases. The Counter-Memorial accordingly presented arguments directed to establishing the meaning of this provision by reference to appropriate treaties and the principle of personality of law which then controlled the development of extraterritorial jurisdiction in Morocco. The Reply has advanced no answer to these arguments, except the assertion that the Counter-Memorial did not reproduce accurately the distinction advanced in the Memorial between *Consular Jurisdiction* and *Capitulatory Jurisdiction* and did not, therefore, properly dispose of the issue. The Government of the United States denies this assertion and rests on the record of the arguments presented in the Memorial on pages 53, 54, and 55, Vol. I, in the Counter-Memorial on pages 363-369, Vol. I, and in the Reply on pages 46 and 47, Vol. I.

B. The Most-Favored-Nation Clause Argument (Reply, pp. 47-57)

(1) The Reply declines to interpret the most-favored-nation clause in the light of the circumstances which shaped its development in treaties of capitulation. To propose an historical interpretation of the clause in the Moroccan treaties is not, as contended in the Reply, to advocate the existence of a rule of inequality between Mohammedan States and other nations. The use of the historical approach is merely an application of the normal rules of interpretation of international instruments. The attitude of the French Government in the matter is the more difficult to understand since the proposed method of interpretation would appear to be especially appropriate when dealing with a subject as specialized as extraterritorial jurisdiction. It is perfectly proper in the view of the Government of the United States to take notice of some historical considerations for the purpose of determining whether the clause always had in the Moroccan treaties the meaning which the Reply would ascribe to it today.

It was noted already in the Counter-Memorial, and the Reply does not deny it, that the most-favoured-nation clause theory upon which the French Government relies is a modern theory, representing a crystallization of the practice of the end of the 19th century and the beginning of the 20th. The Moroccan treaties in which the most-favored-nation clause is included are from an older period. The practice which developed the modern theory was essentially a European-American practice, not a practice

involving Mohammedan States. The rights upon which the clause was to take effect were of an entirely different character. In one practice the meaning of the clause was developed principally in connection with commercial rights. In the other the clause often had as a major purpose the securing of capitulatory rights. In the circumstances, it is a reasonable contention that the most-favored-nation clause of the Moroccan treaties cannot be assumed *a priori* to have had at the time of its inclusion in such treaties the meaning and effect upon which the modern practice is now in agreement. It is characteristic, moreover, of the problem of interpretation of the meaning and effect of the clause in this particular case that the contentions of the parties nullify one another. The Government of the United States objects that the general modern rule, in the absence of contrary proof, cannot be presumed to apply. The French Government conversely objects that, in the absence of contrary proof, the regionalization of the effect of the clause cannot be presumed to apply (p. 48).

It becomes imperative, therefore, to give consideration to factors which may properly be determinative of the interpretation of the clause in the Moroccan treaties. It is difficult to believe that the clause was utilized from the beginning of Moroccan treaty practice with the intent of obtaining the same clear-cut and definite effects which mark its operation today in modern practice. And the more so since the precise effect of the clause was still a matter of debate and controversy in European-American practice before the end of the 19th century. The precise intent or effect of the clause in the Moroccan treaties is thus largely a matter of conjecture, under any theory, and more particularly under a modern theory responding to different needs and preoccupations. The clause must have had, however, at least the effect which even authorities supporting the modern theory recognize as having been characteristic of its early development. Farra, Hornbeck and Ito (see Counter-Memorial, pp. 373-374, Vol. I) have pointed out that originally it was no more than a device to avoid the specific enumeration of advantages granted in other treaties. At what point, if any, the clause was used in the Moroccan treaties with the understanding that the original purpose of permanent incorporation by reference was to be terminated is obviously again a matter of conjecture. But if France felt it could maintain against Brazil from 1857 to 1878, through the most-favored-nation clause, a claim to the permanent benefit of rights not any longer enjoyed by third States, it is not by any means unreasonable to suppose that France and other foreign Powers may have conducted their treaty negotiations in Morocco during the same period or before with the contemplation of ascribing to the clause a similar effect. If anything, it would have been easier to obtain in Morocco such an effect of the clause, and the interest which France and other European Powers had or were increasingly intent

upon securing in that State makes it even more likely that they should have wanted to obtain permanent rights in that country.

In the light of these observations, the Government of the United States believes that there is no reason for holding that the most-favored-nation clause in the Moroccan treaties intended to create only temporary and dependent rights of extraterritorial jurisdiction. The view applies as well to the most-favored-nation clause of the Madrid Convention and perhaps with even more logic, since it is difficult to see why this convention should establish on a permanent basis rights of protection originating from custom and usage, and at the same time recognize on a non-permanent basis the jurisdiction needed by the parties for the exercise of their right over proteges.

The Government of the United States considers that the Convention of Madrid accomplished a collectivization of jurisdictional rights in favor of all the parties and that it was not intended to subject these rights to the mechanical effect of acquisition and loss which characterizes the effect of the modern most-favored-nation clause. Instead, the prerogatives so acquired became an indivisible whole, confirmed moreover by the Act of Algeciras, on which later renunciations by some of the parties remain wholly without effect. To the arguments made in both the Memorial and the Reply that the Madrid Convention could not be deemed to have been concerned with extraterritorial jurisdiction, it may be pointed out that the French Government at one time took quite a different view of the matter. The President of the French Cabinet, Minister of Foreign Affairs, addressed on August 21, 1905, a despatch to French Diplomatic Representatives in London, Petrograd, Berlin, Rome, Vienna, Washington, Brussels, The Hague, Copenhagen, Stockholm and Lisbon instructing them as follows:

> "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 proteges 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...." *Documents diplomatiques, Affaires du Maroc*, 1901-1905, 275. (Translation.)

(2) The position of the United States finds added support, moreover, in the fact that the Moroccan treaties, and especially international acts such as the Convention of Madrid and the Act of Algeciras, were in effect a formalization of existing customs and

usages in matters of extraterritorial jurisdiction. As pointed out in the Counter-Memorial (see pp. 385-391, Vol. I), the law-creating process which culminated in the acquisition by the nationals of foreign Powers of a special regime in all countries of extraterritorial jurisdiction was not an automatic and rigid procedure, but rather an heterogeneous process combining such varied elements as custom, specific treaty provisions, and most-favored-nation treatment. The resulting regime, therefore, cannot be deemed to owe its existence to the specific and mechanical effect of the clause which the French Government, proceeding from a modern and European-American concept of the clause, assigns to it for the purpose of its argument.

The arguments advanced in the Counter-Memorial on this point, far from contradicting the arguments presented in relation to the specific provisions of the treaties, are their logical continuation. The treaties are a means of ascertaining the regime of extraterritorial jurisdiction to which, at the end of the development of the institution of extraterritorial jurisdiction in Morocco, the nationals of all foreign Powers had become entitled. The negotiation by France of a series of agreements for the surrender of rights of extraterritorial jurisdiction with States which never had had treaty relations of any kind with Morocco confirms precisely the validity of the contention of this Government (see Counter-Memorial, p. 388, Vol. I.)

The Reply, however, suggests that these renunciations did not have for their primary purpose the surrender of special privileges, but were intended primarily to be formal declarations of acceptance of the jurisdictional system recently established by France in Morocco. The effect of these declarations, and the legal consequences which the French Government draws from them will now be considered in connection with the related question of the effect of the renunciation by Spain of its rights of extraterritorial jurisdiction in the French Zone of Morocco, under its Treaty of 1861.

(3) According to the Reply, the position of the United States Government in asserting that the Spanish-Moroccan Treaty of 1861 has never been abrogated is groundless. Thus the Reply concludes that the Government of the United States cannot rely upon its provisions to justify the continuing existence of its rights of extraterritorial jurisdiction in Morocco.

By way of preliminary remark, note should be taken of the ruling of the Court of Appeals of Rabat in date of July 12, 1921, previously quoted on page 381, Vol. I, of the Counter-Memorial:

> "Whereas this principle is more specifically stated by Article 5 of the Treaty concluded December 20, 1861, between Morocco and Spain, treaty the benefit of which most foreign Powers can claim by application of the most-favored-nation clause, clause granted notably for France by the Diplomatic Act of May 28, 1825, the Treaty of Sept. 10, 1844, and the Convention of Madrid of July 3, 1880 (Art. 17)...." Rec. arr. Rabat. II, 1923-1924, No. 264, pp. 411 et s. (Translation.)

Either the Court considered that the most-favored-nation clause of the Convention of Madrid did incorporate permanently the provisions of the Spanish Treaty of 1861, or else the Court in 1924—10 years after the conclusion of the Franco-Spanish agreements alleged to have abrogated the Spanish Treaty of 1861—was taking the position that the Spanish Treaty of 1861 was still in effect. The alternative arguments presented by this Government are consequently far from being as unfounded as the Reply would assume.

The Reply asserts that all questions concerning the validity of the Spanish Treaty of 1861 have been settled by the observations presented by the French Government in the course of the Preliminary Objection which took place earlier in this proceeding. The Government of the United States cannot agree with this sweeping generalization and confusion of issues. In its Preliminary Objection, the United States Government merely sought to secure clarification as to whether or not the States of France and Morocco were Parties to the case. The precaution was warranted, since in the observation of this Government, the French Government had been careful in the past to specify in its international acts whether or not it was acting in a particular case for and on behalf of Morocco. Examples were cited by this Government for the single purpose of establishing proof of this practice as well as the manner in which the distinction had been made clear in the past. The comments of the French Government on the substance of these examples were superfluous and unnecessary. An unambiguous statement, consistent with the past practice in point, would have met the objection and immediately clarified the capacity in which France was acting, since the Preliminary Objection did not at any time question the general competence of the French Government to act for Morocco in its capacity of protecting State, but sought to ascertain whether, in the specific instance, the French Government *was exercising* its competence to act for Morocco. This simple statement was supplied by the French Agent, by letter dated October 6, 1951.

The Reply argues that in both the French-Spanish Treaty of November 27, 1912, and the Franco-Spanish Declaration of March 7, 1914, the negotiations between France and Spain were the implementation of the competence which Morocco recognized France to possess under the Treaty of March 30, 1912. The United States Government does not, and has never denied, that the Treaty of March 30, 1912, so far as concerned States which recognized the Protectorate, was effective to establish France as the protecting State of Morocco, nor does it deny that as an outgrowth of this position, France became competent to deal with other States regarding its newly-acquired powers within the whole of Morocco. This acquisition of competence, however, does not determine in advance whether or not the competence

is in fact exercised in a particular case. This must be determined in each particular instance and it is plain that France, in negotiating with Spain regarding Spanish interests in Morocco, negotiated for itself alone and that the agreements with Spain did not have the effect of bringing about an agreement with the State of Morocco as well. It would not be in accord with the facts to maintain that by virtue of the terms of Article I of the Treaty of March 30, 1912, France acted for Morocco in negotiating with Spain in 1912. Article I merely sets forth that France would consult with Spain regarding Spanish interests. And the note addressed by the French Ambassador to the United States Secretary of State on January 19, 1917, makes it clear beyond a doubt that this Article referred to negotiations between the Governments, "not of Morocco, but of France and Spain". (Counter-Memorial, Annex 45.) Since the Government of Morocco was to be specifically excepted, how can it be argued now that the State of Morocco was included in the negotiations ? The French Government fails to distinguish between possession of competence and exercise of competence. In the negotiations with Spain its competence to act for Morocco would have been clear. But the French Government chose not to exercise its competence and acted in the negotiations for the French Government alone.

The French Reply notes an "error in judgment" (p. 53) on the part of the United States Government which it attributes to "a misunderstanding as to the effects of the Protectorate Treaty". If so, the abundant literature on protectorates for which French writers are in large measure responsible is in surprising contrast with the views which the French Government holds today with respect to the status of the State of Morocco in international law. It cannot be denied that the establishment of a protectorate relationship does not entail the disappearance of the protected State as an international entity. There is no annexation and the territories of the two States remain distinct. The Treaty of March 30, 1912, did nothing more than to set forth restrictions on the exercise by Morocco of some of its powers because the State of Morocco so agreed. The State of Morocco retained all that it did not relinquish. It cannot be understood, therefore, how the French Government could claim that, when the States of France and Spain reached agreement, Morocco was an unnamed but participating party. Morocco is not a part of France ; the Moroccan Government is distinct from that of France ; thus, when France negotiated, it negotiated for itself alone. To bind Morocco there should be at least some express indication that Morocco was intended to be bound. This proposition, persuasive because of its consistency in terms of logic and fact, finds added support in numerous statements made by writers fully familiar with the status of protectorates. Scelle notes the following :

"The protected government does not lose juridically the aptitude for international competence and would wholly recover the exercise of it the day on which the protectorate would end in law or in fact. Its participation in international juridical acts is therefore necessary for the validity of the latter...." Scelle, *Droit international public* (1944), 194. (Translation.)

"All its [the protected government] international activity is conditioned by *la tutelle*, but in this international activity it intervenes in name." Scelle, *ibid.*, p. 150. (Translation.)

Similarly, Anzilotti states that :

"Generally, the protector State assumes the exclusive representation of the protected State in international relations [rapports] : it is to the protector State that the international rapports of the protected State lead [aboutissent] : it is the [protector] which concludes international acts, [and] which, in particular, concludes treaties in the name and on behalf of the protected State." Anzilotti, *Cours de Droit international* (1929), 227. (Translation.)

And Despagnet :

"But the protected country keeps its own individuality in international relations ; it is still a distinct State which remains regulated, from the diplomatic point of view, only by the conventions which it has personally concluded or which, after the protectorate, its protector has concluded for him and in its name." Despagnet, *Essai sur les Protectorats* (1896), 380-381. (Translation.)

It must be readily apparent, therefore, that what is at issue here is not a matter which involves merely questions of form, as the Reply contends. If action taken by France, without specific designation that Morocco is also represented, were deemed nevertheless to apply to and bind Morocco, the way would be open for further claims that the status of Morocco has gradually altered and that its identity remains no longer separate and distinct from the identity of the protecting State. The Government of the United States, therefore, believes it necessary to maintain due regard for the legal position of Morocco, especially as concerns what the Reply describes as a pure matter of form. The importance of the use of the precise form has been indicated by Gairal :

".... But even in the case in which the treaty is negotiated and concluded on behalf of the protected by the protector, the personality of the former remains distinct both in form and in substance. With regard to form, the very terms of the convention indicate that the protector acts only in capacity of representative. With regard to substance, the benefit or obligation under the treaty extends to the person of the subordinated State, as the regular acts of a *tutor* benefit the minor or bind him directly." Gairal, *Le Protectorat international*, 178. (Translation.)

The United States Government does not find surprising the results which follow from the proper analysis of the international status

of the State of Morocco in regard to the renunciations of capitulations by foreign Powers. Contrary to the statement of the Reply, this Government has not failed to realize the true scope and effect of these renunciations. The Declarations renouncing rights under capitulations (see Counter-Memorial, p. 293, Vol. I, and Annex 39) are, by their express terms, declarations between France and the declaring party. The Declarations are limited to the French Zone of the Shereefian Empire. The declaring governments do not expressly give up capitulatory rights conferred by the State of Morocco but agree not to claim these rights vis-à-vis France. These declarations, from their inception, have of necessity been valid only between the parties specified in the instrument, and a conclusion that they do not bind Morocco would simply define the situation as it has always existed.

According to the Reply, the negotiations with Spain which were carried on in 1912 and 1914 may be likened to what is regarded as a more recent example of the exercise of the international competence of Morocco, as illustrated by the Economic Co-operation Agreement between the United States and France of June 28, 1948. But, in the opinion of the United States Government, a comparison of the French-Spanish agreements with the French-United States Agreement of 1948 provides apt illustration to the contrary. Both the Convention of November 27, 1912 (Counter-Memorial, Annex 38), and the Declaration of March 7, 1914 (Counter-Memorial, Annex 94), were, by their terms, concluded solely between France and Spain, with no mention that Morocco was intended to be a contracting party. However, in the Economic Co-operation Agreement concluded between the United States of America and France, it is made absolutely clear in Article XI that France was expressly meant to include the French Zone of Morocco. Thus, in this case the French Government must be regarded as having negotiated and concluded the agreement on behalf of the French Zone of Morocco, and it results therefore that contrary to the statement of the French Government (Reply, p. 53), Morocco must be regarded as a party to the treaty.

In the circumstances, this Government is clear that the proper conclusion in this matter is as follows: In view of the protected status of Morocco—under which Morocco has retained its identity as a State—it cannot be presumed that any and every agreement by France implies agreement by Morocco as well. The French Government has, in the past, employed a formula according to which the French Government acts on behalf of Morocco. Use of this formula evidences the realization by France that, in order to bind Morocco, express indication must be made that France acts to represent Morocco. If this formula is to have any significance or meaning of and by itself, either of two results must obtain: when France expressly acts "on behalf of Morocco", Morocco is bound; when France acts alone, with no indication of intent to

represent Morocco, Morocco cannot be bound. Since France did not expressly act on behalf of Morocco in the Franco-Spanish Agreements of 1912 and 1914, these agreements did not abrogate the treaty concluded between Spain and Morocco in 1861.

(4) The Government of the United States maintains the arguments already presented in the Counter-Memorial (pp. 388-395, Vol. I) with respect to the effect of the recognition by the Government of the French protectorate and with respect to the practice of the French authorities in Morocco since that time.

C. NON-APPLICABILITY OF LOCAL LAW TO AMERICAN CITIZENS; RIGHT OF ASSENT

The Government of the United States maintains all the arguments presented on this point in the Counter-Memorial, with the addition of the following remarks.

Point 1 of the arguments presented in the Reply simply admits what the Reply denies in all other parts of the proceeding: the necessity of interpreting an institution such as extraterritorial jurisdiction in the light of the principle of personality of law. The argument that the principle of territorial sovereignty was also known, and that its application was never ignored, is pure dialectics, since as stated in the Reply, Mohammedan communities resolved the jurisdictional problem created by the presence of non-Moslems by giving a large place to their personal law—"en accordant certes une large part à la loi personnelle des intéressés". (P. 59.)

Point 2 is devoted to demonstrating that the privilege of "legislation" is not independent of the right of extraterritorial jurisdiction and could not survive it. But the Counter-Memorial contended at all times that by definition the regime of extraterritorial jurisdiction which developed in Morocco and immunity from the local law were one and the same thing. The arguments of the Reply therefore are pointless.

Point 3 concerns arguments based on the texts of the treaties and is also directed to establishing that immunity from the local law and extraterritorial jurisdiction were not separate elements. The same objection applies here as applied to Point 2: the arguments of the Reply are irrelevant.

Point 4 reiterates the contention of the Memorial that the practice of requesting the assent of the United States prior to making local law applicable to American citizens had no juridical significance, except as a practical means of informing the United States authorities of the existence of certain local laws which might conflict with the treaties. The United States Government maintains that in view of the notice given to the French authorities from the inception of the Protectorate, the practice of the French authorities over a period of more than 30 years in requesting

the assent of the United States before making the local law involved applicable to American nationals, constituted an overt and continued recognition of the immunity of American nationals from the application of such local law.

D. General Observations and Conclusions on the Issue of Extraterritorial Jurisdiction

The Government of the United States has at no time in this proceeding maintained the view that the principle of personality of law should be recognized as a general rule of modern law taking precedence in Mohammedan countries, such as Morocco, over the principle of territorial sovereignty. The Counter-Memorial properly took the position that the institution of extraterritorial jurisdiction should be analyzed by reference to the principle which fostered its development, the principle of personality of law, and properly objected that the principle of territorial jurisdiction, which is today the general rule, could not be accepted as a valid principle of interpretation of the meaning and effect of the treaty provisions which reflected over the years the various stages of development of the institution. The Counter-Memorial further maintained, and with equal validity, that the most-favored-nation clause of the Moroccan treaties, like any other treaty provisions, should be interpreted in the light of the circumstances which influenced and shaped its meaning and effect. The allegation that the reliance of this Government upon normal rules of interpretation is devised to impose upon Morocco a status of inequality among modern States is not only based on a misconstruction of the United States position in justification of which the grounds are surprisingly inadequate, but is in addition a paradoxical attempt to reverse the respective positions of the Parties and ignore the realities of the situation.

France, not the United States, is maintaining a protectorate in Morocco. The restrictions upon the territorial sovereignty of Morocco which result from the Treaty of Fez are sweeping and far reaching. It is a safe assumption that the French Government would not be willing to recognize the Treaty of Fez as invalid on the ground that it is predicated on a principle entirely inconsistent with the modern principles of supremacy of territorial sovereignty and equality of States in international law. This being so, the regime of extraterritorial jurisdiction which was in full force and effect in Morocco in 1912 may just as much be analyzed as an admissible exception to the principle of territorial sovereignty as the Treaty of Protectorate concluded at that time.

The alleged concern of the French Government, with recognition of the principle of territorial sovereignty, is, moreover, a convenient guise for the furthering of its own interests in Morocco. The French

Government could be expected, in view of its arguments, to advocate scrupulous respect of the sovereignty of the State of Morocco. Nevertheless it contends that it may negotiate agreements binding upon Morocco without ever specifying that it acts for and represents the State of Morocco, a contention which denies the retention by Morocco of its identity as a State and would lead, if admitted, to the gradual alteration of its sovereign status and conceivable reduction to a mere territory undistinguishable for all intents and purposes from the territory of metropolitan France and its colonies. The French Government purports to protect and increase the territorial sovereignty of Morocco by obtaining the termination of United States rights of jurisdiction in Morocco. Yet the French Government in fact seeks to obtain the subjection of United States nationals to its own system of jurisdiction in Morocco and thus seeks to obtain an extension and enlargement of the exercise of its own sovereign powers in that country. Any doubt on the point has been removed by the very terms of the requests made by the French Government to the United States Government on October 7, 1913, and July 16, 1914, for the placing of American citizens under the "new jurisdiction" which "is intended to supersede the French consular courts", and for agreeing "to place persons subject to American jurisdiction under that of our courts". (Counter-Memorial, Annexes 42 and 43, pp. 668 and 683, Vol. I.) Appeals from the French courts in Morocco, it should be noted, are made to the Supreme Court of France. It should be equally observed that, surprisingly enough, the system of jurisdiction which France thus maintains in Morocco for foreigners but not, generally speaking, for Moroccans, is predicated in effect on the very principle of personality of law, the rejection of which is so forcefully argued in the Reply, even as a principle of interpretation of the historical development of extraterritorial jurisdiction in Morocco before the establishment of the Protectorate.

In the view of the United States Government, it is not proper for the French Government to attempt to subject American nationals to its own jurisdiction through the device of advancing its arguments under the cover of Moroccan sovereignty. By itself the claim is inconsistent with the position which is incumbent upon the French Government as protecting Power, since the purpose of the argument is to further its own jurisdiction in Morocco. The claim, further, is inadmissible because the French Government relies solely upon an artificial situation of its own making. The French Government elected from the inception of the Protectorate to develop a system of justice of its own in Morocco to exercise jurisdiction over foreigners, and not to let Morocco re-assume the jurisdiction previously granted to foreign Powers under the system of extraterritorial jurisdiction in force before 1912. There were obvious alternatives, and it is no answer to argue that the Moroccan courts, 40 years after the establishment of the Protectorate, are not

ready to assume the complete administration of justice in their own State. The claim, finally, is inconsistent with the status of Morocco as a sovereign State in international law, since it proceeds on the theory that France, acting alone and without specific mention of Morocco, has nevertheless made Morocco a party to agreements concluded with foreign Powers for the renunciation of their rights of extraterritorial jurisdiction. The Government of the United States cannot recognize a position purporting to nullify the requirement of specific designation of the protected State since this requirement is, in the peculiar relationship of a protectorate, the sole guaranty of the maintenance by Morocco of its identity in international law.

It is submitted that the Reply fails in its contentions that the United States :

(a) obtained only civil jurisdiction in the Treaties of 1787 and 1836 ;

(b) does not possess all the rights of jurisdiction which it possessed prior to the establishment of the Protectorate by virtue of specific treaty provisions, the effect of the most-favored-nation clause, and custom and usage ;

(c) cannot claim, as a corollary, immunity for its citizens from the application of the local law except when such local law has received its prior assent.

CONCLUSION AND SUBMISSIONS

The Government of the United States believes that the treaties and international agreements to which it is a party with Morocco have created binding obligations, the termination, adjustment or renewal of which should be a matter of bilateral negotiations, in conformity with established procedures under international law. The Government of the United States has always been ready and still stands ready to negotiate with both France and Morocco any necessary or advisable arrangement or agreement, temporary or permanent, to replace and recast in a form more properly adapted to present circumstances the treaty bounds originally contracted with the State of Morocco.

There does not exist, in the view of this Government, any compelling necessity of any kind requiring or permitting the French Government to seek or obtain sanction of a right unilaterally and arbitrarily to depart, ignore, or violate the treaty obligations which bind the protected State of Morocco and the United States. While it is true that under any treaties or agreements there might be special or new circumstances which may require new adjustments, it is equally true that in the special situation of a protectorate the claim of the protecting State to liberation from restraining treaty

provisions must be examined with the greatest circumspection. For this purpose, treaty provisions which bind Morocco, and which France must respect and has indeed specifically undertaken to respect, must be looked upon as constitutional guaranties which, by their limitative effect upon the powers of France in Morocco, are a legal warrant of Morocco's survival as a separate entity and sovereign State in international law.

The claim of France in this instance should be rejected, since it is clear that its claim to a right to discard the restraints of pre-existing treaty obligations is inspired, wholly or in part, by purposes of self-interest rather than interest in the welfare of Morocco. In support of its view, and in explanation of the failure of treaty negotiations undertaken so far between the United States and France acting on behalf of Morocco, the Government of the United States quotes the statement made in 1939 by the chief French delegate to the negotiations conducted at that time, as this statement was reported in the approved minutes :

> "In that connection he [Mr. Marchal] stated that since the war the North-African coast had assumed a position of the most vital importance for France. He added the wholly personal opinion that it was only by means of the development of this North-African coast that France might maintain its position as a great Power. He observed that he foresaw as a possible political development in Morocco during the next thirty years the transformation of French Morocco not as a part necessarily of metropolitan France but in a relationship much closer than it occupies today. Consequently, the abrogation of the Act of Algeciras would give France the advantage of pursuing, as circumstances permitted, the latter development ; and the new negotiations which he had in mind pursuing with us would, while admitting a new freedom of development to France in this regard, at the same time safeguard our essential economic interests in French Morocco for a period of thirty years." (Minutes, Meeting of July 11, 1939.)

In the circumstances, the Government of the United States, without prejudice of observations and submissions further to be presented, maintains in their entirety the submissions presented to the Court on pages 406-408, Vol. I, of its Counter-Memorial.

(Signed) ADRIAN S. FISHER,
Agent of the Government
of the United States of America.

LIST OF ANNEXES

ANNEXES

Annex 1

REPORT FROM THE OFFICE OF E.C.A. SPECIAL REPRESENTATIVE IN EUROPE ON FRENCH TRADE LIBERALIZATION, DATED AUGUST 5, 1950

ECONOMIC CO-OPERATION ADMINISTRATION

Date Sent : August 5, 1950.
Date Rec'd : August 9, 1950.

To : Economic Co-operation Administration,
Washington, D.C.
Office of E.C.A. Special Representative in Europe,
Paris.

The extension of liberalization of trade measures to the various territories of the French Union is under consideration. This action has been made dependent on the re-establishment of tariff protection for goods originating within the French Union. Preferential tariffs were suspended in most of the territories of the Union during the war and the immediate post-war period. (See TOECA-TOREP DISPATCH 326 of Feb. 1, 1950, describing trade liberalization policies in Metropolitan France and O.E.E.C. Document TC (50) 57, Paris, 24 July, 1950, "Trade Committee Liberalization of Trade in the Dependent Overseas Territories of Member Countries".)

Since tariffs are enacted separately under varying conditions in the different territories, the following summary of the position in respect to tariffs and trade liberalization has been prepared.

(1) *Algeria* is an administrative group of three "departements". Tariffs are identical to those in Metropolitan France. The December liberalization lists were extended by administrative act of the Metropolitan Exchange-Control Office dated December 28, 1949, following the re-establishment of tariffs.

(2) *Guadeloupe, Martinique, Guiana* and *Reunion,* the four overseas departments, have the same tariff as Metropolitan France with certain exceptions. The December lists were made applicable by administrative act of the Metropolitan Exchange-Control Office dated July 30, 1950, after these tariffs had been re-established. Twelve products of minor importance were excepted from the lists.

(3) The Overseas Territories (those administered by the Ministry of Overseas France) fall into three sub-categories :

(a) *French West Africa* and the *French Pacific possessions* (New Caledonia and Oceania) are permitted to establish their own tariffs subject to approval by the Metropolitan government.

Recently the Deliberative Assembly of the Federation of French West Africa re-enacted and revised the tariffs which had been suspended during the war. This action becomes effective October 2 if it is not disapproved by the Metropolitan government before that date. Simultaneously, this assembly rejected the liberalization list until such time as French West-African products should be adequately protected on French markets. Officials of the Ministry expressed concern over this act and their desire to offer this protection in order to secure adoption of the list. (See TOECA-TOREP DISPATCH 553 of July 26). No immediate action is in prospect.

New Caledonia and Oceania, the Pacific territories mentioned above, have re-established preferential tariffs. Liberalization lists are expected to be applied there shortly.

(b) *Madagascar* and the *Comores Islands* are subject to the same tariffs as Metropolitan France. However, action by the Metropolitan Parliament is required to re-establish tariffs which were suspended during the war in these territories. In addition, the local assembly may request that exceptions be made. According to officials in the Ministry, reestablishing these tariffs will require a considerable time.

(c) *Togo*, the *Cameroons* and *French Equatorial Africa* are subject to international agreements prohibiting the enactment of preferential tariffs. Togo and the Cameroons are United Nations trusteeship territories, and the Federation of French Equatorial Africa (with the exception of one of its component territories, the Gaboon, and part of another, Chad) is subject to the Congo Basin Convention established by the Act of Berlin in 1885 and the declaration of Brussels in 1890. The Colonial Administration expressed the desire to extend liberalization to these territories despite the lack of protection for French goods and the problem posed by the extension of preferential treatment under the terms of this international agreement only to the members of the O.E.E.C. However, no immediate action is in prospect.

(d) The *Gaboon Territory* and *part of Chad* (see 3 *c* above) can, theoretically, vote the re-establishment of tariffs and subsequently receive the benefits of liberalization since they have the same status as French West Africa and the Pacific possessions. However, the technical problem of separating them from the Federation of which they are a part appears insoluble until the status of the Federation as a whole is determined.

(4) *Morocco* is a French protectorate subject to the Act of Algeciras of 1906. The problem in Morocco is the same as that in the territories of 3 *c* above.

(5) *Tunisia*, another protectorate, is a special case. For certain products Tunisia is part of a customs union with France, Algeria and the overseas departments. For others, France and the territories mentioned above are accorded preferential treatment. Revision of this complicated structure is under study. Liberalization is subject to this revision and is not expected to be applied for a considerable time.

(Signed) TIMMONS.

Annex 2

LETTER FROM M. LURET, CONTROLLER OF MOROCCAN CUSTOMS, TO THE AMERICAN MINISTER IN TANGIER, DATED JULY 16, 1912

CONTRÔLE DE LA DETTE.

N° 566. Tanger, le 16 juillet 1912.

Monsieur le Ministre,

Nous avons l'honneur de vous accuser réception de votre communication n° 300 du 6 juillet relative à la taxation en douane des pétroles de la Vacuum Oil Co.

Ainsi que nous avons déjà eu l'honneur de vous le faire connaître, les Oumana des ports appliquent, pour l'estimation des marchandises, les règles établies par l'Acte d'Algésiras et par le règlement des douanes. Ils utilisent les mercuriales, les factures, leurs connaissances professionnelles.

La facture est un élément d'appréciation, mais elle ne fait pas obligatoirement foi.

Néanmoins, le Service des Douanes aurait eu intérêt à prendre connaissance des factures relatives au pétrole de la Vacuum Oil Co. qui aurait été une utile documentation, mais les correspondants de cette compagnie ont toujours déclaré n'avoir pas de factures, prendre en charge les pétroles sans s'occuper du prix de revient et les vendre au prix fixé par la Compagnie sur lequel ils préléveraient leur remise.

Un agent a bien consenti à indiquer aux Oumana que la Compagnie le débite invariablement et pour mémoire des envois qui lui sont faits, à raison de 5 frs. 50 la caisse, quels que soient les cours des marchés, mais ces cours étant essentiellement variables, ce prix de 5,50 ne peut servir de base à la taxation qui doit porter non pas sur une valeur moyenne et fixée une fois pour toutes, mais sur celle actuelle et exacte des produits rendue au bureau de douane.

Vous nous faites remarquer par votre lettre du 6 juillet que la Vacuum Oil, contrairement à ce que nous pensions, ne produit, ni ne raffine son pétrole, qu'elle l'achète aux États-Unis et est, par suite, en mesure de présenter à la douane des factures authentiques de ses importations au Maroc.

Puisqu'il en est ainsi, il y aurait tout avantage pour cette compagnie à faire présenter ces factures qui seraient pour les estimations de la douane un utile élément d'appréciation.

La douane a toujours procédé comme il est dit ci-dessus à l'égard des pétroles importés de Fiume et de Trieste, pour lesquels les importateurs lui donnent des moyens d'appréciation en joignant aux déclarations les factures originales dont les prix sont comparés avec les cours des marchés d'origine.

Elle procédera de la même façon relativement aux pétroles de la Vacuum Oil le jour où celle-ci lui donnera des moyens d'appréciation qu'elle pourra rapprocher des cours actuels du marché de New-York pour établir avec précision la valeur imposable de ces pétroles en caisses ou en barils rendue au bureau de douane.

Cette valeur comporte le prix d'achat du pétrole f. o. b. New-York augmenté de tous les frais postérieurs à l'achat, tels que les droits de sortie acquittés aux douanes étrangères, le transport, l'emballage, le frêt, l'assurance, les manipulations, le débarquement, etc., en un mot tout ce qui contribue à former, au moment de la présentation au bureau de douane, la valeur au comptant et en gros du produit suivant laquelle doivent, d'après l'art. 95 de l'Acte d'Algésiras, être liquidés les droits.

En ce qui concerne les droits de douane perçus par erreur à Safi sur une valeur supérieure à celle attribuée par le tableau des valeurs, nous en avons autorisé à la date du 25 juin dernier le remboursement à l'agent de la Vacuum Oil dans ce port, et nous sommes prêts à faire rembourser toute autre somme que cette compagnie justifierait avoir payée sur une valeur supérieure au maximum du tableau des valeurs.

Veuillez agréer, Monsieur le Ministre, les assurances de notre haute considération.

P. les Délégués au Contrôle de la Dette,
(Signé) G. LURET.

S. E. Monsieur F. W. CARPENTER,
Ministre des États-Unis d'Amérique au Maroc.

Annexe 3

NOTE FROM THE DIPLOMATIC CABINET OF THE FRENCH RESIDENCY TO THE AMERICAN CONSULATE-GENERAL AT CASABLANCA, DATED AUGUST 14, 1948

RÉSIDENCE GÉNÉRALE DE LA RÉPUBLIQUE FRANÇAISE AU MAROC

Cabinet diplomatique

NOTE

N° 458 D.

Par une note n° 35 du 21 juillet dernier, Monsieur le Consul général des États-Unis à Casablanca a bien voulu appeler l'attention du Conseiller diplomatique du Protectorat sur le différend qui s'est élevé entre la Direction des Douanes et le citoyen américain Clarence C. NELSON, au sujet des taxes de consommation intérieures applicables à un chargement de 10 tonnes de pneus.

M. MARCHAT a l'honneur de faire savoir à Monsieur FLETCHER que le dahir du 28 février 1948, modifiant les tarifs desdites taxes, a été soumis à l'agrément du Département d'État, par une lettre adressée le 20 avril suivant à M. l'Agent diplomatique des États-Unis à Tanger.

Aucune réponse n'ayant encore été reçue de M. PLITT, cette Résidence générale prescrit à la Direction des Douanes de calculer suivant les anciens tarifs les droits applicables à l'importation dont il s'agit.

M. MARCHAT n'en saisit pas moins cette occasion d'appeler l'attention de Monsieur FLETCHER sur les inconvénients d'une procédure qui permet aux ressortissants américains d'échapper, pendant des délais souvent considérables, à la réglementation fiscale du Protectorat, et les place, ainsi, en fait, dans une situation privilégiée par rapport à leurs concurrents, ce qui est contraire au principe d'égalité économique proclamé par l'Acte d'Algésiras.

Rabat, le 14 août 1948.

Consulat général des États-Unis,
Casablanca.