class of its own or of foreign nationals, except as a punishment for their own misconduct, deprives them of one of the most fundamental rights which belongs to the individual in modern society.

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THE NEW COMMERCIAL TREATY WITH GERMANY

The Senate on February 10, 1925,[1] advised and consented to the ratification of the new Treaty of Friendship, Commerce and Consular Rights, which was signed at Washington, December 8, 1923. It expressly provides (Article XXX) that it shall not be construed to limit or restrict the rights, privileges and advantages granted to the nationals of either party under the Treaty of Berlin, concluded August 25, 1921.

The treaty is most comprehensive in character and its clauses have been elaborated with marked care and completeness, incorporating the latest commercial experience and the most recent legislative policies of both countries. It will, in all likelihood, serve as a model for similar treaties to be negotiated with other countries. Some of its clauses are novel in content, while others carry out familiar rules in more detailed and specific terms.

The treaty accords to the nationals of each of the high contracting parties not only rights of residence in the familiar terms of permission "to enter, travel and reside in the territories of the other," and to exercise liberty of conscience and freedom of worship, but also "to engage in professional, scientific, religious, philanthropic, manufacturing and commercial work of every kind without interference," and in connection therewith, to own and lease lands upon the same terms as nationals of the state of residence, subject to local laws (Article I). Equality between the nationals of both parties is also extended in the matter of payment of any internal charges or taxes, in addition to the usual clauses for freedom of access to the courts and of the enjoyment of protection and security for persons and property. The Senate, has, however, found it necessary to add a reservation to Article I, providing that the existing statutes of either country in relation to the immigration of aliens, or the right of either country to enact such statutes, shall not be affected.

In the provisions for the protection of real and personal property and the security of individual freedom from domiciliary visits and searches, we are on familiar ground. A national of one of the parties must within three years dispose of immovable property inherited within the territory of the other, if forbidden to hold land under provisions of local law, with a privilege of reasonably prolonging the period if circumstances demand (Article IV). This is, of course, intended to meet the rule still prevailing in some of our States, though the disability has been abolished in others (*e.g.*, New York).

[1] Cong. Record, 68th Cong., 2nd Sess., pp. 3482–3487. Ratifications had not been exchanged when the JOURNAL went to press.

Even where the rule still prevails, the period allowed for the disposal of the property is usually longer than the treaty period (*e.g.*, Indiana, 5 years; Kentucky, 8; Nebraska, 8; Washington, 12).[2]

The experience of the United States during the late war in regard to the draft of aliens who had declared their intention to become naturalized has been carefully covered by Article VI, which provides for compulsory military service in time of war unless the declarant leaves the country within sixty days.

The treaty accords most-favored-nation treatment in regard to tariffs and duties on exports and imports, whether shipped in American or German bottoms, with the exception of border traffic (often exempted by agreement between European countries), and excepting also commerce of the United States with any of its dependencies, Cuba, or the Canal Zone (Article VII). Clauses such as this have been held by the Supreme Court not to interfere with arrangements with other countries founded upon a concession of special privileges based on valuable considerations.[3]

Equality of treatment, except in the coasting trade, is granted as between United States and German vessels in respect to tonnage and harbor duties, where the cargo is wholly discharged, or discharged in part only, the vessel then proceeding to other ports of the same country (Articles IX, XI). The Senate, by a reservation, has been careful to restrict this privilege to a period of sixty days after the enactment of any inconsistent legislation by Congress. But Mr. Hughes has expressed the hope that the policy of reciprocal national treatment will continue to be our policy, and that Congress will not exercise its right under the reservation.[4]

The treaty contains the usual provision for the recognition within the territory of one of the countries, of corporations and associations organized for profit in the other country, upon compliance with local laws (Article XII). A somewhat novel clause (Article XIII) accords most-favored-nation treatment in the organization of and participation in such corporations; also in the acquisition and ownership of shares, and in the holding of executive or official positions therein. Many nations of Europe have recently carried a spirit of nationalism into the regulation of corporations doing business in their territory, and have required that at least a majority of the directorate shall be nationals of the country in which the business is conducted. On the other hand, some of our States prohibit corporations from holding land if a certain proportion of stockholders are aliens (*e.g.*, District of Columbia, one-half, Code, sec. 397; Missouri, one-fifth, R. S. sec. 751).

The new treaty regulates in great detail the rights of commercial travelers, fixes tariff exemptions upon samples used by them, and defines the classes of persons not to be regarded as commercial travelers (Article XIV). A

[2] See "Alien Land Laws and Alien Rights," House Doc. No. 89, 67th Cong. 1st Sess.

[3] Bartram *v.* Robertson, 122 U. S. 116; Whitney *v.* Robertson, 124 U. S. 190.

[4] Address before the New York Chamber of Commerce, April 28, 1925.

license must be granted upon the payment of a single fee, good throughout the entire territorial jurisdiction of the country which issues the license.

The consular provisions of the treaty follow the lines laid down in the treaty with Germany of December 11, 1871, with certain modifications and extensions. A new clause is added with regard to the right of consular officers to take charge of property left by an intestate decedent, and the right of the consul to be appointed administrator. The language employed here is very guarded, probably in view of the many disputes arising over the interpretation of Article IX of the treaty of 1853 with the Argentine Republic, and culminating in the decision of the Supreme Court in Rocca *v.* Thompson, 223 U. S. 317. The present treaty limits the right of the consul to be appointed as administrator, by subjecting his appointment to the discretion of the court and to the provisions of local laws.

The actual operation of the new treaty will alone determine whether the *voeu* expressed in the preamble is to be realized and its provisions prove "responsive to the spiritual, cultural, economic, and commercial aspirations of the peoples" of both countries.

ARTHUR K. KUHN.

WAIVER OF STATE IMMUNITY

English and American courts have come to regard it as "an axiom of international law" that foreign states should be immune from suit in the national tribunals unless they expressly or impliedly waive their immunity and submit to the jurisdiction.[1] The exercise of jurisdiction in the absence of waiver, it has been said, would be "a violation of the respect due to every sovereign."[2] Sound policy has been thought to require that foreign states should be free from "the harassment of litigation" in forums and under conditions not of their own choosing.[3] Yet it has not been doubted that states may waive immunity and submit to the local jurisdiction if they wish. In practice they frequently find it advantageous to do so. Some difficult questions arise when it becomes necessary to define the requisites of a waiver or to determine its precise effect in a particular case.

There is a waiver of immunity in a limited sense, in the first place, whenever a foreign state begins suit in a national court. States, as well as individuals, may resort to the courts to assert or protect their rights.[4] If they do

[1] See Duke of Brunswick *v.* King of Hanover (1844), 6 Beav. 1, 40 (1848), 2 H. L. C. 1; Wadsworth *v.* Queen of Spain (1851), 17 Q. B. 171; Gladstone *v.* Ottoman Bank (1863), 1 H. & M. 505; Hassard *v.* United States of Mexico (1899), 61 N. Y. Supp. 939. See also The Schooner Exchange *v.* M'Faddon (1812), 7 Cr. 116; The Parlement Belge (1880), L. R. 5 P. D. 197.

[2] Strousberg *v.* Republic of Costa Rica (1880), 44 L. T. R. 199, 201.

[3] The Gloria (1923), 286 Fed. 188, 194.

[4] Colombian Government *v.* Rothschild (1826), 1 Sim. 94; Hullet & Co. *v.* King of Spain (1828), 1 Dow & Clark 169; Republic of Mexico *v.* Arrangois (1855), 11 How. Pr. 1; King of Prussia *v.* Kuepper's Adm'r. (1856), 22 Mo. 550; United States of America *v.* Wagner (1867), 36 L. J. Ch. N. S. 624.