upon the issue thus determined is ready for submission to the Court of Arbitration. Until the approval of the Senate is obtained the United States is not bound, and in like manner France is not bound until the procedure has been complied with required by the constitutional laws of France. When this procedure has been complied with the *compromis* is established by France. Both parties are thus bound, and until both are neither is. This expedient is as simple as it is wise, because it frees each President from the responsibility of determining whether the vital interests, the independence, or the honor of the Contracting States is involved, and by associating the constitutional organs of each State divides a responsibility which at all times would be grave and which at times might be oppressive.

The third article provides that the convention shall remain in force for a period of five years, so that if the carefully drawn provisions prove unsatisfactory in practice they may be revised in the light of experience.

## INTERNATIONAL LAW INVOLVED IN THE SEIZURE OF THE TATSU MARU

The recent seizure (on February 5, 1908) of the *Tatsu Maru,* a Japanese merchant vessel, by Chinese authorities, for the prevention of smuggling of arms, has given rise to grave diplomatic discussion which at one time seemed likely to threaten the peaceful relations of China and Japan. It was alleged that the seizure of the vessel in question, laden with a cargo of arms destined to Macao, a port under Portuguese jurisdiction, which vessel sailed under a Japanese permit, was a justifiable act of the Chinese authorities, whether the vessel was upon the high seas or within the waters technically under the jurisdiction of Portugal, because the delivery of the arms at Macao was colorable, their real destination being to the Chinese interior for illicit purposes. It has been stated and denied that the vessel when seized was within Portuguese jurisdiction, and therefore, for the purposes of this brief note, it may be assumed that the seizure was not within Portuguese waters. If the vessel when seized was within Portuguese waters, the question, already sufficiently complicated, would be more involved, because in seizing the vessel and the cargo consigned to Macao the Portuguese jurisdiction would have been violated in law, however justifiable in morality it may otherwise have been. As, however, Portugal does not seem to advance the contention that the seizure actually took place within its jurisdiction,

it may be eliminated from consideration. The question, then, presents itself whether or not a Japanese vessel upon the high seas beyond the 3-mile limit is liable to seizure, detention, and confiscation of the cargo on the ground that if the voyage be completed the smuggling laws or the revenue laws of China will be violated. Reduced to simplest form the question, therefore, is whether a seizure is permissible beyond the 3-mile limit in order to prevent a violation of the revenue laws of the country effecting the seizure. For the purposes of discussion the alleged drawing down of the Japanese flag may be omitted, because the question is not what particular act may be done, but whether any act may be committed against the foreign merchant vessel found hovering more than 3 miles off the coast with the intention of violating the revenue laws of China.

The right of visit and search upon the high seas is universally permitted in time of war, but it is a belligerent right and does not exist in time of peace, and if exercised it is wholly at the risk of the country committing the act. China, whatever the internal situation of the country may be, is outwardly at peace, and war, in the sense of international law, does not exist. Therefore the right of visit and search as a purely war right does not arise and we return to the question whether the foreign merchant vessel may be seized beyond the 3-mile limit for a violation of revenue laws. In practice and in theory the right has been claimed and exercised, and there are, indeed, statutes which permit the visitation and search of merchant vessels beyond the 3-mile limit in order to prevent the violation of the revenue laws. These acts may be divided into two classes: Revenue laws extending the right of visit and search beyond the 3-mile limit to vessels of the home or foreign country before entering port. Such acts are permissible. The rights of foreign vessels are not involved, although foreign cargo may incidentally be. A country may extend its jurisdiction to a vessel of its own nationality upon the high seas, because, the high seas being the highway of the world and not subject to any jurisdiction, the laws of the home port may be extended to its merchant vessels so placed, on the theory that the municipal law may extend to nationals not within the jurisdiction of any foreign country and therefore not subject to its rules and regulations. In Wheaton's International Law the following passage is found:

> The British "hovering act," passed in 1736 (9 Geo. II, chap. 35), assumes, for certain revenue purposes, a jurisdiction of four leagues from the coasts, by prohibiting foreign goods to be transshipped within that distance without payment

of duties. A similar provision is contained in the revenue laws of the United States, and both these provisions have been declared by judicial authority in each country to be consistent with the law and usage of nations.

The statute referred to by Mr. Wheaton was passed on March 2, 1797, sec. 27, and reads, as incorporated into the Revised Statutes, as follows:

SEC. 2760. The officers of the revenue cutters shall respectively be deemed officers of the customs, and shall be subject to the dirction of such collectors of the revenue, or other officers thereof, as from time to time shall be designated for that purpose. They shall go on board all vessels which arrive within the United States, or within four leagues of the coast thereof, if bound for the United States, and search and examine the same, and every part thereof, and shall demand, receive, and certify the manifests required to be on board certain vessels, shall affix and put proper fastenings on the hatches and other communications with the hold of any vessel, and shall remain on board such vessels until they arrive at the port or place of their destination.

The "hovering act" of Great Britain, referred to by Wheaton, has been, according to Mr. Boyd (Boyd's Wheaton, 241), long since repealed. This brings us to a consideration, therefore, of the American statute and its interpretation. The ablest commentator on Wheaton, and indeed one of the clearest and subtlest authorities on international law — Mr. Richard Henry Dana — takes issue with the text of Wheaton quoted, and lays down in no uncertain terms what he considers to be the true doctrine of international law in regard to municipal seizures beyond the 3-mile limit. As Mr. Dana's note is so important and has so largely influenced American practice, it is quoted in full:

The statement in the text requires further consideration. It has been seen that the consent of nations extends the territory of a state to a marine league or cannon shot from the coast. Acts done within this distance are within the sovereign territory. The war right of visit and search extends over the whole sea. But it will not be found that any consent of nations can be shown in favor of extending what may be strictly called territoriality, for any purpose whatever, beyond the marine league or cannon shot. Doubtless states have made laws, for revenue purposes, touching acts done beyond territorial waters; but it will not be found that, in later times, the right to make seizures beyond such waters has been insisted upon against the remonstrance of foreign states, or that a clear and unequivocal judicial precedent now stands sustaining such seizures, when the question of jurisdiction has been presented. The revenue laws of the United States, for instance, provide that if a vessel, bound to a port in the United States, shall, except from necessity, unload cargo within four leagues of the coast, and before coming to the proper port for entry and unloading, and receiving permission to do so, the cargo is forfeit, and the master incurs a penalty (act 2d March, 1797, sec. 27); but the statute does not authorize a

seizure of a foreign vessel when beyond the territorial jurisdiction. The statute may well be construed to mean only that a foreign vessel, coming to an American port, and there seized for a violation of revenue regulations committed out of the jurisdiction of the United States, may be confiscated; but that, to complete the forfeiture, it is essential that the vessel shall be bound to, and shall come within, the territory of the United States after the prohibited act. The act done beyond the jurisdiction is assumed to be part of an attempt to violate the revenue laws within the jurisdiction. Under the previous sections of that act it is made the duty of revenue officers to board all vessels, for the purpose of examining their papers, within four leagues of the coast. If foreign vessels have been boarded and seized on the high sea, and have been adjudged guilty, and their governments have not objected, it is probably either because they were not appealed to or have acquiesced in the particular instance, from motives of comity.

The cases cited in the author's note do not necessarily and strictly sustain the position taken in the text. In *The Louis* (Dodson, II, 245) the arrest was held unjustified because made in time of peace for a violation of municipal law beyond territorial waters. The words of Sir William Scott, on pages 245 and 246, with reference to the hovering acts, are only illustrative of the admitted rule that neighboring waters are territorial; and he does not say, even as an *obiter dictum*, that the territory for revenue purposes extends beyond that claimed for other purposes. On the contrary, he says that an inquiry for fiscal or defensive purposes, near the coast but beyond the marine league, as under the hovering laws of Great Britain and the United States, "has nothing in common with the right of visitation and search upon the unappropriated parts of the ocean;" and adds, "A recent Swedish claim of examination on the high seas, though confined to foreign ships bound to Swedish ports, and accompanied, in a manner not very consistent or intelligible, with a disclaimer of all right of visitation, was resisted by the British Government, and was finally withdrawn."

Church v. Hubbard (Cranch, II, 187) was an action on a policy of insurance, in which there was an exception of risks of illicit trade with the Portuguese. The voyage was for such an illicit trade, and the vessel, in pursuance of that purpose, came to anchor within about four leagues of the Portuguese coast; and the master went on shore on business, where he was arrested, and the vessel was afterwards seized at her anchorage and condemned. The owner sought to recover for the condemnation. The court held that it was not necessary for the defendants to prove an illicit trade begun, but only that the risks excluded were incurred by the prosecution of such a voyage. It is true that Chief Justice Marshall admitted the right of a nation to secure itself against intended violations of its laws by seizures made within reasonable limits, as to which, he said, nations must exercise comity and concession, and the exact extent of which was not settled; and, in the case before the court, the four leagues were not treated as rendering the seizure illegal. This remark must now be treated as an unwarranted admission. The result of the decision is that the court did not undertake to pronounce judicially, in a suit on a private contract, that a seizure of an American vessel, made at four leagues, by a foreign power was

void and a mere trespass. In the subsequent case of Rose v. Himely (Cranch, IV, 241), where a vessel was seized ten leagues from the French coast and taken to a Spanish port, and condemned in a French tribunal under municipal and not belligerent law, the court held that any seizures for municipal purposes beyond the territory of the sovereign are invalid; assuming, perhaps, that ten leagues must be beyond the territorial limits, for all purposes. In Hudson v. Guestier (Cranch, IV, 293), where it was agreed that the seizure was municipal, and was made within a league of the French coast, the majority of the court held that the jurisdiction to make a decree of forfeiture was not lost by the fact that the vessel was never taken into a French port, if possession of her was retained, though in a foreign port. The judgment being set aside and a new trial ordered, the case came up again, and is reported in Cranch, VI, 281. At the new trial the place of seizure was disputed; and the judge instructed the jury that a municipal seizure, made within six leagues of the French coast, was valid and gave a good title to the defendant. The jury found a general verdict for the defendant, and exceptions were taken to the instructions. The Supreme Court sustained the verdict — not, however, upon the ground that a municipal seizure made at six leagues from the coast was valid, but on the ground that the French decree of condemnation must be considered as settling the facts involved; and, if a seizure within a less distance from shore was necessary to jurisdiction, the decree may have determined the fact accordingly; and the verdict in the Circuit Court did not disclose the opinion of the jury on that point. The judges differed in stating the principle of this case and of Rose v. Himely; and the report leaves the difference somewhat obscure.

This subject was discussed incidentally in the case of the *Cagliari*, which was a seizure on the high seas, not for violation of revenue laws, but on a claim, somewhat mixed, of piracy and war. In the opinion given by Dr. Twiss to the Sardinian Government in that case, the learned writer refers to what has sometimes been treated as an exceptional right of search and seizure, for revenue purposes, beyond the marine league, and says that no such exception can be sustained as a right. He adds: "In ordinary cases, indeed, where a merchant ship has been seized on the high seas, the sovereign whose flag has been violated waives his privilege; considering the offending ship to have acted with *mala fides* towards the other state with which he is in amity, and to have consequently forfeited any just claim to his protection." He considers the revenue regulations of many states, authorizing visit and seizure beyond their waters, to be enforceable at the peril of such states, and to rest on the express or tacit permission of the states whose vessels may be seized.

It may be said that the principle is settled that municipal seizures can not be made, for any purpose, beyond territorial waters. It is also settled that the limit of these waters is, in the absence of treaty, the marine league or the cannon shot. It can not now be successfully maintained either that municipal visits and search may be made beyond the territorial waters for special purposes or that there are different bounds of that territory for different objects. But, as the line of territorial waters, if not fixed, is dependent on the unsettled range of artillery fire, and, if fixed, must be by an arbitrary measure, the courts, in the earlier cases, were not strict as to standards of distance, where no

foreign powers intervened in the causes. In later times it is safe to infer that judicial as well as political tribunals will insist on one line of marine territorial jurisdiction for the exercise of force on foreign vessels, in time of peace, for all purposes alike.

The practice of the American Government is set forth by two Secretaries of State, who brought to the performance of the duties of their office trained legal minds. In a note dated January 22, 1875, written by Mr. Fish, Secretary of State, that learned authority says:

We have always understood and asserted that, pursuant to public law, no nation can rightfully claim jurisdiction at sea beyond a marine league from its coast. * * *

It is believed, however, that in carrying into effect the authority conferred by the act of Congress referred to, no vessel is boarded, if boarded at all, except such a one as, upon being hailed, may have answered that she was bound to a port of the United States. At all events, although the act of Congress was passed in the infancy of this Government, there is no known instance of any complaint on the part of a foreign government of the trespass by a commander of a revenue cutter upon the rights of its flag under the law of nations.[1]

And his learned successor, Mr. Evarts, stated squarely, on April 19, 1879, that:

An attack by Mexican officials on merchant vessels of the United States, when distant more than 3 miles from the Mexican coast, on the ground of breach of revenue laws, is an international offense, which is not cured by a decree in favor of the assailants, collusively or corruptly maintained in a Mexican court.

And in a later note, dated March 3, 1881, Mr. Evarts held that —

The wide contradiction between the several statements does not suffice to bring the position of three of the vessels at the time within the customary nautical league. This Government must adhere to the 3-mile rule as the jurisdictional limit, and the cases of visitation *without that line* seem not to be excused or excusable under that rule.[2]

It is unnecessary to appeal further to authority. The jurisdiction of the home government may affect its vessels upon the high seas or in places without the jurisdiction of any other country, but it is abundantly clear that the claim to visit foreign merchant vessels beyond the 3-mile limit is without foundation in theory as it is without reputable practice. It is true that the great authority of Chief Justice Marshall may be quoted in support of the practice, but it is well established that the views

[1] Moore's International Law Digest, Vol. I, p. 731.
[2] Moore's International Law Digest, Vol. I, p. 732.

expressed by the learned Chief Justice have not been supported by subsequent decision of that august tribunal over which he presided. As Professor John Bassett Moore has happily said:

> It is not, however, by any means essential to Marshall's pre-eminence as a judge to show that his numerous opinions are altogether free from error or inconsistency. In one interesting series of cases, relating to the power of a nation to enforce prohibitions of commerce by the seizure of foreign vessels ouside territorial waters, the views which he originally expressed, in favor of the existence of such a right (Church v. Hubbart, 2 Cranch, 187), appear to have undergone a marked if not radical change in favor of the wise and salutary exemption of ships from visitation and search on the high seas in time of peace (Rose v. Himely, 4 Cranch, 241) — a principle which he affirmed on more than one occasion. (*The Antelope*, 10 Wheaton, 66.)[3]

In view, therefore, of the circumstances of the case and the unjustifiableness of the seizure of a Japanese vessel, although in Chinese waters, beyond the 3-mile limit, it is gratifying to note that China has receded from its untenable position and that the Chinese Government accepts the five conditions presented by Japan for the peaceful settlement of the incident:

> 1. An apology, with the saluting of the Japanese flag in the presence of the consul;
> 2. Unconditional release of the vessel;
> 3. Payment of the actual cost of the arms under detention;
> 4. China to engage to investigate the circumstances of the seizure and take suitable measures against the responsible persons;
> 5. An indemnity for the actual losses.

The *London Times* of March 14, 1908, from which the preceding conditions are quoted, further states that —

> Upon the acceptance by China of the above conditions, Japan undertakes to cooperate in the task of preventing the smuggling of arms into China.

The incident, therefore, seems to be closed in accordance with enlightened theory and practice.

## THE FORTIFICATION OF THE ALAND ISLANDS

Since the days when Peter the Great, after having vanquished his rival, Charles XII, seized these islands Russia and Sweden have been desirous of securing possession of them. These islands command the entrance to the Gulf of Bosnia, and the largest, from which the group

[3] Moore's International Law Digest, Vol. VII, p. 312.