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The "Kronprins Gustaf Adolf" (Sweden, USA)

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XXXIII.

THE "KRONPRINS GUSTAF ADOLF".

PARTIES: Sweden, U.S.A.

SPECIAL AGREEMENT: December 17, 1930.

ARBITRATOR: Eugène Borel (Switzerland).

AWARD: Washington, D.C., July 18, 1932.

Swedish-American treaties of 1787 and 1827.—Embargo.—Angary.—Detention of ship.—Contraband.—United States Espionage Act of June 15, 1917.—Export licence for bunkers brought into the United States in foreign ships.—Exhaustion of local remedies.—Department of State as channel of communication with foreign governments.—Presumption of abandonment of a claim.

¹ For bibliography, index and tables, see Volume III.

Special Agreement.

(See text of *Arbitral Decision* below.)

ARBITRAL DECISION

RENDERED

IN CONFORMITY WITH THE SPECIAL AGREEMENT CONCLUDED
ON DECEMBER 17th, 1930,

between

THE KINGDOM OF SWEDEN

and

THE UNITED STATES OF AMERICA

RELATING TO THE ARBITRATION OF A DIFFERENCE CONCERNING THE
SWEDISH MOTOR SHIPS "KRONPRINS GUSTAF ADOLF" AND "PACIFIC".

I.

A Special Agreement relating to the arbitration of a case concerning two Swedish motor ships, *Kronprins Gustaf Adolf* and *Pacific*, was signed on December 17, 1930, between the Kingdom of Sweden and the United States of America. This Agreement was ratified by the Kingdom of Sweden on January 3, 1931, and by the United States on April 17, 1931. The ratifications were exchanged at Washington on October 1, 1931. The text of the Agreement reads as follows:

Whereas, the Government of Sweden has presented to the Government of the United States of America certain claims on behalf of Rederiaktiebolaget Nordstjernan, a Swedish corporation, for losses said to have been incurred as a result of the alleged detention in ports of the United States of America, in contravention of provisions of treaties in force between the United States of America and Sweden, of the motor ship *Kronprins Gustaf Adolf* and the motor ship *Pacific* belonging to said Swedish corporation; and

Whereas, the Government of the United States of America has disclaimed any liability to indemnify the Government of Sweden in behalf of the owners of the said motor ships, therefore:

The President of the United States of America and His Majesty the King of Sweden being desirous that this matter of difference between their two Governments should be submitted to adjudication by a competent and impartial Tribunal have named as their respective plenipotentiaries, that is to say:

The President of the United States of America :

Henry L. Stimson, Secretary of State of the United States of America; and

His Majesty the King of Sweden :

W. Boström, Envoy Extraordinary and Minister Plenipotentiary at Washington;

Who, after having communicated to each other their respective full powers found in good and due form, have agreed upon the following articles:

ARTICLE I.

There shall be submitted to arbitration pursuant to the Convention for the Pacific Settlement of International Disputes, signed at The Hague, October 18, 1907, and the Arbitration Convention between the United States of America and Sweden, signed at Washington, October 27, 1928, the following questions:

First, Whether the Government of the United States of America detained the Swedish motor ship *Kronprins Gustaf Adolf* between June 23, 1917, and July 12, 1918, and the Swedish motor ship *Pacific* between July 1, 1917, and July 19, 1918, in contravention of the Swedish-American Treaties of April 3, 1783 and July 4, 1827.

Second, Whether, if the first question be decided in the affirmative, the Government of the United States of America is liable to the Government of Sweden in behalf of the owners of the motor ships for damages resulting from such unlawful detention; and

Third, Should the reply be in the affirmative what pecuniary reparation is due to the Government of Sweden on behalf of the owners of the motor ships above mentioned.

ARTICLE II.

The questions stated in Article I shall be submitted for a decision to a sole arbitrator who shall not be a national of either the United States of America or Sweden. In the event that the two Governments shall be unable to agree upon the selection of a sole arbitrator within two months from the date of the coming into force of this Agreement they shall proceed to the establishment of a Tribunal consisting of three members, one designated by the President of the United States of America, one by His Majesty the King of Sweden, and the third, who shall preside over the Tribunal, selected by mutual agreement of the two Governments. None of the members of the Tribunal shall be a national of the United States of America or of Sweden.

ARTICLE III.

The procedure in the arbitration shall be as follows:

(1) Within ninety days from the date of the exchange of ratifications of this Agreement, the Agent for the Government of Sweden shall present to the Agent for the Government of the United States of America a statement of the facts on which the Government of Sweden rests the claim against the United States of America, and the demand for indemnity. This statement shall be accompanied by the evidence in support of the allegations and of the demand made;

(2) Within a like period of ninety days from the date on which this Agreement becomes effective, as aforesaid, the Agent for the Government of the United States of America shall present to the Agent for the Government of Sweden at Washington a statement of facts

relied upon by the Government of the United States of America together with evidence in support.

(3) Within sixty days from the date on which the exchange of statements provided for in paragraphs (1) and (2) of this Article is completed each Agent shall present in the manner prescribed by paragraphs (1) and (2) an answer to the statement of the other together with any additional evidence and such argument as they desire to submit.

ARTICLE IV.

When the development of the record is completed in accordance with Article III hereof, the Government of the United States of America and the Government of Sweden shall forthwith cause to be forwarded to the International Bureau at The Hague, for transmission to the Arbitrator or Arbitrators, as the case may be, three complete sets of the statements, answers, evidence and arguments presented by their respective Agents to each other.

ARTICLE V.

Within thirty days from the delivery of the record to the Arbitrator or Arbitrators in accordance with Article IV, the Tribunal shall convene at Washington for the purpose of hearing oral arguments by Agents or Counsel, or both, for each Government.

ARTICLE VI.

When the Agent for either Government has reason to believe that the other Government possesses or could obtain any document or documents which are relevant to the claim but which have not been incorporated in the record, such document or documents shall be submitted to the Tribunal at the request of the Agent for the other Government and shall be available for inspection by the demanding Agent. In agreeing to arbitrate the claim of the Kingdom of Sweden in behalf of Rederiaktiebolaget Nordstjernan the Government of the United States of America does not waive any defence which was available prior to the concluding of the Agreement.

ARTICLE VII.

The decision of the Tribunal shall be made within two months from the date on which the arguments close, unless on the request of the Tribunal the Parties shall agree to extend the period. The decision shall be in writing.

The decision of the majority of the members of the Tribunal, in case a sole Arbitrator is not agreed upon, shall be the decision of the Tribunal.

The language in which the proceedings shall be conducted shall be English.

The decision shall be accepted as final and binding upon the two Governments.

ARTICLE VIII.

Each Government shall pay the expenses of the presentation and conduct of its case before the Tribunal; all other expenses which by

their nature are a charge on both Governments, including the honorarium for the Arbitrator or Arbitrators, shall be borne by the two Governments in equal moieties.

ARTICLE IX.

This Special Agreement shall be ratified in accordance with the constitutional forms of the Contracting Parties and shall take effect immediately upon the exchange of ratifications, which shall take place at Washington as soon as possible.

In witness whereof, the respective plenipotentiaries have signed this Special Agreement and have hereunto affixed their seals.

Done in duplicate at Washington this seventeenth day of December, nineteen hundred and thirty.

HENRY L. STIMSON. [Seal.]

W. BOSTRÖM. [Seal.]

II.

1. Pursuant to Article II of the said Agreement the two high contracting Parties agreed to ask the undersigned, Eugène Borel, Honorary Professor of International Law at the University of Geneva, to decide the case, as sole Arbitrator, according to the terms of the said Agreement. The undersigned informed both Governments that he accepted the appointment.

2. On April 5, 1932, as prescribed in Article IV of the Agreement, the statements, answers, evidence and arguments presented by the respective agents of the two States were sent by the International Bureau at The Hague to the Arbitrator.

3. On May 5, 1932, the Arbitrator met with the Parties at the Swiss Legation at Washington and, acting pursuant to the provisions of the Convention for the Pacific Settlement of International Disputes, signed at The Hague on October 18, 1907, and of the Arbitration Convention between the United States and Sweden, signed at Washington on October 27, 1928, announced, with the consent of the Parties, the necessary rules for the hearing of oral arguments, according to Article V of the Special Agreement. He also, with the consent of both Parties, appointed as secretary to the Arbitration Tribunal Mr. Robert Perret of the New York Bar, a native of Geneva, Switzerland.

4. The hearings in the case took place at the Internal Revenue Building at Washington, D.C. The several hearings began on May 9, 1932, and lasted until June 2, 1932. The Kingdom of Sweden (claimant) was represented by its agent, His Excellency W. Boström, Swedish Minister at Washington, D.C., assisted by Messrs. Edward B. Burling, Professor Osten Uden, George Rublee, Dean G. Acheson and H. Thomas Austern. The Government of the United States was represented by its agent, Mr. J. A. Metzger, Chief Assistant Legal Adviser, Department of State, Washington, D.C., assisted by Messrs. Bert L. Hunt, James O. Murdock, Frederick Fisher and Miss Ann O'Neill.

Oral arguments were presented on behalf of the Swedish Government by His Excellency W. Boström and by Messrs. Edward B. Burling, Professor Osten Uden, Dean G. Acheson and H. Thomas Austern.

Oral arguments were presented on behalf of the Government of the United States by Messrs. J. A. Metzger, Bert L. Hunt, James O. Murdock and Frederick Fisher.

An official report of the oral proceedings was prepared by the secretary of the Tribunal, to be signed by the Arbitrator and the secretary and communicated to both Parties. Also, a complete shorthand report of the hearings was made under the supervision of the Arbitrator and the Parties. When closing the hearing on June 2, 1932, the Arbitrator noted for the record the regularity of all proceedings which had hitherto taken place. The Parties unreservedly approved such notation. The Arbitrator added that, pursuant to Article VII of the Special Agreement, the decision would be delivered by him in writing within a time-limit of two months.

III.

The Special Agreement of December 17, 1930 (hereinafter called "Special Agreement") submits to arbitration three questions dealing with two Swedish motor ships *Kronprins Gustaf Adolf* and *Pacific*, which belong to a Swedish corporation, the Rederiaktiebolaget Nordstjernan (also known and hereinafter mentioned as the "Johnson Line"). These questions are submitted to the Arbitrator in succession, the necessity for determining the second and third thereof being dependent upon the first question being answered in the affirmative.

I. The Kingdom of Sweden alleges, and the United States denies, that the two ships in question were detained by the Government of the United States of America for some time during the years 1917 and 1918, and that this was in contravention of the Swedish-American Treaties of April 3, 1783, and July 4, 1827. Whether these ships were so detained in contravention of the treaties aforesaid is the first question, and upon its decision depends the necessity of answering the two succeeding questions.

II. If the Arbitrator finds a detention in violation of the treaties aforesaid, he will then pass to the question of whether the Government of the United States is liable to the Government of Sweden on behalf of the owners of the motor ships, as the latter government contends, for all damages resulting from such detention. This liability the Government of the United States denies.

III. If the Arbitrator finds that the Government of the United States is liable, he must, of course, determine the amount of the pecuniary reparations due to the Government of Sweden. This is the third question.

The case presents a very large number of disputed questions of fact, as well as numerous and difficult points of law. Both questions of fact and points of law had been dealt with at length by the Parties in their pleadings and most elaborately argued at the hearings. It is necessary to make here some preliminary observations regarding the questions of fact and the legal points to be considered.

1. The evidence produced by both Parties consists chiefly of documents dating from the war period and tending to show what took place with regard to the two motor ships *Kronprins Gustaf Adolf* and *Pacific* during the years 1917 and 1918; also the diplomatic correspondence exchanged between the two Governments prior to the making of the Special Agreement. These

documents are printed in the statements and answers of the Parties, viz.: on behalf of Sweden, in its Case (hereinafter quoted as "SW I"); its Answer (hereinafter quoted as "SW II"); the Additional Documents produced at the hearing (hereinafter quoted as "SW III"); the Appendix (hereinafter quoted as "SW App."); on behalf of the United States of America, the Statement of its Case with Appendices and Exhibits (hereinafter quoted as "US I"); its Answer and Argument, with annexes (hereinafter quoted as "US II"); its Additional Annexes (hereinafter quoted as "US III").

During the hearings several additional documents were produced by the Parties. They will be especially mentioned hereinafter as far as may be necessary.

Beside this documentary evidence the Government of Sweden produced, as part of the above-named Appendix, Answer and Additional Documents, several affidavits, most of which relate to the happenings in 1917 and 1918. The Government of the United States also submitted affidavits, relating to the events which took place at the time in question. With regard to the affidavits produced by the Swedish Government it has been observed on behalf of the American Government that they cannot be relied upon as acceptable evidence, as nearly fourteen years have elapsed since the facts to which they relate took place, and furthermore because statements made in the said affidavits, particularly relating to figures, do not coincide with the amounts disclosed in the writings of the period.

The Arbitrator does not doubt the good faith of the persons whose affidavits are produced, but quite apart from a consideration of the question of the close connection of some of the affiants with the Johnson Line, the said affidavits cannot be accepted without some qualification and reserve. Considering the time elapsed since the facts in question took place, oral evidence given in 1931 and 1932 cannot be given the same weight as authentic exhibits dating from the years 1917 and 1918 and, therefore, the Arbitrator will consider such oral evidence only in so far as it finds corroboration in the documentary evidence dating from the time concerned.

2. As regards the law, the task of the Arbitrator is clearly fixed and circumscribed by the first question submitted to arbitration. The Arbitrator is to consider the facts only with the purpose in mind of determining whether or not the United States violated any of the provisions of the Treaties which were signed between Sweden and the United States of America on April 3, 1783, and July 4, 1827, and which, though they expired on February 4, 1919, were still in force during the years 1917 and 1918.

The first question does not refer to any special article of the said Treaties, nor does it make any distinction between such provisions of the Treaties as were relied upon by the Parties (either *ab initio* or later on) and such other provisions as have not been expressly quoted by them.

On behalf of the United States it has been observed that the Arbitrator is not to base his decision on principles of international law as such, as his jurisdiction is limited to a consideration of the question whether provisions of any of the two Treaties mentioned in the Special Agreement have been infringed. However just in itself, this observation must not be allowed to lead to a misapprehension. The decision to be given is undoubtedly to be governed by the Treaties, and the Arbitrator is not asked to look for other rules in the field of international law. On the other hand, it is clear that the Treaties themselves are part of the international law as accepted by both contracting Powers and it may be safely assumed that, when the said Treaties

were concluded, both Parties considered them as being agreed upon as special provisions to be enforced between them in what may be called the atmosphere and spirit of international law as recognized by both of them. Particularly, it may be also assumed that it was not the intention of the Parties to adopt provisions which would give their respective nationals rights inferior to those which they already possessed by virtue of rules of international law recognized as binding by both States.

IV.

The facts set forth in the documents submitted by the Parties are so numerous that a complete statement thereof at this point would confuse rather than clarify the issue. It will be more convenient to proceed by way of classification, the more so because the three questions submitted to arbitration are to be dealt with successively. The same applies to the arguments made before the Arbitrator during the hearings. The reasoning of the Parties on all the litigated points in the case will be dealt with in connection with the problems to which they relate. To proceed thus is all the more necessary as the Arbitrator will follow the rule generally applied by international tribunals, namely that only those points which are material for the purpose of rendering the decision will be considered, leaving aside all those the determination of which would be of purely academical value. It will be sufficient here (A) to relate briefly the negotiations which led to the Special Agreement and (B) to reproduce the contentions and reasonings of the Parties, as they have been condensed in the pleadings. The hearings have, in the main, been devoted to the further development of these contentions.

(A)

On October 27, 1928, the Kingdom of Sweden and the United States of America signed at Washington, D.C. an arbitration treaty which was ratified by the President of the United States on January 4, 1929, and by Sweden on March 7, 1929, the ratifications being exchanged at Washington, D.C. on April 15, 1929.

Basing itself on the provisions of this treaty, the Legation of Sweden, in a note dated June 16, 1927, presented to the Department of State a claim on behalf of the Johnson Line for the alleged detention by American authorities of the M.S. *Kronprins Gustaf Adolf* from October 27, 1917, to July 12, 1918, and of the M.S. *Pacific* from September 14, 1917, to July 19, 1918. The note was accompanied by a statement of claim of the Johnson Line for the amount of \$1,609,664 and by a certain number of exhibits. This note, together with the said claim and exhibits, is reproduced in US I, p. 246 *et seqq.* From further exhibits found in the same volume on pages 303 *et seqq.* it appears that, in March and June, 1928, the Swedish Legation, while considering some phases of the claim, communicated to the Department of State two memoranda on the question of whether the said claim could be considered as barred due to the fact that the Johnson Line allegedly had failed to exhaust the legal remedies which were said to have been at its disposal (US I, pp. 303 and 309). The same memoranda were submitted to the Arbitrator at the hearing.

In a note of June 13, 1928 (US I, p. 310), the Secretary of State stated the reasons why he considered the Swedish claim as unjustified.

The Legation of Sweden replied to this communication in an elaborate note under date of October 31, 1928 (US I, p. 319), and also addressed a further note to the Secretary of State on June 14, 1929 (US I, p. 330). It does not appear whether the last two notes were answered by the Department of State; their contents will be considered in detail later.

In the second half of the year 1930 the two Governments reached an understanding to the effect that the claim should be submitted to international arbitration. The pertinent correspondence appears in SW App., pp. 46 to 51. The Department of State having prepared a draft of the agreement reached between the two Governments, and the same having been accepted by the Swedish Government, it became, on December 17, 1930, the Special Arbitration Agreement reproduced above.

(B)

1. The Swedish claim as transmitted with the note of the Swedish Legation of June 16, 1927, reads as follows:

I. The Rederiaktiebolaget Nordstjernan is and was at all times mentioned herein a Swedish corporation and the owner of the motor ships *Kronprins Gustaf Adolf* and *Pacific*.

II. The *Kronprins Gustaf Adolf* and the *Pacific* were at all times mentioned herein motor ships of Swedish registry, and were each of 7,186 tons deadweight capacity. Both vessels use and used oil fuel.

III. On June 23, 1917, the *Kronprins Gustaf Adolf* arrived in New York from Sweden via Halifax to load a cargo of sugar for Finland. On arrival, the vessel had on board 347.25 tons of fuel oil. On November 24, 1917, the vessel had in its bunkers 338 tons of fuel oil. The voyage from New York to Sweden, via Kirkwall, could have been made by the vessel with not exceeding 165 tons of fuel oil.

IV. On July 1, 1917, the M.S. *Pacific* touched at Newport News bound from Chile to Malmoe and Helsinborg with a cargo of nitrates, the property of the Swedish Superphosphate Selling Company, a Swedish corporation. The *Pacific* had on board, upon arrival in the United States, 885.8 tons of fuel oil. On November 24, 1917, the vessel had in its bunkers 850 tons of fuel oil. The voyage from Newport News to Sweden, via Kirkwall, could have been made by the vessel with not exceeding 165 tons of fuel oil.

V. On June 15, 1917, the President approved the so-called Espionage Act (Act of June 15, 1917, C. 30, Title VII, 40 Stat. 217, 225) which contained the following provisions:

[Here follows title VII of the Act of June 15, 1917.]

On the following dates the President proclaimed that certain articles named, including fuel oil, nitrates, and foods, should not be exported to certain countries named, including Sweden, except at such times and under such regulations and subject to such limitations as the President might prescribe, July 9, 1917 (40 Stat. 1683), August 27, 1917 (40 Stat. 1691), November 28, 1917 (40 Stat. 1720), February 14, 1918 (40 Stat. 1746). On October 12, 1917, the President, by Executive Order, vested in a War Trade Board, therein created, the authority to issue or withhold export licenses, under the above-mentioned Act of

June 15, 1917, and the Proclamations theretofore and thereafter made by authority of that Act, under such terms and conditions as were not inconsistent with law. This power had theretofore, since August 21, 1917, been exercised by the Exports Administrative Board.

VI. By Treaty between the King of Sweden and the United States of America, signed April 3, 1783, and revived as to the provisions set forth below by the Treaty of July 4, 1827, the following agreements were entered into by the two nations:

[Here follow seventh, eighth, ninth, tenth, twelfth, and seventeenth articles of the Treaty of 1783.]

The foregoing treaty provisions were in full force and effect at all times herein mentioned.

VII. On August 14, 1917, the Delegate of the Royal Swedish Government in the U.S., Mr. A. R. Nordvall, inquired of the Exports Administrative Board whether an export license would be required for the cargo of the *Pacific* which originated in Chile. After some correspondence, the Exports Administrative Board replied on September 5, 1917, that the law applied to this cargo. On September 14, 1917, application was made for a license to export to Sweden the cargo of the *Pacific*. This application was unconditionally denied by the War Trade Board on December 3, 1917. Meanwhile, the cargo of nitrates had begun to melt and cause damage to the ship.

VIII. In November, 1917, the Ordnance Department of the U.S. Army had offered to purchase the cargo of nitrates at a stated price, stating that if the price was not accepted, the cargo would be requisitioned. Accordingly, in December, 1917, after refusal of the license to export the cargo, the said cargo was sold to the Ordnance Department and unladen. See Annex VI and Annex VII.

IX. In October, 1917, the owners of the *Kronprins Gustaf Adolf* learned that the cargo which the said vessel had expected to carry from the United States to Sweden could not be obtained because a license to export the same could not be obtained. Thereupon, the said owners determined to dispatch the *Kronprins Gustaf Adolf* empty to Sweden, using her own fuel oil. On or about October 27, 1917, the agent of the said owners was orally informed by the War Trade Board that the vessel would not be permitted to leave the port of New York without an export license for the fuel oil on board the said vessel and that the said license would only be granted on the conditions set forth in the regulations theretofore promulgated, and attached hereto as part of Annex VII. The said regulations in force at this time and until February 1, 1918, did not in terms apply to bunker fuel brought into the United States in a ship's bunkers. Among the conditions necessary to obtain licenses to export at this time was an agreement by the owner of the vessel that upon completing the contemplated voyage the vessel would "return to the United States with a cargo which would be approved by the Board or which is destined for a country other than a border neutral". On and after February 1, 1918, other conditions were imposed which are set forth below. See Annex VII.

X. On November 24, 1917, the Minister of Sweden addressed a note to the Secretary of State pointing out that the *Kronprins Gustaf Adolf* had been refused clearance from New York without an export

license for her own fuel oil, such license only to be granted on the conditions promulgated in the regulations, and also that the M.S. *Pacific* was being held at Newport News. The note pointed out that "this detention was not in accord with the provisions of the treaties of 1783 and 1827" and requested that "the ships be permitted to proceed at once upon their voyages without licenses or, if for technical reasons licenses were necessary, that such be granted without delay and unconditionally". On January 24, 1918, the Acting Secretary of State replied to the above note stating that after careful consideration it was the view of the United States Government that the said treaties had no bearing on the delay caused by the necessity for export licenses and that the owners of the ships in question must comply with the regulations. On January 30, 1918, the Swedish Legation acknowledged the Acting Secretary's note, and requested that the State Department indicate how it interpreted the treaties in question, since its construction of them appeared to be the opposite of that of the Royal Swedish Government. On April 30, 1918, the Swedish Legation again requested the Secretary of State to express his reasons for the belief that the said detention of the said two vessels referred to above was not in violation of the treaties of 1783 and 1827. On June 26, 1918, the Secretary of State replied setting forth his views, and adhering to the position theretofore taken by him. See Annex VIII.

XI. As of February 1, 1918, the War Trade Board promulgated new regulations governing the issuance of licenses to export. These regulations were made applicable to bunker fuel brought into the United States in a ship's bunkers. Copies of the regulations and of the several papers to be signed in order to secure a license to export are attached hereto as Annex IX. These regulations required that a condition to the issuance of an export license a ship-owner must not only agree that the particular vessel should return to the United States after completing her voyage, but that all the owner's vessels wherever they might be should be governed by the rules of the Board forbidding trade with or for enemy countries or citizens and otherwise regulating the conduct of vessels. Furthermore, no licenses were granted under the regulations unless the ship's charter was approved by the Chartering Committee of the U.S. Shipping Board.

XII. Throughout the entire period covered by the above-mentioned discussions—that is to say, in the case of the *Kronprins Gustaf Adolf* from October 27, 1917 to July 12, 1918, when the said vessel was given permission to depart as set forth below, and in the case of the *Pacific* from September 14, 1917, to July 19, 1918, when said vessel was given permission to depart as set forth below—the United States, acting by and through the said War Trade Board, detained the said vessels and refused to permit them to depart either with or without cargo and using their own fuel oil brought by said vessels into the United States in their own bunkers, except upon condition that the owner of the said vessels would agree in whole or in part to the requirements of the said War Trade Board from time to time in force and effect, and more particularly unless said owner would agree that the said vessels would enter into charters approved by the said War Trade Board and also that either the said vessels or other vessels of the said owner would immediately return or come to the United States and

be subject to the disposition of the United States. At all times during said period of detention the said vessels and each of them had sufficient fuel oil on board—brought into the United States in the several bunkers of the said vessels—to return to Sweden. See Annex X.

VIII. Finally, on July 3, 1918, the *Kronprins Gustaf Adolf* was chartered to l'Office francais d'Affrètements and the *Pacific* to the Italian Government Commission, both for the duration of the War. The *Kronprins Gustaf Adolf* was delivered to the charterer on July 12, 1918, and the *Pacific* on July 19, 1918, and said vessels subsequently were permitted to depart from the United States. At the time of such deliveries, respectively, the *Kronprins Gustaf Adolf* still had on board 290 tons of fuel oil and the *Pacific* 762 tons. See Annex XIII.

XIV. By reason of the detention by the United States of the motor ships *Pacific* and *Kronprins Gustaf Adolf*, in violation of the provisions of the treaties hereinabove referred to, the owner of these ships suffered injury in the amount of the damage to the *Pacific* caused by the melting of the cargo of nitrates during the detention and in the further amount of the fair value of the use of both ships and their crews during their respective periods of detention. An impartial and competent board of survey examined the *Pacific* on December 7, 17, and 20, 1917, and estimated the cost of repairing the damage caused by the melting of the nitrates to be \$100,000. See Annex XII. Both of said vessels were fully manned by Swedish crews during the entire period of their detention in the United States. The fair market value of the use of each of said vessels upon a time charter basis at and throughout the said time when said vessels were detained as aforesaid was \$12.00 per deadweight ton per month. The *Kronprins Gustaf Adolf* was detained from October 27, 1917, to July 12, 1918, a period of eight months and fifteen days. The deadweight tonnage of this ship is 7186. The *Pacific* was detained from September 14, 1917, to July 19, 1918, a period of ten months and five days. The deadweight tonnage of this ship is 7186. The damages to claimant, therefore, were as follows:

M.S. *Pacific*

Injury due to melting of nitrates	\$100,000.00
Detention for ten months and five days	876,692.00

M.S. *Kronprins Gustaf Adolf*

Detention for eight months and fifteen days	732,972.00
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Total	1,609,664.00
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Wherefore, claimant was damaged by the wrongful detention of the M.S. *Pacific* and M.S. *Kronprins Gustaf Adolf* by the United States in the sum of \$1,609,664.00. No part of said sum, nor any payment on account of said damages, has ever been paid to claimant.

In the "Case of the Kingdom of Sweden", filed on December 30, 1931, the claim as heretofore presented was modified inasmuch as the periods of alleged detention were said to be, for M.S. *Pacific*, from August 2, 1917, to July 18, 1918 (instead of from September 14, 1917, to July 19, 1918), and for M.S. *Kronprins Gustaf Adolf* from November 1, 1917, to July 12, 1918 (instead of from October 27, 1917, to July 12, 1918).

In consequence thereof the amount of the claim, which on June 1, 1927, was said to be \$1,609,664, increased to \$3,012,173.28. In the above-mentioned "Case" the claim of the Swedish Government is set forth in the following terms:

By reason of the above-stated facts and the law applicable thereto, the Royal Swedish Government demands indemnity from the Government of the United States of America on account of the detention by that Government of M.S. *Pacific* from August 2, 1917, to July 18, 1918, and of M.S. *Kronprins Gustaf Adolf*, from November 1, 1917, to July 12, 1918; in the amount of three million twelve thousand one hundred seventy-three dollars and twenty-eight cents (\$3,012,173.28), computed as follows:

For detention of M.S. *Pacific*:

For loss of services	\$966,795.17	
Interest through Dec. 31, 1931	780,481.82	
		\$1,747,276.99

For detention of M.S. *Kronprins Gustaf Adolf*:

For loss of services	\$699,441.20	
Interest through Dec. 31, 1931	565,455.09	
		1,264,896.29

Total Indemnity Claimed		\$3,012,173.28
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2. The summary of facts as presented by the United States Government in its answer and argument, reads as follows (US II, pp. 276 *et seq.*):

SUMMARY OF FACTS.

The record reveals, as to the *Kronprins Gustaf Adolf* that:

1. The ship discharged approximately 200 tons of fuel oil when it entered dry dock in June, 1917. This oil was imported into the United States and was sold.
2. Approximately 220 tons of fuel oil were obtained in the United States and put on board this ship in September, 1917.
3. The ship was not in position to leave port without obtaining ship stores and fuel oil in the United States.
4. Application was made for license to export 900 tons Diesel oil, 50 barrels of lubricating oil, and large quantities of ship stores for use in a voyage by the ship.
5. Efforts were made to arrange to obtain licenses for various quantities of bunker fuel to be procured in the United States in addition to the 220 tons which were taken on board this ship in September, 1917.
6. Application was not made for license to take out of the United States oil which the ship brought into the country.
7. Application was not made for clearance of the ship.
8. License to take out of the United States oil which the ship brought into the country was not refused.

9. Clearance for the ship was not refused.
10. The Government of the United States did not prohibit the sailing of the ship and did not prohibit the exportation of bunker oil which the ship brought into the country.

The record reveals as to the *Pacific* that:

1. The ship took on board in excess of 5000 barrels of fuel oil in the Panama Canal Zone within the jurisdiction of the United States in April, 1917.
2. The ship entered port of Newport News, Va., to await instructions as to next port of call.
3. The ship was not in position to leave without obtaining supplies in the United States.
4. The owner of the ship endeavored to obtain from the British Government letters of assurance, permission to call at Halifax instead of Kirkwall, and assurances that the cargo would not be placed in Prize Court. The desired assurances and facilities were not granted by the British Government.
5. Requests were made for licenses to export on the *Pacific* ship stores obtained in the United States. Licenses were not granted. Unsuccessful efforts were made to arrange to obtain licenses for cargoes and additional quantities of fuel oil for the *Pacific*.
6. The agent of the owner of the ship endeavored to sell the cargo of the ship consisting of nitrate of soda, and a representative of the Swedish Government requested and obtained the assistance of the authorities of the United States in disposing of the cargo in the United States. The cargo was sold to the United States War Department as a result of the efforts of the agent of the owner of the ship and the representative of the Swedish Government to sell the cargo.
7. Application was not made on basis of an accurate statement of facts for license to take the cargo of the ship out of the United States.
8. Application was not made in accordance with applicable regulations for license to take out of the United States the fuel oil which the ship brought into the country.
9. Application was not made for clearance for the ship. The owner was not in position to declare a port for which clearance was desired because of the refusal of the British Government to grant letters of assurance for the cargo or to permit the ship to call at Halifax.
10. License to take out of the United States the oil which the ship brought into the country was not refused.
11. Clearance for the ship was not refused.
12. The Government of the United States did not prohibit the sailing of the ship and did not prohibit the exportation of the bunker oil which the ship brought into the United States.

SUBMISSION.

The Government of the United States did not detain the *Kronprins Gustaf Adolf* or the *Pacific* in contravention of the treaty in force between the United States and Sweden in 1917 and 1918. Therefore, questions as to the amount of damages do not arise.

The position is confidently asserted that the United States is not liable for the payment of damages in the present case, that the method of calculating damages proposed in the Case of the Kingdom of Sweden is not applicable, that factors in the Swedish formula for calculating damages have not been established, and that interest is not allowable in the presence of facts and circumstances which characterize the case.

V.

A. As aforesaid, the first question submitted in the Special Agreement is to be answered in the light of the two Treaties herein mentioned, viz. as far as they were in force at the time in question. This applies to the whole of the Treaty of July 4, 1827, and to those provisions of the Treaty of April 3, 1783, which, by Article 17 of the Treaty of 1827, were re-enacted as if they had been inserted into the context of the said Treaty. Whether, and if so to what extent, the preamble to the Treaty of 1783 may still be considered as explaining the meaning of the revived articles of the same Treaty, is a question which the Arbitrator will have to take up when considering those articles.

It is superfluous to observe that the Arbitrator need not consider whether the provisions here applicable impose undue limitations on the sovereignty of the high contracting Parties. Their very existence is a manifestation of the sovereign will of the Powers which had deemed it convenient to stipulate the said provisions and to accept them as governing their mutual relations. That these provisions, produced by the sovereign will, cannot be considered as incompatible therewith is moreover shown by the fact that, according to the terms of the Treaty, each of the contracting Parties remained at liberty to recede from it, if and when it deemed it convenient to do so, a right of which the United States of America has made use, as aforementioned. On the other hand it must be observed that, considering the natural state of liberty and independence which is inherent in sovereign States, they are not to be presumed to have abandoned any part thereof, the consequence being that the high contracting Parties to a Treaty are to be considered as bound only within the limits of what can be clearly and unequivocally found in the provisions agreed to and that those provisions, in case of doubt, are to be interpreted in favor of the natural liberty and independence of the Party concerned.

B. In the preamble to the Treaty of April 3, 1783, the high contracting Parties state that "desiring to establish, in a stable and permanent manner, the rules which ought to be observed relative to the correspondence and commerce which they have judged necessary to establish between their respective countries and subjects, they have thought that they could not better accomplish that end than by taking for a basis of their arrangements the mutual interest and advantage of both nations, thereby avoiding all those burthensome preferences which are usually sources of debate, embarrassment and discontent, and by leaving each party at liberty to make,

respecting navigation and commerce, those interior regulations which shall be most convenient to itself".

On behalf of the United States great stress has been laid on this statement and it has been inferred therefrom that the chief object of the Treaty was expressly to maintain and safeguard the sovereignty of each State. This certainly goes too far, for, if such had been the aim contemplated by the Parties, no Treaty was needed in order to reach it. In the opinion of the Arbitrator the Parties wanted to lay down principles which in their mutual interest were to be accepted as henceforth governing their mutual relations, but that their respective liberty remained entirely reserved whenever and as far as it could be reconciled with what was clearly and unambiguously stated in the Treaty.

C. This applies i.a. to Article 7 which reads as follows:

"All and every the subjects & inhabitants of the Kingdom of Sweden, as well as those of the United States, shall be permitted to navigate with their vessels in all safety and freedom and without any regard to those to whom the merchandizes and cargoes may belong, from any port whatever. And the subjects and inhabitants of the two States shall likewise be permitted to sail and trade with their vessels and, with the same liberty and safety, to frequent the places, ports and havens of Powers enemies to both or either of the contracting parties, without being in any wise molested or troubled, and to carry on a commerce not only directly from the ports of an enemy to a neutral port, but even from one port of an Enemy to another port of an Enemy, whether it be under the jurisdiction of the same or of different Princes. And as it is acknowledged by this treaty, with respect to ships and merchandises, that free ships shall make the merchandizes free, and that everything which shall be on board of ships belonging to subjects of the one or the other of the contracting parties shall be considered as free, even though the cargo or a part of it should belong to the enemies of one or both, it is nevertheless provided that Contraband goods shall always be excepted; which, being intercepted, shall be proceeded against according to the spirit of the following articles. It is likewise agreed that the same liberty be extended to persons who may be on board a free ship, with this effect, that although they be enemies to both or either of the parties, they shall not be taken out of the free ship, unless they are soldiers in the actual service of the said enemies."

According to the Swedish Government, Article 7 grants to Swedish ships in American ports, as well as to American ships in Swedish ports, the freedom of navigation which is therein stipulated, from any port whatever, while on behalf of the United States it is contended that the said Article 7 applies to freedom of navigation on the high sea, but cannot be considered as controlling the legal status of ships of one Party in the ports of the other. In the opinion of the Arbitrator the true interpretation of Article 7 lies between both contentions. Article 12, which is applicable in ports as well as on the high sea, expressly refers to the freedom of navigation granted by Article 7. On the other hand the free navigation provided for by Article 7 is not only from the ports of either signatory, but from any port whatever, although obviously the framers of the Treaty had no intention to decide anything as to the regulations in force in the ports of other States. The true meaning of Article 7 will be found if one considers the difference between the high sea,

on which belligerent States claim a right of control of commercial intercourse with their enemies, and the ports of either contracting Party subject to the territorial sovereignty of the State concerned and to the interior regulations, respecting navigation and commerce, which the State remained at liberty to make as it deemed convenient. In this respect, the preamble to the Treaty of 1783, though not renewed in 1827, remains relevant for the interpretation of the articles of the Treaty of 1783 enumerated in Article 17 of the Treaty of 1827.

Article 7 gives effect to the rule that free ships shall make the merchandise free, except contraband goods, in the port of either signatory or on the high seas, but it is more than doubtful whether, when applied to the ports of either contracting party, it was meant to go further and to prescribe in general terms the liberty of navigation. Such a scope given to Article 7 would have made entirely superfluous the second part of Article 17, which is particularly to be considered here as the *lex specialis* applying to the circumstances of the present case.

Moreover, to prescribe an unlimited freedom of navigation could not have been the intention of the framers of the Treaty, who had expressly reserved the liberty of either party to make, respecting navigation and commerce, those interior regulations which should be most convenient to itself (preamble of the Treaty of 1783) and the obligation for their nationals to "conform to such regulations and ordinances concerning navigation, and the places and ports which they may enter, as are or shall be in force with regard to national vessels" (Article 11 of the Treaty of 1827).

It follows therefrom that the provisions of the Treaty applying to the present case are to be found rather in those articles which deal particularly with the situation of the ships of one Party in the ports of the other Power and which have thus, as already mentioned, the character of a *lex specialis* as compared with the general principle laid down in Article 7.

D. The first provision thus alluded to is included in Article 17 of the Treaty of 1783, which is one of the articles revived according to Article 17 of the Treaty of 1827. This Article contemplates the possibility of one of the contracting Parties being at war, while the other remains neutral, an occurrence which actually took place in 1917 and 1918, when the United States of America entered the Great War, while Sweden remained neutral. The first phrase of Article 17 need not be mentioned, but the second bears directly on the present case and reads as follows:

Les Marchands, Patrons et Propriétaires des Navires, Matelots, gens de toute sorte, Vaisseaux et Bâtiments et en général aucunes marchandises ni aucuns effets de chacun des Alliés ou de leurs Sujets ne pourront être assujétis à aucun embargo, ni retenus dans aucun des Pays, Territoires, Isles, Villes, Places, Ports, Rivages ou Domaines quelconques de l'autre Allié, pour quelque expédition militaire, usage public ou particulier de qui que ce soit, par saisie, par force ou de quelque manière semblable.

Merchants, masters and owners of ships, seamen, people of all sorts, ships and vessels, and in general all merchandises and effects of one of the allies or their subjects, shall not be subject to any embargo nor detained in any of the countries, territories, islands, cities, towns, ports, rivers, or domains whatever, of the other ally, on account of any military expedition or any public or private purpose whatever, by seizure, by force, or by any such manner; much less shall it be lawful for the subjects of one of the parties to

seize or take anything by force from the subjects of the other party, without the consent of the owner.

The meaning of the provision here reproduced has been the subject matter of careful argument on the part of both Parties.

1. On behalf of the Government of the United States it has been contended that the provision contemplated a requisition by right of angary and that it merely aimed at prohibiting such a requisition with regard to the persons, ships or goods mentioned in the said provision. As an explanation of the fact that the provision does not merely mention embargo, but also refers to detention, it was said that the framers of the Treaty added this, in order to show clearly the meaning of the word "embargo" which, during the 18th century, had often been used in the sense of requisition. Moreover, it has been inferred from the French wording of Article 17, that the detention there contemplated is a detention for public or private "use", which is precisely a requisition.

As regards these contentions it is true that in several works which appeared on international law during the 18th century and even later the meaning of the word "embargo" was extended as far as to include a requisition, implying the use of what is seized by the State proceeding to requisition, but there can be no doubt that at the time of the Treaty the proper meaning of the word "embargo" was common enough to lead to the conclusion that the framers of the Treaty used it in its ordinary and proper sense.

The following definitions are to be found, among others, in the law dictionaries which were published at a period not remote from the time when the Treaty of 1783 was concluded and when, in 1827, some of its provisions (i. a. Article 17) were revived.

Burn's Law Dictionary, Vol. 1, page 308, ed. 1792 London:

Embargo, is a prohibition upon shipping not to go out of any port. This the King can enjoin in time of war by virtue of his prerogative, but, in time of peace, this may not be done without an act of Parliament. 1 Black. 271.

Law Dictionary, by Thomas W. Williams, London 1816:

Embargo, a prohibition upon shipping, not to go out of any port. Cowel. Blount, 1 Black. 270.

Wharton's Law Lexicon, Harrisburg, Pa., U.S.A., 1848:

Embargo (embargar, Span.) a prohibition upon shipping not to go out of any port on a war breaking out, etc.; to detain; a stop put to trading vessels.

The term "angary" is not to be confounded with "embargo". The word "angary" refers to the requisition and use of goods and to the justification of such a measure by the emergency which makes it necessary. The real meaning of "embargo" as distinct from "angary" cannot be better shown than in the laws which were enacted by the United States at a time almost immediately following the conclusion of the Treaty of 1783. On March 26, 1794 (1 Stat. 400), it was

"RESOLVED by the Senate and House of Representatives of the United States of America in Congress assembled, That an embargo be laid on all ships and

vessels in the ports of the United States, whether already cleared out, or not, bound to any foreign port or place, for the term of thirty days; and that no clearances be furnished, during that time, to any ship or vessel bound to such foreign port or place, except ships or vessels, under the immediate directions of the President of the United States; And that the President of the United States be authorized to give such instructions to the revenue officers of the United States, as shall appear best adapted for carrying the said resolution into full effect."

Likewise, on December 22, 1807 (2 Stat. 451), it was enacted

"By the Senate and House of Representatives of the United States of America in Congress assembled, That an embargo be, and hereby is laid on all ships and vessels in the ports and places within the limits or jurisdiction of the United States, cleared or not cleared, bound to any foreign port or place; and that no clearance be furnished to any ship or vessel bound to such foreign port or place, except vessels under the immediate direction of the President of the United States; and that the President be authorized to give such instructions to the officers of the revenue, and of the navy and revenue cutters of the United States, as shall appear best adapted for carrying the same into full effect: Provided, that nothing herein contained shall be construed to prevent the departure of any foreign ship or vessel, either in ballast, or with the goods, wares and merchandise on board of such foreign ship or vessel, when notified of this act."

These instances show clearly that embargo was considered as being a prohibition to leave port regardless of whether this prohibition applied to ships, crews, persons or goods.

2. It must be further observed that the provision here in question very distinctly contemplates on the one hand an embargo and on the other hand a detention. If in their view both had exactly the same meaning, the framers would certainly have abstained from what would have been a mere superfluous repetition and they would at any rate not have used the wording to be found in the said provision which reads that "Merchants, masters and owners of ships, seamen, people of all sorts, ships and vessels, and in general all merchandises and effects of one of the allies or their subjects, shall not be subject to any embargo *nor* detained"

There can be no doubt but that the framers of the Treaty contemplated here two different measures, both of which they wanted to prohibit and this is confirmed by a similar provision in numerous other treaties, prior, contemporaneous with and posterior to the Treaty of 1783.

Article XVI of the Treaty between the United States and Prussia (1785) (Miller: "Treaties and other international acts of the United States of America," Vol. II, Washington 1931 page 173) provides that "the subjects or citizens, etc., shall not be liable to any embargo or detention". The same words appear in Article VII of the Treaty between the United States and Spain (1795) (Miller: *eodem*, page 323).

The use of the two words shows that the framers of the Treaty meant to exclude both the embargo as such and any other detention of the kind contemplated by the terms used in Article 17.

3. With regard to these terms two points deserve special mention:

(a) In the English text, Article 17 prohibits detention "on account of any military expedition or any public or private purpose whatever",

while the French wording reads "pour quelque expédition militaire, usage public ou particulier de qui que ce soit". The question may arise whether a difference is to be found between the words "purpose" and "usage".

The original of the Treaty of April 3, 1783, is in French. According to an entry in the Journal of Congress of the United States, Vol. 4, page 241, Tuesday July 29, 1783: "Congress took into consideration a treaty" (follows the English text), and on page 278 of the same volume is to be found the proclamation of the President of the United States of September 25, 1783:

"Whereas the said treaty has been duly approved and ratified by the United States in Congress assembled and the translation thereof made in the following words, to wit:" (See Treaty, page 240.)

From these quotations it appears that, though the original wording is French, the Treaty was understood and ratified by the United States as it stands in the English text and a note on page 150 of Miller's book above mentioned shows, especially with regard to Article 6, the care which the translator, Charles Thompson, Secretary of Congress, applied to his task. It may therefore be safely assumed that the word "purpose" is not due to an inadvertence, the more so since the same word "purpose" is to be found in similar provisions of other treaties of the United States. It appears in Article XVI of the treaty with Prussia (1785), in Article VII of the treaty with Spain (1795) referred to above, not to speak of posterior treaties, such as that with Columbia (1824), Article V (Molloy, *Treaties of the United States*, Vol. II, page 294); with Central America (1825), Article VII (Molloy, *supra*, page 62), etc. It follows that the provision here considered must be understood as contemplating and prohibiting a detention, even without actual use, as well as a requisition proper.

(b) Another observation may be made with regard to the words "by seizure, by force, or by any such manner". On behalf of the United States it has been observed that, assuming (but not admitting) that the two vessels concerned were detained, they were not detained by seizure or by force. But against this objection it must be observed that Article 7 reads further "or by any such manner" ("ou de quelque manière semblable"). These very comprehensive words show that the framers of the Treaty sought to prohibit not only a detention by sheer physical force, but also a detention by other means leading to the same result, as for instance, a prohibition of departure enforced by providing for severe punishment in case of infringement.

The last phrase in Article 17 deals with a totally different situation. It contemplates seizures, detentions and arrests made by the order and authority of justice according to the ordinary practice regarding debts or defaults of the subject. This would be applicable when, owing to an infringement of the law or for any other similar cause, the State in whose port the ship is lying has the ship detained, seized or arrested according to law. Such an instance will be shown hereinafter in the very case of the *Pacific* which was libelled at the request of the master of another ship, who alleged that his vessel had suffered damage by the fault of the master of the *Pacific*. A situation of that type is entirely distinct from that which is contemplated by the preceding phrase of Article 17.

4. As to the detention which could be considered as justifying a claim for damages under the Treaty further observations are to be made:

(a) As far as Article 17 secures to the ships of one Party the liberty to depart from the ports of the other State, it imposes on that other State no duty whatever with regard to the supplying of those ship's stores and other necessaries which the ships may need to continue their voyages. In other words, the ships may depart, but they are to sail and proceed by their own means. Without the necessary supplies it may in fact be impossible for them to leave, even if at liberty to do so, but against such an occurrence the Treaty itself gives no relief, and it contains no general provision forbidding either signatory to restrict or prohibit the exportation from its territory of any goods, including such as are necessary to ships at sea. This is indirectly confirmed by Article 21 of the Treaty of 1783 which provided that:

"When the subjects and inhabitants of the two parties, with their vessels, whether they be public and equipped for war, or private, or employed in commerce, shall be forced by tempest, by pursuit of privateers and of enemies, or by any other urgent necessity, to retire and enter any of the rivers, bays, roads, or ports of either of the two parties, they shall be received and treated with all humanity and politeness, and they shall enjoy all friendship, protection, and assistance, and they shall be at liberty to supply themselves with refreshments, provisions, and everything necessary for their sustenance, for the repair of their vessels, and for continuing their voyage; provided always, that they pay a reasonable price; and they shall not in any manner be detained or hindered from sailing out of the said ports or roads, but they may retire and depart when and as they please, without any obstacle or hindrance."

In the special case thus contemplated either Party is bound to allow the persons concerned to supply themselves with refreshments, provisions and everything necessary for their sustenance, for the repair of their vessels and for continuing their voyage: but since this provision deals with the exceptional case of distress, it may be safely inferred therefrom that the same obligation was not intended to be stipulated as a general rule and it will be shown hereinafter that Separate Article 5 of the Treaty of 1783 distinctly refers to prohibition of export on the part of either of the contracting Parties.

This point is placed beyond doubt by Article 4 of the Treaty of 1827, which provides that "all that may be lawfully exported from the United States of America in the vessels of the said State may also be exported therefrom in Swedish and Norwegian vessels, etc." indicating most clearly that either State retains the right of prohibiting exports.

In the year 1896 the Government of the United States not only contended that a similar provision contained in the Spanish-American treaty of 1795 applied to merchandise on board ship but also to property on land. At a later date an American Claims Commission, which dealt with the cases which had given rise to the said contention, followed the same interpretation as the same had also been accepted by the Spanish Government. The correctness of such an interpretation, if it were to be applied to the treaties here under consideration, might appear as most doubtful in the light of the provisions which imply the right of either signatory to prohibit exports, and especially under Separate Article 5 of the Treaty of 1783. In the present case, however, the question does not arise and therefore need not be decided.

(b) The second observation is based on the meaning of the word "detained", which obviously implies that, at the time the act of detention

took place, the person or the thing subjected thereto was about to move and would have moved, but for the said measure. With regard to ships this raises the question as to whether, at the time the measure or measures complained of were put in effect, the person who had the control of the said ships had decided to leave and was ready to do so.

(c) Lastly it must be observed that a ship cannot be considered as "detained" as long as the decisions on which depend the sailings under regulations in force not contrary to the Treaties have not been properly called forth in compliance with the said regulations.

E. The second provision alluded to above as having the character of a *lex specialis* and affecting the present case is to be found in Separate Article 5 of the Treaty of 1783, which reads as follows:

ARTICLE 5.

It is agreed that when merchandises shall have been put on board the ships or vessels of either of the contracting parties, they shall not be subjected to any examination, but all examination and search must be before lading, and the prohibited merchandises must be stopped on the spot before they are embarked, unless there is full evidence or proof of fraudulent practice on the part of the owner of the ship, or of him who has the command of her. In which case, only he shall be responsible and subject to the laws of the country in which he may be. In all other cases, neither the subjects of either of the contracting parties who shall be with their vessels in the ports of the other, nor their merchandises, shall be seized or molested on account of contraband goods which they shall have wanted to take on board, nor shall any kind of embargo be laid on their ships, subjects, or citizens of the State whose merchandises are declared contraband, or the exportation of which is forbidden: those only who shall have sold or intended to sell or alienate such merchandise being liable to punishment for such contravention.

The same provision appears in more or less similar terms in two other treaties of the United States concluded at almost the same time. i.e. the treaty with France of February 6, 1778, Article XXX (28) (Miller, Vol. 2, page 26), and the treaty with Prussia of September 10, 1785, Article VI, (Miller, *eodem.* page 166).

On behalf of the United States it is contended that Separate Article 5 is to be understood as dealing with articles the sale of which was prohibited and applies to contraventions of such prohibition. This interpretation cannot be accepted in the face of the wording of Separate Article 5, which on the contrary refers in express words to "merchandises the export of which is forbidden". Indeed it may be said that this Separate Article 5 is the only provision in the Treaty of 1783 which by implication reserves to either Party the right to forbid the exportation of merchandise, but precisely because this Article applies to such a case, it must be taken and applied as it stands and it can have no other meaning than the following one: Either Party is at liberty to prohibit the exportation of merchandise; even of such merchandise which is not contraband, but in case of such prohibition the necessary measures for preventing the exportation are to be taken before the merchandise is loaded. As the Treaty expressly says: "The prohibited merchandises must be stopped on the spot before they are embarked."

Separate Article 5 reserves the case where "full evidence or proof of fraudulent practice on the part of the owner of the ship, or of him who has command of her" can be produced. In all other cases "neither the subjects of either of the contracting Parties who shall be with their vessels in the port of the other, nor their merchandises shall be seized or molested on account of contraband goods, which they shall have wanted to take on board, nor shall any kind of embargo be laid on their ships, subjects or citizens of the State whose merchandises are declared contraband or the exportation of which is forbidden". The words are so clear that the whole Separate Article 5 would be meaningless, if it could be interpreted in such a way that a vessel may be detained on account of merchandise, the exportation of which was forbidden, but which nevertheless was allowed to be laden without fraudulent practice on the part of the owner of the ship or of him who has command of her. But, considering the exceptional nature of the provision here mentioned, it must be added that the interpretation thereof is to remain within its strict terms and that it cannot affect any right of the State concerned which may properly be reconciled therewith.

VI.

Before turning to the facts of the case it is necessary to recall here the regulations which played a great part therein, and to mention a judicial decision given in another controversy of a similar nature.

(A)

The pertinent regulations in force in the ports of the United States include those which govern the clearance of vessels. Amongst others, the following relevant sections are to be found in the Revised Statutes of the United States:

SEC. 4197. The master or person having the charge or command of any vessel bound to a foreign port, shall deliver to the collector of the district from which such vessel is about to depart, a manifest of all the cargo on board the same, and the value thereof, by him subscribed, and shall swear to the truth thereof; whereupon the collector shall grant a clearance for such vessel and her cargo, but without specifying the particulars thereof in the clearance, unless required by the master or other person having the charge or command of such vessel so to do. If any vessel bound to a foreign port departs on her voyage to such foreign port without delivering such manifest and obtaining a clearance, as hereby required, the master or other person having the charge or command of such vessel shall be liable to a penalty of five hundred dollars for every such offence.

Section 4198 sets out the oath to be taken by the master of the vessel, Section 4199 the form of the report and manifest to be delivered to the collector.

SEC. 4200. Before a clearance shall be granted for any vessel bound to a foreign port, the owners, shippers, or consignors of the cargo of such vessel shall deliver to the collector manifests of the cargo, or the parts thereof shipped by them respectively, and shall verify the same by oath.

Such manifests shall specify the kinds and quantities of the articles shipped respectively, and the value of the total quantity of each kind of articles; and the oath to each manifest shall state that it contains a full, just, and true account of all articles laden on board of such vessel by the owners, shippers, or consignors, respectively, and that the values of such articles are truly stated, according to their actual cost, or the values which they truly bear at the port and time of exportation. And before a clearance shall be granted for any such vessel, the master of that vessel, and the owners, shippers, and consignors of the cargo, shall state, upon oath, to the collector, the foreign port or country in which such cargo is truly intended to be landed. The oath shall be taken and subscribed in writing.

Section 4201 gives the form of the clearance, to be granted to a ship or vessel on her departure to a foreign port or place.

SEC. 4573. Before a clearance is granted to any vessel bound on a foreign voyage or engaged in the whalefishery, the master thereof shall deliver to the collector of the customs a list containing the names, places of birth and residence, and description of the persons who compose his ship's company; to which list the oath of the captain shall be annexed, that the list contains the names of his crew, together with the places of their birth and residence, as far as he can ascertain them; and the collector shall deliver him a certified copy thereof, for which the collector shall be entitled to receive the sum of twenty-five cents.

(B)

1. After the declaration of war the Congress of the United States enacted a Law on June 15, 1917, called the "Espionage Act" and containing i.a. under Title VII the following provisions:

TITLE VII.

CERTAIN EXPORTS IN TIME OF WAR UNLAWFUL.

Section 1. Whenever during the present war the President shall find that the public safety shall so require, and shall make proclamation thereof, it shall be unlawful to export from or ship from or take out of the United States to any country named in such proclamation any article or articles mentioned in such proclamation, except at such time or times, and under such regulations and orders, and subject to such limitations and exceptions as the President shall prescribe until otherwise ordered by the President or by Congress: *Provided, however,* That no preference shall be given to the ports of one State over those of another.

Sec. 2. Any person who shall export, ship, or take out, or deliver or attempt to deliver for export, shipment, or taking out, any article in violation of this title, or of any regulation or order made hereunder, shall be fined not more than \$10,000, or, if a natural person, imprisoned for not more than two years, or both; and any article so delivered or exported, shipped, or taken out, or so attempted to be delivered or exported, shipped, or taken out, shall be seized and forfeited to the

United States; and any officer, director, or agent of a corporation who participates in any such violation shall be liable to like fine or imprisonment, or both.

Sec. 3. Whenever there is reasonable cause to believe that any vessel, domestic or foreign, is about to carry out of the United States any article or articles in violation of the provisions of this title, the collector of customs for the district in which such vessel is located is hereby authorized and empowered, subject to review by the Secretary of Commerce, to refuse clearance to any such vessel, domestic or foreign, for which clearance is required by law, and by formal notice served upon the owners, master, or person or persons in command or charge of any domestic vessel for which clearance is not required by law, to forbid the departure of such vessel from the port, and it shall thereupon be unlawful for such vessel to depart. Whoever, in violation of any of the provisions of this section shall take, or attempt to take, or authorize the taking of any such vessel, out of port or from the jurisdiction of the United States, shall be fined not more than \$10,000 or imprisoned not more than two years, or both; and in addition such vessel, her tackle, apparel, furniture, equipment, and her forbidden cargo shall be forfeited to the United States.

2. Under this law and by virtue of the powers conferred to him thereunder the President issued several proclamations and orders prohibiting exports from the United States and providing for the setting-up of an organization which would enforce the new laws.

(a) The first relevant proclamation bears the date of July 9, 1917. It provides that "except at such time or times, and under such regulations and orders, and subject to such limitations and exceptions as the President shall prescribe", certain categories of goods therein mentioned "shall not on and after the 15th day of July, 1917, be carried out or exported from the United States or its territorial possessions" to foreign countries enumerated in the proclamation, including Sweden. The proclamation lists i. a. coal, coke, fuel oils, kerosene and gasoline, including bunkers, food grains, flour and meal thereof, fodder and feeds, meat and fats. The proclamation added that "the orders and regulations from time to time prescribed will be administered by and under the authority of the Secretary of Commerce from whom licenses, in conformity with the said orders and regulations will issue".

(b) By a proclamation of August 27, 1917, the list of articles subject to prohibition of export was considerably enlarged and made to include "all contrivances for, or means of, transportation on land or in the water or air". The proclamation provides that, on and after August 30, 1917, the goods enumerated therein shall not "be exported from or shipped from or taken out of the United States or its territorial possessions". It names the Exports Administrative Board as the authority "from whom licenses . . . will issue".

(c) A third proclamation giving a still more complete list was issued on February 14, 1918.

(d) For the purpose of administering and executing the provisions of the law, as well as of the proclamations and orders, the President, by an order of June 22, 1917, created an Exports Council, authorized and directed by him

to formulate policies for the consideration and approval of the President and make recommendations necessary to carry out the purposes of the Espionage Act.

(e) An order of August 21, 1917, set up another body, the Exports Administrative Board, which the President entrusted with the execution of all provisions of Title VII of the Espionage Act and the proclamations thereunder, and which was authorized and directed i. a. to grant or refuse export licenses thereunder in accordance with his instructions.

(f) The order of August 21, was later on superseded by an order of October 12, 1917, establishing the War Trade Board, having the power and authority to issue licenses under such terms and conditions as were not incompatible with law, or to grant or refuse licenses for the exportation of all articles (except coin, bullion or currency), the exportation or taking out of the United States of which might be restricted by proclamations heretofore or hereafter issued under Title VII of the Espionage Act.

By the same order the President vested in the Secretary of Commerce the power "to review the refusal of any Collector of Customs under the provisions of Sections 13 and 14 of the Trading with the Enemy Act to clear any vessel, domestic or foreign, for which clearance is required by law".

Section 13 of the Act of October 6, 1917, just alluded to, reads as follows:

SEC. 13. That, during the present war, in addition to the facts required by sections forty-one hundred and ninety-seven, forty-one hundred and ninety-eight, and forty-two hundred of the Revised Statutes, as amended by the Act of June fifteenth, nineteen hundred and seventeen, to be set out in the master's and shipper's manifests before clearance will be issued to vessels bound to foreign ports, the master or person in charge of any vessel, before departure of such vessel from port, shall deliver to the collector of customs of the district wherein such vessel is located a statement duly verified by oath that the cargo is not shipped or to be delivered in violation of this Act, and the owners, shippers, or consignors of the cargo of such vessels shall in like manner deliver to the collector like statement under oath as to the cargo or the parts thereof laden or shipped by them, respectively, which statement shall contain also the names and addresses of the actual consignees of the cargo, or if the shipment is made to a bank or other broker, factor, or agent, the names and addresses of the persons who are the actual consignees on whose account the shipment is made. The master or person in control of the vessel shall, on reaching port of destination of any of the cargo, deliver a copy of the manifest and of the said master's, owner's, shipper's, or consignor's statement to the American consular officer of the district in which the cargo is unladen.

(C)

In their pleadings and during the hearings the Parties discussed at length a claim against the United States which had been adjudicated by the United States Court of Claims. The following facts appear in the decision of the said Court, delivered on December 7, 1931. (SW II, pp. 66 *et seq.*)

1. In September, 1917, a Dutch steamship named *Zeelandia* sailed from Buenos Aires for Holland with a cargo consigned to the Netherland Oversea Trust Company, an organization formed in Holland prior to the

entry of the United States into the war, through the co-operation of the Government of the Netherlands and the Governments of the Allied Powers. Its purpose was to guarantee to Holland and the Allied Governments that goods consigned to it would remain in Holland and would not be reconsigned to, or used for, the benefit of enemies of the Allied Powers.

Arriving off New York Harbor, the steamship *Zeelandia* carried a full supply of provisions, stores and bunker coals, sufficient to enable her to continue and complete her voyage to Holland without additional stores or provisions, provided no passengers were taken on at New York.

The *Zeelandia* could have discharged the United States naval officer, passengers, and mail by tugs beyond the waters of the United States and proceeded on her journey; but an official of the plaintiff, relying upon the assurances of the customs officials in New York that so long as the *Zeelandia* did not take on additional cargo, stores, or provisions in the United States, an export license would not be necessary and, that the vessel might come in and be cleared out without hindrance from the United States, the *Zeelandia* came into the harbor of New York on October 16, 1917.

On October 17, 1917, an official of the plaintiff wired the director of the export license bureau of the United States Shipping Board that while the *Zeelandia* had sufficient bunkers and stores to carry her to Holland without additional passengers, there were a number of stranded Dutch citizens in the United States who desired to book passage to Holland and applied for a license for additional stores to enable the *Zeelandia* to carry these passengers to Holland.

On October 19, 1917, the Director of the Export License Bureau of the United States Shipping Board wired the New York representative of the plaintiff to send to him for inspection copies of the manifests of the steamship *Zeelandia* and lists of stores and fuel aboard, and on the same day these manifests and lists were sent by messenger to the said director.

On the morning of October 22, 1917, not having received any reply from Washington the plaintiff abandoned its plan to attempt to transport the additional Dutch passengers and submitted the manifests of the steamship *Zeelandia* and applied for clearance from the port of New York to the proper customs officials in New York; clearance of the said steamship *Zeelandia* was refused by the said customs officials of the Treasury Department of the United States on the asserted ground that the plaintiff did not submit an export license for her transit cargo, bunkers, and stores.

On the same date, October 22, 1917, the plaintiff made application for an export license for cargo, bunkers, and stores on board the steamship *Zeelandia*, and the said application was made under protest, however, that the United States could not legally require an export license, since the steamship *Zeelandia* had come into the port at New York without intention to land any of her cargo, bunkers, or stores, and that, in fact, none of her cargo, bunkers, or stores had been loaded in any port of the United States or territory subject to the jurisdiction of the United States, and that the said cargo, bunkers, and stores were transit cargo en route from South American ports to ports of the Netherlands.

Thereafter, although demands for clearance were repeatedly made to the officials of the United States having charge of the matter, by the plaintiff and by the representatives of the Government of the Netherlands in the United States, the United States continually refused, during all of the time from October 22, 1917, to March 21, 1918, to permit the steamship *Zeelandia* to leave the harbor of New York.

The refusal to grant clearance to the steamship *Zeelandia* and the refusal to permit her to leave the harbor of New York from October 22, 1917, to March 21, 1918, was by the direction of the War Trade Board, created under and by an Executive order of the President of the United States.

The refusal of the United States to grant clearance to the steamship *Zeelandia* and the refusal to permit her to leave the harbor of New York from October 22, 1917, to March 21, 1918, was for the primary purpose of having available "additional Dutch vessels for the use of the United States" and of having Dutch vessels available to be "placed at the disposal of the Allies". A secondary purpose was the preventing of the cargo of the *Zeelandia* entering the Netherlands.

2. The Court of Claims, which by a special act of Congress had been authorized to adjudicate a claim of the owners of the *Zeelandia* for damages sustained as a result of the refusal to grant clearance, decided that Title VII of the Espionage Act was, if possible, to be interpreted in such a manner as to be reconciled with international law. In the opinion of the Court, the words "carry out", "export from" or "take out of" used in the Act applied only to an exportation or taking out of goods which were a part of the general mass of goods belonging to the United States.

The Court, therefore, held that the demand that an application for a license covering the cargo and bunkers and stores already carried by the *Zeelandia* on October 22, 1917, be made did not justify the detention of the vessel when she sought clearance on the latter date. The Court concluded that the *Zeelandia* had been entitled to clearance under the laws of the United States, as well as under the law of nations, and that her detention was not justified by the provisions of the Espionage Act or the Trading with the Enemy Act.

VII.

Reverting now to the facts of the present case, it will be convenient to state such of them here, as far as they are relevant, as had occurred prior to the time when the first diplomatic correspondence relating to the case took place between the two governments. As of that moment, it will be necessary for the Arbitrator to see and determine the rights of the Parties under the treaties and the facts of the case, as they stood then. This will be followed by the consideration of what happened thereafter.

As above set forth, the two motor vessels concerned are owned by the Rederiaktiebolaget Nordstjernan, a Swedish corporation, commonly known and here referred to as the "Johnson Line", the chairman of the board of which is, and was in 1907 and 1908, Mr. Axel Axelson Johnson, a Swedish subject, resident of Stockholm. The Johnson Line at the time had in the United States a representative at New York, Mr. Gösta Ekström. There also were at that time two delegates of the Royal Swedish Government in the United States, who were negotiating for export facilities to Sweden. They were Mr. A. R. Nordvall and Dr. Hj. Lundbohm.

The events relating to the two motor vessels may be stated here separately up to the time when the steps and measures to be considered were taken. For the sake of clearness, the questions to which they give rise will be discussed in order and in direct connection with the events or measures concerned. As far as necessary, reference will be made to the pleadings from which quotations are made.

(A)

"KRONPRINS GUSTAF ADOLF".

1. This motor vessel was sent out from Sweden to the United States on March 30, 1917, in order to load a cargo of sugar of which 75 % was intended for Russia (SW App., 160).

Before entering the port of Halifax, on June 17, 1917, the vessel touched ground slightly, but got afloat at once. A leakage was noticed in tank No. 1 and the master inquired at Halifax about drydock accommodation, and was told that he could not drydock in Halifax. On June 19, 1917, the damage was surveyed by Lloyd's survey agents, who issued a certificate of seaworthiness for the vessel to continue to New York, where a further survey would be held. The vessel sailed for New York, where it arrived on June 24, 1917.

Contrary to the suggestion of the master, who thought that the vessel might be repaired temporarily, the permanent repairs to be postponed until the return to Sweden, the surveyors found that the damage required permanent repairs in New York. Accordingly, on June 26, 1917, the vessel went into drydock, where it remained being repaired until September 25, 1917.

By reason of the damage sustained at Halifax, it was contended on behalf of the Swedish Government that Article 21 of the Treaty of 1783 might be considered as applicable, as the damages caused to the *Kronprins Gustaf Adolf* forced the vessel as an "urgent necessity" to enter the port where it was repaired. It was, therefore, argued that under said Article 21 the *Kronprins Gustaf Adolf* was later on "at liberty to supply itself with refreshments, provisions and everything necessary for its sustenance . . . for continuing its voyage". This contention cannot be upheld. Article 21 contemplates obviously a case of real distress at sea, an event which compels a vessel to deviate from its route and seek refuge at the nearest port in order to find shelter and proceed to make the repairs necessary for the continuation of the voyage. These conditions did not exist in the present case. The *Kronprins Gustaf Adolf* was not compelled by distress to take refuge in the port of Halifax, for it had to call there, nor was it in distress, since the surveyors having authority declared it seaworthy for the continuation of the voyage to New York. It is true that in New York Harbor the vessel went into drydock for repairs, but the Port of New York was not a port in which distress at sea compelled the vessel to take refuge; it was, on the contrary, its port of destination.

Therefore, Article 21 of the Treaty of 1783 cannot be considered as applying to the case.

2. Owing to the necessity of drydock repairs, it was deemed preferable to unload a certain quantity of oil, which the vessel had brought from Sweden.

The Collector of Customs at the Port of New York was requested to grant permission to discharge and dispose of about 200 tons of fuel oil then in the bunkers. This quantity was delivered to the Anglo American Oil Company, Ltd., who credited the Johnson Line with an agreed price, and after the return of the vessel from drydock a slightly larger quantity of oil was delivered by the same Anglo American Company, Ltd., and loaded on the vessel.

3. While the vessel was in drydock, in the middle of July, 1917, Mr. Ekström filed applications for licenses to export 15 barrels of lubricating oil, 900 tons of Diesel oil and ship's stores.

A new application for ship's stores was made on August 15, 1917, and another for 10 barrels of linseed oil on August 20, 1917.

In a letter of August 24, 1917, to the Division of Export Licenses, Mr. Ekström stated that, with regard to the articles for the home voyage, the Custom House officials had declared that no difficulty would be met when clearing the vessels, but that he (Ekström) desired and hoped to obtain a license for additional quantities necessary for the outward voyage of the *Kronprins Gustaf Adolf* to the west coast of America. (See US I. pp. 139 to 159.)

4. In his letter of August 20, 1917, to the Division of Export Licenses, Mr. Ekström stated that the vessel was going to load a cargo of sugar, and added that the loading would take place "in the beginning of next week". In fact, as already mentioned, the vessel left drydock only on September 25, 1917. No application for clearance was made; further information about the ship is found in the following documents:

On September 29, 1917 (US II, p. 364), Mr. Morris, then American Minister at Stockholm, informed the Department of State at Washington, D.C., that Mr. Axel Johnson had called on him the day before and had asked whether the American Government would be interested in a proposition whereby his line would place about 40,000 to 50,000 tons of shipping at the disposal of said Government in return for facilities and return cargo for two vessels from San Francisco to Gothenburg and for facilities for other Johnson Line steamers plying between Sweden and South America.

On September 26, 1917, the Johnson Line wrote to Mr. Ekström:

"We have been negotiating with various firms as regards employment of our motor ships and shall be obliged if you will thoroughly canvass the freight market and let us know what is offering in time, charter, single or round trips from Buenos Aires, Chile to North America, Japan, China, East Indies, etc., as we must do something with the boats, having been lying idle with them quite too long."

(SW III, p. 80.)

On October 23, 1917, Mr. Ekström wrote to the United States Shipping Board that pending negotiations between representatives of the Swedish and the American Governments the Johnson Line was willing to charter the *Kronprins Gustaf Adolf* to the said Shipping Board for one trip to South America and back to the United States (US II, p. 472).

On November 22, 1917, Mr. Ekström wrote to the delegates of the Swedish Government at Washington that the *Pacific* or the *Gustaf Adolf* was, on November 1st, offered by the Johnson Line to the Commission for Belgian Relief (SW App., p. 146).

These letters clearly show that at the time the Johnson Line and its representatives in the United States were bent upon obtaining a cargo to be loaded on the *Kronprins Gustaf Adolf* and brought to Europe.

"PACIFIC".

1. On March 29, 1917, the motor vessel *Pacific* sailed from Mejillones (Chile) with a cargo of nitrate for Sweden (SW App., 160). It stopped in the Panama Canal from April 6, 1917, to May 3, 1917, and loaded there

bunker and ship stores (US II, p. 302). After a stay at St. Thomas, Virgin Islands, it arrived at Newport News, Virginia, on July 1, 1917. In a letter, at that time, Mr. Ekström says that the *Pacific* called at Newport News for bunkering purposes. In reality, as is said in the Swedish Case (SW I, p. 44), she anchored at Newport News to obtain instructions from her owners as to her next port of call.

2. On July 7th the vessel was subjected to an attachment by the master of the British vessel *Turcoman*, who claimed compensation for alleged damages done to his ship. On giving a bond the vessel was released from the attachment on September 6, 1917, and by a final decree given on September 24, 1918, an American Court having jurisdiction dismissed the claim of the *Turcoman*. (See US II, pp. 330, 331; US III, pp. 557, 559.)

3. On July 23rd, Mr. Ekström applied to the Collector of Customs at Newport News for a license for ship stores and in reply was advised that he would have to obtain a special license for the cargo of nitrate aboard the ship. Accordingly, a formal application for a license covering the said cargo of nitrate was made by Mr. Ekstrom to the Division of Export Licenses of the Department of Commerce on August 2, 1917. Later on, in reply to inquiries made by him, Mr. Ekström was informed that his application was under consideration.

4. Having applied on October 19, 1917, for a license concerning another cargo (a small cargo of bicarbonate of soda), Mr. Ekström received the following letter from the Bureau of Exports, dated November 1, 1917, and which appears to be a form letter:

"Pending current negotiations, no licenses are being granted at the present time for shipments to Holland, Denmark, Norway or Sweden. Accordingly, all applications now on file for licenses to export to these countries are being returned to the applicants, and the Bureau of Exports will not receive additional applications until further notice.

It is hoped that the efforts of the War Trade Board to reach an agreement with the Northern Neutrals will result in a favorable change in the situation, and as soon as such object has been accomplished, due publicity regarding the same will be given through the press, and applicants will then be entitled to renew their applications. For this purpose new forms of applications will be prepared; and, to assist the Bureau in recognizing such applications as renewals, IT WILL BE NECESSARY THAT THEY BE ACCOMPANIED BY THE ORIGINAL APPLICATIONS, WHICH SHOULD THEREFORE BE CAREFULLY PRESERVED BY YOU."

5. In a previous letter of October 5, 1917, to Mr. Dean, then attorney for the Johnson Line (SW App., p. 186), the same Bureau of Export Licenses wrote that it was impossible at that time to give any definite information as to whether a license for the cargo of nitrate on board the "*Pacific*" would be granted or refused. The final decision on this point, which was a refusal, was communicated to Mr. Ekstrom in a letter dated December 3, 1917, and confirmed in a letter dated December 5, 1917, to which was annexed another copy of the form letter above mentioned. (SW App., pp. 187 to 190.)

On the facts disclosed by these documents, the Swedish Government contends that the relevant Articles of the Treaty of 1783 were violated as to the cargo of nitrate by the undue delay on the part of the American authorities in passing on the application for a license and by the final refusal of the

said license. In view of the Treaty, i.e., of Separate Article 5 thereof, as well as of the decision rendered by the Court of Claims in the *Zeelandia* case, it appears that the cargo of nitrate loaded in Chile on a vessel later touching at an American port, but really bound for Sweden, did not come under the Espionage Act and the resulting proclamations and orders, and was not subject to the license required and refused.

The Government of the United States contended that the cargo was saltpetre, an article declared contraband in Article 9 of the Treaty of 1783 and, as such, excepted from the freedom of navigation and commerce stipulated in Article 8. In the opinion of the Arbitrator, this objection cannot be sustained. The said cargo was not worked "into the form of an instrument or thing for the purpose of war by land or by sea" (Article 10), nor was it "consigned to an enemy's port" (Article 13), and, therefore, Article 9 was not applicable. It may also be observed that there is no identity between nitrate of soda and saltpetre, as appears from the lists of commodities requiring export licenses, issued on July 9, 1917, and September 18, 1917, which distinctly separate nitrate of soda, placed under the heading of "fertilizers", and saltpetre, placed under the heading of "arms, ammunition and explosives".

6. But the Arbitrator must consider here whether the delay in entertaining and the refusal in granting the license was the real cause which kept the *Pacific* at Newport News, or whether there was another reason why the representative of the Johnson Line could not and did not order the ship to proceed on its voyage.

There having been no application for clearance, which would have evidenced a determination to sail, it becomes necessary to consider the circumstances as they then existed, and especially the obstacles which were placed in the way of navigation, by the British authorities and which proved a hindrance to the further voyage of the *Pacific*.

In a memorandum delivered to Mr. Lansing, the Secretary of State, on June 11, 1917 (US I, p. 232), Mr. Lagercrantz, one of the Swedish delegates in Washington, mentions that "a great part of the Swedish tonnage lies idle in foreign ports (mainly on account of lack of accommodations from the British side)".

A British Order-in-Council of February 16, 1917, had enacted that all vessels not calling at British ports for examination would be presumed to carry goods of enemy origin or destination and that the carrying of such goods would be ground for the condemnation of ship and cargo. As a consequence, Swedish ships, i. e. ships of the Johnson Line, had to call at a British port of examination, Kirkwall, in the north of Scotland, being first designated for that purpose, and later on Halifax, in Nova Scotia. A memorandum delivered at Washington, D.C., by the delegates of the Swedish Government on June 15, 1917, gives a list of Swedish steamers then lying in different ports of the United States with cargoes destined for Sweden, which steamers could not proceed until permission of visitation at a port outside of England had been granted. This list includes the *Pacific*, then at Colon, C.Z. (US I, p. 236).

In a letter of July 26, 1917, Mr. Dean, attorney for the Johnson Line, proposes that ships be allowed to return to Sweden with cargoes in consideration of tonnage to be given to the United States by the Swedish Government, adding that, "it will, of course, be necessary to obtain from the British assurances for these cargoes and right of inspection at Halifax and permission after inspection to proceed immediately to Sweden." (US I, p. 240.)

On July 25, 1917, Mr. Axel Johnson wrote Mr. Ekström: "As you know, the British authorities have not yet allowed our M.S. *Pacific* to proceed to Sweden, so that it seems that they at present will not permit nitrate to be imported to Sweden." (SW III, p. 71.)

On August 15, 1917, Mr. Nordvall cabled Mr. Ekström: "British Legation believes no letter assurance needed for *Pacific* with cargo from South American port. Legation has no instructions from London yet regarding permission for *Pacific* call Halifax." (SW App., p. 132.) The day before he had informed Mr. McCormick, the chairman of the Exports Administrative Board, that the *Pacific* "is detained in United States at present because permission to call at Halifax (instead of Kirkwall) has not yet been granted by the British Government". (SW App., p. 131.)

On August 16, 1917, Mr. Ekström wrote the Johnson Line the following: "With regard to permit from the British Government, I was informed by Mr. Mellin (the agent of the Johnson Line in London) that, as letter of assurance cannot be granted on nitrates for Sweden, permission to proceed to Halifax cannot be given. I also received a similar communication from the British Embassy on this side." (SW III, p. 75.)

At the same time he wrote Mr. Nordvall: "I have telegraphed to our London representatives asking them to try again to obtain permit for the ship to proceed to Halifax, and will let you know the result in due course." (SW App., p. 133.)

In a letter from Stockholm, dated September 22, 1917, Mr. Johnson made the following correct observation regarding the *Pacific*: "As you know this vessel's cargo is not American cargo, and therefore same cannot according to our opinion be detained by the American authorities", but he adds immediately, "however, we are willing to undertake some transport in order to obtain permission from the British authorities for the vessel to proceed to Halifax".

Annexed to answer and arguments of the United States are extracts from the minutes of the London Contraband Committee, which had power to decide on permissions to proceed to Halifax. It appears from the said minutes that on August 15, 1917, the Johnson Line requested permission for the *Pacific* to be inspected at Halifax and that the Committee confirmed the negative answer already given in this respect on August 3, 1917. On September 8, 1917, the Johnson Line again applied and the Committee answered that the British Government "was unable to give any facilities for the importation of the nitrate into Sweden". (US II, pp. 408-409.)

Repeatedly the Johnson Line endeavored to overcome the obstacles thus put in its way. It appears that, considering the difficulties, the Johnson Line decided to discharge the cargo in the United States, but the owners of the cargo protested and, in order to avoid the responsibility which his company might incur, Mr. Johnson wrote Mr. Ekström on September 7, 1917: "Everything must be done to get this vessel away and we have cabled to Mr. Mellin, asking him not to leave a stone unturned until we have received permission to sail." (US II, p. 414.)

As already mentioned, Mr. Mellin was the agent of the Johnson Line in London and it was there that the efforts contemplated by Mr. Johnson were to be made. In fact, it appears from the record (US II, p. 408) that Mr. Mellin in London applied again in September, 1917, for permission for the *Pacific* to proceed to Halifax and then to Sweden and in reply was informed that the British Government would not grant any facilities for the importation of the nitrate into Sweden.

The Swedish Government has argued that an examination of the attitude of the British authorities is irrelevant, as any assumption as to what they would have done, if the American Government had granted the necessary licenses, rests on pure speculation. It also asserted that, with an American license, the ship could have continued on its voyage unmolested, as the British and Allied Powers would have been subservient to the wishes of the United States Government. The Kingdom of Sweden further pleaded that the wrong done by the United States could not be disregarded because the British Contraband Committee had allegedly impeded the free movement of the vessel, just as little as the latter could be absolved from liability for the consequences resulting from its unfriendly attitude simply by shifting the responsibility for the detention of the *Pacific* to the American authorities.

In the opinion of the Arbitrator these arguments cannot prevail.

It has been shown, and is confirmed by a telegram of the American Minister at Stockholm, of September 29, 1917 (US II, p. 364), that the transportation of nitrate to Sweden was not allowed by the British authorities at the time. It is the opinion of the Arbitrator that this circumstance prevented Mr. Ekström and the Johnson Line from assuming with any possible degree of certainty that a further transportation of the said cargo would be possible.

There is no evidence that permission to proceed to Halifax would have been given, if the license for the cargo had been granted. No conclusive inference in this respect can be drawn from letters written some months later under the *modus vivendi* agreement which will be mentioned hereafter. On the contrary, Mr. Ekström was of the opinion, as he cabled to the Johnson Line on September 10, 1917, that "chance obtain license if succeeding British Government's permission necessary proceed Halifax" (US II, p. 415).

Nor are the difficulties made by the British Government to be considered here as an excuse for the American authorities. They are only relevant here as to a mere question of fact, the question whether throughout the time in question the Johnson Line had envisaged the departure of the *Pacific* and decided that she was to sail. That the decision on this point was not affected by the delay in considering the application for and the subsequent refusal of the license for the cargo of nitrate which the vessel had on board, has been seen from letters already quoted and will be further shown by facts to be mentioned hereafter. The extreme slowness of the voyage of the *Pacific* from Chile, where it sailed on March 29th to Newport News, which it reached on July 1, 1917, could only have been caused by the fact that permission to call at Halifax had not yet been obtained and it was for such permission that the vessel later waited at Newport News. The impossibility of overcoming the ill-will of the British authorities was obviously the reason why, as early as August, 1917, the Johnson Line contemplated the discharge of the cargo in the United States at a time when the application for a license was pending and no indication had yet been given that it would eventually meet with a refusal. This intention having called forth a protest on the part of the charterers of the vessel, the owners of the cargo, the Johnson Line wrote to Mr. Ekström on August 11, 1917: "We asked you to ascertain whether the vessel would eventually be allowed to proceed to Halifax, as we fear that we cannot, without further, discharge this cargo in the United States, but that we must first have called at a port of inspection in order to see if the authorities really intend to seize the cargo." (SW III, No. 79.)

When in September, 1917, the Johnson Line, threatened with a claim for damages on the part of the charterers, gave up the plan of discharging the cargo, and reverted to that one of having the *Pacific* sail to Sweden with the cargo, it was in London that it sought to leave no stone unturned (see its letter to Mr. Ekström of September 7, 1917, quoted hereabove on page 1272). Likewise the sale of the cargo in the United States by the charterers as a way out of the difficulty had already been contemplated as early as August, 1917, as it is alluded to in the letter of the Johnson Line to Mr. Ekström of August 11, 1917, hereabove quoted. On September 27, 1917, Mr. Nordvall wrote to Mr. McCormick: "I have been asked to find out if it would be possible to sell this cargo of nitrate (the cargo per M.S. *Pacific*) in this country. . . . I am trying to get a bid here on this cargo to submit to the owners. . . ." (US II, p. 332.) At that time Mr. Nordvall had already been informed that the cargo was considered by the American Board as "coming within the provisions of the Embargo Act" (see his telegram to Mr. Ekström of September 6, 1917) (SW App., p. 135), but there was as yet no reason to anticipate a refusal, and it cannot be said that the sale was decided upon owing to the attitude of the American authorities.

At the time when the license was refused (December 3, 1917) the cargo had already been sold (see telegram of Melchior Armstrong and Dessau Inc. of November 14, 1917, US II, p. 347) and on December 3, 1917, the *Pacific* arrived at the port where the cargo was to be discharged, a job which was completed on December 20, 1917 (US II, pp. 357, 359). (See also US II, pp. 332 *et seq.*, and SW App., p. 113.)

In the light of these facts there can be no doubt that the Johnson Line was not in position to seriously consider the departure of the *Pacific* with the cargo she had on board. As a matter of fact, at no time during the period had it decided on the departure of the vessel and the reason why such decision could not be and was not made is to be found in the difficulties put in its way by the British Government and not in the attitude of the American authorities, a conclusion further confirmed by the fact that the cargo on board the *Pacific* is mentioned neither in the letter in which the Johnson Line appealed to the Swedish Foreign Minister nor in the diplomatic correspondence which ensued and which will be considered hereafter.

One last point deserved to be mentioned in connection with the cargo of the *Pacific*. There appears to have been some delay in the negotiations concerning the sale and between the sale and the discharge. The sale was confirmed on behalf of the owners of the cargo on November 14, 1917 (US II, p. 347). Their agents in New York, not receiving the contract signed by the American authorities, protested by letter of November 27, 1917 (US II, p. 348) in which they write:

"The latter (the owners of the steamer) have filed with us a protest threatening to hold us responsible for the delay in discharging the cargo and we take this opportunity to formally protest against the delay and shall be compelled to claim from the Government such demurrage and other losses that may be a consequence of the delay." (US II, p. 348.)

On the following day the same agents write:

"We refer to our yesterday's letter and to our conversation over the telephone yesterday afternoon in which you advised us that Captain Gelshenen would communicate with us here in New York, and in which you also agreed to pay demurrage and any other expenses that

might be caused by the delay in giving us instructions for the discharge of the *Pacific's* cargo."

and in the same letter they add, in P.S.:

"Since writing the above Captain Gelshenen has telephoned us that we can instruct the captain of M.S. *Pacific* to proceed to Norfolk to discharge, and we will act accordingly. To-morrow being a holiday and it being too late to clear the vessel at Newport News to-day, the *Pacific* can probably not commence discharging at Norfolk until Saturday morning." (US II, pp. 350, 351.)

As a matter of fact the *Pacific* arrived at Norfolk early on December 3, 1917, commenced discharging on the following day and finished unloading on December 20, 1917 (US II, pp. 357 to 359). On January 7, 1918, it went into drydock for repairs and remained there until January 10, 1918 (Affidavit of Master Meyer (SW App., p. 113)).

For the delay of about fourteen days thus occasioned the American Government might be, in law, liable as buyer to the Swedish corporation which owned and sold the cargo, and which, in its turn, would have been liable to the Johnson Line. This appears to have been the view of Mr. Ekström as expressed in his letter to the Johnson Line of December 3, 1917 (SW III, p. 90). But it does not represent the "detention" contemplated and prohibited by Article 17 of the Treaty of 1783 and it may be further observed that, if ready to sail fourteen days earlier than it was in fact, the *Pacific* would not have departed because, according to the Charter signed on December 13, 1917, the time for loading was at the discretion of the charterers until January 3, 1918 (SW App., p. 163); and as late as January 8, 1918, Mr. Ekström was requesting the Commission for Relief in Belgium for instructions for the *Kronprins Gustaf Adolf* and the *Pacific* "to proceed to port of loading". (SW App., p. 215.)

VIII.

During the month of October, 1917, the question arose whether the proclamations subjecting the export of bunkers to a license did or did not apply to the bunkers on board the ship which had brought them into American waters.

A decision on this point appears to have been reached by the Exports Administrative Board on September 30, 1917, and on October 9, 1917, the Director was ordered to instruct the Collectors of Customs that no vessel should be permitted to clear from a United States port without a license from the War Trade Board for her cargo, bunker fuel, sea stores and ship's stores, notwithstanding that such cargo, sea stores, bunker fuel or ship's stores were not taken on board at a United States port, the fact that they had been brought into a United States harbor being sufficient to subject them to the provisions of Title VII of the Espionage Act (SW App., pp. 73, 74).

On October 5, 1917, the War Trade Board issued, under the heading "Bunkers to Neutrals", a notice as to the policy it had adopted and which consisted "in stipulating that a vessel en route to non-European neutrals which touches at a United States port for bunker coal shall not be permitted to have bunker coal for the voyage unless she will agree to return to the

United States with a cargo which would be approved by the Board or which is destined for a country other than a border neutral." (SW App., pp. 72, 73.)

This intimation of the future policy of the War Trade Board referred apparently to bunkers which should be taken from the United States, but later on the War Trade Board showed its intention to apply the same policy with regard to bunkers which the vessel had already on board on arrival in that country. At the end of October, 1917, Mr. Ekström appears to have been verbally informed of this intention with regard to the *Kronprins Gustaf Adolf*. The telegram which he thereupon sent to the Johnson Line is quoted in a letter of the said Johnson Line to the Foreign Minister of Sweden on October 31, 1917 (SW App., pp. 156, 157). In this letter Mr. Johnson states that it had been impossible to obtain a license for the cargo of sugar for which the vessel had been sent to America. "Then the ship was chartered to carry a cargo of flour to a Swedish port, but now it looks as if it might not be possible to obtain that cargo either. Now, however, a new difficulty has arisen which appears to be even more serious than the previous one. The fact is that we have received the following cable from our New York office:

'Gustaf Adolf Authorities inform quantity bunker oil on board about threehundred tons subject to new bunkerregulations. Consequently if ship sails Sweden bunker license necessary also for quantity now on board and will only be granted if you guarantee ship return immediately to States.' "

Assuming that the bunker oil in question was identical with that which had been taken by the ship when leaving Sweden, Mr. Johnson asked the Swedish Government to intervene in order to ward off the danger of what he considered as "illegal interference". He added "that it is now feared that the same difficulties will be encountered with regard to the departure of the *Pacific*", which, as he writes, had on board about 800 tons of oil, "in part carried from home, in part procured at Balboa and St. Thomas on the strength of licenses previously obtained". The Johnson Line therefore concluded:

"From this it would seem that there is a question of an hitherto unknown violation of law and justice, and we beg respectfully to request Your Excellency to take the most energetic measures for the purpose of warding off this danger. If this (attempted) illegal interference with this vessel should be successful, it must follow that similar and even worse interferences will be made with regard to all Swedish ships that are in American ports."

On the same day, October 31, 1917, the Johnson Line instructed its agent in London, Mr. Mellin, to ask for the assistance of the British authorities in helping to modify what he called the "unreasonable demand of the United States Government".

As the Arbitrator was informed at the hearing, the request made accordingly by Mr. Mellin met with a refusal.

On November 20, 1917, the Johnson Line applied directly to the American Minister at Stockholm with the request that he

"be kind enough to cable to the American Government to look into this matter in order that our motor vessels *Kronprins Gustaf Adolf* and

Pacific may be allowed to proceed with the bunkers they already have on board without being imposed any bunker conditions. Should the charters to Belgian Relief result, we of course require to be supplied with the Diesel oil necessary for the voyage across to Rotterdam as all transport for the Belgian Relief is carried out in the interests of the Allied powers, this of course without being bound by any bunker clause." (SW App., pp. 160, 161.)

The Department of State, to which this request was forwarded, replied on January 4, 1918:

"Inasmuch as the Rederiaktiebolaget Nordstjernan is apparently a Swedish firm it would appear that the company should properly apply to the Swedish Government for intervention in the matter and not directly to the United States Government. The copies of the letter from the Rederiaktiebolaget Nordstjernan are returned herewith." (SW III No. 3.)

Acting upon the letter of the Johnson Line, the Swedish Foreign Minister sent on November 3, 1917, the following telegram to the Minister of Sweden at Washington, D.C.:

"Motorship Kronprins Gustav Adolf at present in New York owners agents cable authorities inform bunkeroil onboard about three hundred tons subject to new bunker regulations and consequently ship cannot sail if guarantee not given that she will immediately return States *Stop* As bunkeroil carried from Sweden we presume decision due to oversight especially as ship is going in regular traffic *Stop* Make representations with State Department to ensure that ship may sail irrespective of bunker conditions if necessary make also representation in same sense regarding Pacific cable soonest." (SW App., p. 102.)

Mr. Nordvall apparently refers to this telegram in a letter to Mr. Ekström dated November 9, 1917, in which he writes:

"I have once more taken up this matter, and have had it thoroughly explained. There is no doubt that the law reads, and means, that bunker license will be necessary for all vessels, independent of the country where the bunkers have been taken on board.

"The matter has been referred on an earlier date to the Attorney-General of the State Department, and his explanation is that this is the way the law should be understood.

"There is nothing more to do in this matter but loyally agree to the law and the regulations." (SW App., p. 143.)

Thereupon the Swedish Minister addressed to the State Department the note of November 24, 1917, which opened the diplomatic correspondence between the two Governments.

IX.

As of the moment this correspondence begins, it is necessary to state clearly what, in the opinion of the Arbitrator, was the position of the case under the Treaties. The Arbitrator then will consider the notes exchanged and, though they followed at more or less long intervals, it will be convenient

to include them in a comprehensive survey, since they show the contentions raised, the reasons given and the requests made by either side. But it must be borne in mind that the present case, as submitted to the Arbitrator, does not depend solely on the contentions and reasons set forth therein. The Arbitrator is not asked to decide as to the points on which either was right or took a wrong view of the situation. The considerations relating thereto, however important, are only part of all the considerations which are material to his decision and which, viewed in the light of all relevant facts and juridical reasons, bear on the general question: "Whether the Government of the United States of America detained the Swedish motor ship *Kronprins Gustaf Adolf* between June 23, 1917, and July 12, 1918, and the Swedish motor ship *Pacific* between July 1, 1917, and July 19, 1918, in contravention of the Swedish-American Treaties of April 3, 1783, and July 4, 1827."

Accordingly it is necessary first to see how the case stands under the Treaties, then, the notes having been produced, to proceed to an examination of the consideration to which they give rise, as well as of the observations both Parties made concerning them.

A.

The controversy between the two Governments does not bear directly on the ships concerned. No embargo has been laid on these as such. In this respect, counsel for Sweden quoted the proclamation of August 27, 1917, which subjected to the export regulations i. a. "all contrivances for or means of transportation on land or in the water or air", and inferred therefrom that it included unreservedly any ship in American ports. But, in the opinion of the Arbitrator, this interpretation cannot be accepted. The item quoted in the proclamation applies obviously to such contrivances for, or means of, transportation as could possibly be "exported" from the territory of the United States, and there is no evidence that the export regulations were applied to vessels, and especially to vessels of neutral States, lying in a port of the United States.

The notes deal with the attitude of the American authorities with regard to bunkers on board the *Kronprins Gustaf Adolf* and the *Pacific*. In this respect great stress was laid by the Swedish side on the policy followed by the Allies and by the United States, after they had entered the war, with regard to bunkers, the control of which was used by them to bring an undue pressure on neutral States and on neutral owners of vessels. While this policy undoubtedly represents one of the "public purposes" contemplated in Article 17 of the Treaty of 1783, it is immaterial as long as the State concerned acts within the limits of its rights and does not infringe obligations assumed by it under treaties such as those which are here being considered.

B.

There must be considered all goods and commodities on board the ships *Kronprins Gustaf Adolf* and *Pacific*. Here a distinction is to be made between those which the said vessels had retained on board, having had them on arrival in the United States and those which were taken out of the mass of goods in the United States. With regard to these latter a further distinction is to be made between such goods as were not on board at the time in question and those which had already been loaded and were on board at that time.

1. To begin with the goods which the ships had brought with them, when they entered American ports, and which remained on board, the Arbitrator will follow the decision given by the Court of Claims of the United States in the case of the Dutch steamship *Zeelandia*. This decision has not been appealed from by the American Government and the Arbitrator accepts it as conclusive as well with regard to the true interpretation of the Espionage Act and the proclamations of the President, as with regard to the ruling of the Court under international law. The Court has decided that the provisions of the Espionage Act, and consequently those of the proclamations, did not apply to such goods and commodities as a neutral ship had on board when entering a port of the United States and which remained on board. This decision includes all kinds of goods on board the ships and is especially to be considered with regard to the cargo of nitrate of soda which the *Pacific* had loaded in Chile and had on board when she stopped in transit at Newport News, the cargo being destined to a Swedish company in Sweden.

From the decision in the *Zeelandia* case it follows that the American authorities had the right neither to refuse a license for which an application was made, nor even to require such a license, the consequence being that the refusal to grant a license for the said cargo on December 3, 1917, as well as the undue delay which elapsed before that decision, were not warranted by the law and the regulations in force at the time. This being the case, the Swedish Government with regard to the cargo of the *Pacific* is justified in contending that the Johnson Line had a right which has not been respected. The same applies to the bunkers and stores which the *Pacific* had on board at the time of arrival in Newport News. It is true that considerable quantities of Diesel oil and some ship's stores were taken by the *Pacific* at Balboa in the Canal Zone (US II, pp. 312, 315), which, for purposes of the application of the Espionage Act and the proclamations, could have been considered as part of the territorial possessions of the United States. But at the time of the loading, neither the Espionage Act nor the proclamations were in force and the *Pacific*, leaving the Canal Zone and later on the port of St. Thomas, Virgin Islands, had sailed out of the jurisdiction of the United States and out into the high sea, whence it entered the port of Newport News. The Arbitrator is of the opinion that under these circumstances the bunkers, as well as the cargo on board the *Pacific*, was merchandise belonging to a Swedish subject and brought in a Swedish ship to the United States.

As has been seen above, the contention that the *Pacific* was "detained" contrary to the Treaties by the delay and, later on, the refusal to grant a license, implies that this vessel was ready to sail; that it would have sailed but for the said delay and refusal; that the person in control of the ship had resolved that it should depart and that, therefore, the attitude of the American authorities was the cause why this decision was not carried out. This point has already been dealt with and it has been found that at no time during the period in question had the Johnson Line, or its representative, decided on the departure of the *Pacific* with its cargo; on the contrary, the impediment put in the way by the British Government had caused them to contemplate the discharge, and later the sale of the cargo, a sale which had already been effected at the time when the license was finally refused by the War Trade Board.

It will, therefore, be seen that, while the decision of the War Trade Board requiring a license for the cargo and the bunkers of the *Pacific* and the

refusal to grant a license for the cargo were unjustified, it does not follow that the *Pacific* was thereby detained in violation of the Treaties.

2. As to any goods and commodities taken out of the United States, the United States had the indisputable right to control, regulate and even prohibit the exportation thereof, and in this respect neither the Espionage Act nor the Proclamations of the President make any difference between the articles therein mentioned. But reference is here to be made to the special clause of Separate Article 5 of the Treaty of 1783 concerning those goods and commodities which, though taken out of the United States, had in fact already been loaded aboard the vessels. Under Separate Article 5 the United States authorities could no longer seize or detain these goods, nor could they detain the ships on account of such goods. On the other hand, the effect of Separate Article 5 does not go further. As already mentioned, it must be interpreted strictly and cannot affect the operation of regulations in force in the United States in so far as these regulations can be reconciled with it. These regulations did not in fact absolutely prohibit the exportation of the commodities to which they applied. Such exportation was subject to a license to be granted by the War Trade Board. The right of the United States to require a license cannot be doubted. Such a measure appears as entirely justified for the purpose of controlling the export of commodities from the United States, and the fact that a license might be refused in no way excludes the possibility that a license would be granted in a proper case especially in one in which it appears that the applicant was entitled to such license under a treaty.

C.

On November 24, 1917, the Swedish Minister at Washington, wrote to the Department of State (SW App., p. 102):

"The Swedish Government has been informed that the American authorities are refusing to allow the Swedish motor ship *Kronprins Gustaf Adolf*, at present at New York, to proceed from that port without export license for some 300 tons of bunker oil, carried on board of the ship on its arrival to America, such license only to be granted on conditions set forth in the regulations for obtaining license for bunker coal in the United States, which have recently been promulgated.

The same difficulties of obtaining permit to leave an American port the Swedish motor ship *Pacific* at present at Newport News, also is reported to have encountered.

The Royal Government considers it most likely that in applying the American export regulations to the bunker fuels in question which have been on board of the ships already at their arrival to America, the American authorities have overlooked the essential facts of the case.

In this connection I beg to respectfully refer to the Swedish American treaty of 1783, Art. 17, according to which Swedish property is exempted from every kind of embargo or detention in the United States and to the treaty of 1827, Art. 12, according to which goods on board of a Swedish vessel in an American port, which is not unloaded there, does not come within the American customs regulations but is free to be carried further to any other country.

I also take leave to refer to the declaration of policy published by the Exports Administrative Board in the Official Bulletin on October 5, last, which seems to clearly indicate that the regulations regarding coal

for neutral vessels in American ports have no bearing on cases of the kind cited where no coal or other fuel is required from the United States.

In accordance with instructions received from my Government, I, therefore, have the honor to draw your Excellency's attention to this matter and ask for your kind intervention in order that the said ships may, as soon as possible, be allowed to proceed on their journey without any license for their bunker oil, or, if for technical reasons such license is required, that such be given without delay and unconditionally."

On January 24th, 1918, the Department of State replied as follows (SW App., p. 103):

"I have received your note of November 24th, last, complaining that American authorities are refusing to allow the Swedish motor ship *Kronprins Gustaf Adolf* to proceed from the port of New York without an export license for some three hundred tons of bunker oil carried on board the ship on its arrival in America, and pointing out that the same difficulties exist in the case of the Swedish motor ship *Pacific*, which desires to leave Newport News. In this relation you refer to Article 12 and Article 17 of the Swedish-American treaties of 1783 and 1827 respectively, under which, you state, Swedish property and Swedish vessels are free from embargo or detention.

I have delayed answering your communication in order that the question, involving, as you indicate, the interpretation of two treaties with your country might receive the careful and considerate attention which it merits at the hands of this Government. I am now in a position to state, in reply to your communication, the view of this Government on the facts of these cases, as understood by me, that the two articles of the treaties mentioned have no application to the delay caused to the *Kronprins Gustaf Adolf* and the *Pacific* on account of difficulty in obtaining export license. Inasmuch as the Government entertains this view, which has been arrived at only after thoughtful consideration, I am, as you will appreciate, under the necessity of requesting that these vessels, and others in like cases, comply with the regulations of the Government for the control of commodities exported from or taken out of the jurisdiction of the United States."

This reply gave rise to the following note of the Legation of Sweden, dated January 30, 1918 (SW App., p. 104):

"I note that the State Department does not consider that article 12 and article 17 of the Swedish-American treaties of 1783 and 1827 respectively have any application to the delay caused to these vessels, as outlined in my note of November 24, 1917. In view thereof, I should be greatly obliged if Your Excellency could find it opportune to indicate to me how the State Department interprets the articles in question, no indication in that respect being given in the note under acknowledgment, and the State Department's understanding of them apparently being quite the opposite of ours."

On the same day the Legation submitted to the Department of State for its information copy of the telegram which it had received in the matter from the Johnson Line. This telegram, which bears the date of

January 19, 1918, reproduces a cablegram sent to Mr. Ekström and concludes as follows:

"Kindly make representations to American Government order either get charter for *Pacific Gustaf Adolf* confirmed or permission for these vessels proceed home in ballast" (SW App., p. 105).

On April 30, 1918, the Legation called attention to its notes and requested an answer (SW App., p. 106).

The answer of the Department of State, June 26, 1918, runs as follows:

"I have received your note of April 30th last, acknowledging the receipt of a communication expressing this Government's decision, reached after the most careful and thoughtful consideration, that Article 12 and Article 17 of the Swedish-American treaties of 1783 and 1827, respectively, had no application to the delay in American ports caused to the Swedish motor ships *Kronprins Gustaf Adolf* and *Pacific* on account of difficulty in obtaining export license for quantities of bunker oil carried on board the ships on their arrival in America. In this relation you state that the Swedish Government's view concerning the application of the articles of the treaties in question is the opposite of that held by this government, and you ask, accordingly for a statement of the reasons for the apparent difference in the interpretation of the treaty stipulations by the two governments in this case.

I have the honor to state, in reply to your communication, that Article 17 of the Swedish-American Treaty of 1783, while forbidding both the laying of an embargo and the detention of ships, vessels or merchandise in general 'by seizure, by force or by any such manner', does not appear to place the United States under obligation to refrain from applying general regulations for the control of commodities exported from or taken out of this country to the Swedish motor ships in question.

An embargo has been defined by M. Calvo, as you are informed, as a prohibition of leaving generally applied to merchant ships, and usually imposed in order that the ships may be employed in the service of the nation laying the embargo, or that they may hinder and obstruct the operations of the enemy. You will not fail to perceive, therefore, that no embargo has been laid upon the ships *Kronprins Gustaf Adolf* and *Pacific*. Moreover, this Government has not prohibited the sailing of the ships in question, nor has it prohibited the exportation of the bunker oil which they carried. It has merely required, for reasons which will readily occur to you, the licensing of all commodities desired to be removed from the jurisdiction of the United States. The law on this subject makes no distinction between the exportation of an article of commerce and the taking out of an article which has never been entered at a customs house of the United States and never left the ship on which it came into the territorial waters of this country. It is obvious that there is a wide distinction between necessary compliance with the licensing regulations of the United States relating to articles of commerce exported or taken out of the jurisdiction of the United States, and detention, 'by force, by seizure or by any such manner', under Article 17 of the Treaty of 1783.

I have the honor further to state that this Government after careful consideration of the provisions of Article 12 of the treaty of 1827, is

constrained to the opinion that no part of this article can be considered to have been intended to apply to cases such as those of the two ships in question, and that a construction of the several provisions of the article makes it appear that the provision according to vessels the privilege of freely departing refers to departure free of a duty on that portion of the cargo not landed, and not to departure free of commercial regulations, quarantine regulations, port charges and similar restrictions. This construction is made more certain by the fact that the subject of port charges appears to have been dealt with independently in the concluding provision of the same article.

In conclusion I may add that it is understood that certain of the co-belligerents of the United States in Europe having similar treaties with Scandinavian countries, negotiated a century or more ago and intended to cover situations then in contemplation but quite different from those presented by present day conditions of commerce and shipping, do not regard them as applicable to cases similar to those under discussion."

D.

1. To begin with the Swedish note of November 24, 1917. It has been said by the American side that the request ought to have been addressed to the War Trade Board; that the Department of State was not the proper authority to receive such an application; that the note could only be considered as asking the good offices of the Department. This objection cannot be sustained. There is no doubt that, for the Swedish Government, the only way to intervene on behalf of a Swedish subject claiming a right under the Treaty was for the Swedish Minister to make a representation addressed to the Secretary of State in the form of a note, as it was most correctly done. The Minister of Sweden could not apply to the War Trade Board. His request could only be lodged in the hands of the Secretary of State, and he was fully entitled to ask from that official that the Treaties in force be complied with by the proper American authorities.

As far as the note referred to bunkers which the two boats had on board when entering an American port, the request of the Legation was entirely justified. In the light of the decision given by the Court of Claims the War Trade Board was not in a position to require a license for such bunkers, or if such a license were applied for it had to grant it unconditionally. It is noteworthy that the Swedish Legation accepted the possibility of a license being required for technical reasons, while later the Court of Claims denied to the War Trade Board even the right to require such a license. However, the Swedish note was based on insufficient information about the real facts and it did not cover the whole ground of the case. The Johnson Line and the Swedish Foreign Minister had not been informed that about 200 tons of Diesel oil had been discharged at New York and had been sold and delivered to an American firm in that city. It is probable that the relevancy of the fact completely escaped the attention of Mr. Ekström, who considered that no material change had taken place in the quantity of the fuel oil brought by the *Kronbrins Gustaf Adolf*, but on the juridical ground on which the case stands there is no doubt that, as a consequence of the sale, the oil in question had become the property of an American firm and when the same, or rather a slightly larger quantity of oil, was again loaded on the ship, that that was an amount of bunkers directly taken out of the United States at a time when the export proclamations were in force.

Moreover, the Swedish note left out all reference to the ship's stores and supplies which had likewise been taken out of the United States and loaded on the ships. Here again it appears that the Swedish authorities were not fully informed as to all aspects of the case, and that is shown in particular by the fact that the note, which purported to enumerate the provisions of the Treaty relied upon, does not mention Separate Article 5, which was precisely the provision which should have been quoted in the first place. In the discharge of his task the Arbitrator cannot disregard these facts for the sole reason that no importance was attached to them at the time. For him the question remains whether the Johnson Line was entitled to claim what was asked in the Swedish note if, at the time, no application had yet been made for all the bunkers and commodities which were on board the ships and had been taken out of the United States. This question remained unsettled even after the Swedish note of November 24, 1917.

In the light of these considerations the two provisions of the Treaty of 1783 relied upon in the Swedish note do not appear to cover the whole ground of the problem under discussion.

As already seen, Article 17 of the Treaty of 1783 provides that: "Merchants, masters and owners of ships, seamen, people of all sorts, ships and vessels and in general all merchandises and effects of one of the Allies or their subjects, shall not be subject to any embargo nor detained in any of the countries, territories, islands, cities, towns, ports, rivers or domains whatever, of the other Ally, on account of any military expedition, or any public or private purpose whatever by seizure, by force or by any such manner."

However general the terms of this Article, it has not been contended that they were intended to apply to any merchandise in any part of the territory of one of the signatories which belonged to a national of the other signatory. If one of the contracting parties decides to prohibit the exportation of goods, Article 17 does certainly not mean that this prohibition may not include goods, in any part of the territory of the prohibiting State belonging to subjects of the other State. Article 17 is rather to be understood as applying to vessels of the one State lying in any port of the other and to merchandise on such vessels.

Furthermore, as previously observed, Article 17 contemplates and prohibits the embargo or detention of ships, together with what they have on board, but it does not impose on one of the signatories the obligation of enabling the ships of the other to sail. The contention which has been raised by the Swedish side that Article 21 of the Treaty of 1783 could be relied upon in the case of the *Kronprins Gustaf Adolf* has already been disposed of and need not be further considered here. Nor does Article 17 affect the liberty of either signatory to make, respecting navigation and commerce, such regulations which it may deem fit. In this respect the preamble of the Treaty of 1783, though formally no longer in force as such, remains effective and Article 1 of the Treaty of 1827, which guarantees to the nationals of one signatory the most complete security and protection in their mercantile transactions, subjects them to the obligation of submitting to the laws and ordinances of the other signatory. A similar provision is to be found in Article 11 of the same Treaty.

It follows therefrom that the prohibition to export goods issued by one of the signatories is not contrary to Article 12, even if it actually has the effect of preventing the departure of ships of the other signatory, because such ships cannot navigate without some of the said goods. For the same reasons Article 17 cannot be relied upon against the regulations which

subjected to a license the exportation from the territory of the United States of the commodities enumerated in the proclamations.

Article 12 of the Treaty of 1827, which is also relied upon in the Swedish note, deals with ships entering the port of one of the contracting Parties for the sole purpose of unloading a part of the cargo. It provides that duties, imposts or other charges legally due can only be claimed for that part of the cargo which is thus discharged. No such duties, imposts or charges are due for the remaining part of the cargo which does not leave the ship; and with that remainder the ship may freely depart for other ports or proceed to any other country, due reserve being made for the duties, imposts or charges whatsoever, which are or may become chargeable upon the vessels themselves.

This Article 12, which, as any other provisions of the Treaties concerned, is to be understood and applied within the limits of the terms therein employed, alone governs the question of duties, imposts or charges on the cargo brought by the ships. It has no application to goods and commodities taken out of the territory of the State whose port is entered.

2. The note of the American Government of January 24, 1918 (SW App., p. 103) refers exclusively to the two provisions mentioned in the Swedish note and which, in the opinion of the Department of State, have no application in the case of a delay caused by difficulty in obtaining an export license. It concludes with the request that the two vessels and others in like cases comply with the regulations of the Government for the control of commodities exported from, or taken out of, the jurisdiction of the United States.

The general terms thus used by the Department of State leave open the question as to how far the contention of the Department went with regard to goods subject to license.

The second American note of June 26, 1918 (SW App., pp. 107, *et seq.*), seems to indicate that, in the opinion of the Department of State, the law and the proclamation applied also to goods brought by ships on arrival in the United States and kept on board by them. In the said note the Secretary of State contended in support of his view that Article 12 of the Treaty of 1827, on which the Swedish note of November 24, 1917, had relied, merely relieved the ships from the obligation of paying duties, imposts or charges on the part of the goods which they had on board on entering a port and did not unload there, and that it did not relieve the ships from the commercial regulations, quarantine regulations, port charges and similar restrictions. The Secretary of State added in the said note that this construction "is made more certain by the fact that the subject of port charges appears to have been dealt with independently in the concluding provision of the same article". (SW App., p. 108.)

It is certain that Article 12 in no way deals with other regulations than those relating to duties, imposts or charges and that other regulations must be considered as reserved, but, as far as the note of June 24, 1918, interpreted Article 12 in favor of the contention that the merchandise coming on a Swedish ship and remaining on board could be subjected to an export prohibition, it was not justified.

The words in Article 12 "they may freely depart with the remainder" ("ils pourront s'en aller librement avec le reste"), which are quite general, cannot be restricted by what follows. If the framers of the Treaty had the intention of stipulating merely that the ships would be free from duties

imposed or from charges for the part of the cargo not unloaded, they would have chosen more appropriate words to give expression to this intention. They might have said that the ships concerned would not be subject to any duties, imposts or charges. It cannot be said that the words "they may freely depart" have no other meaning than that of an exemption from the said charges, and if Article 12 is read together with Separate Article 5 of the Treaty of 1783, it appears that, in the meaning of the Treaties, merchandise brought by the ships of one of the States concerned and remaining on board the ship cannot be considered as being subject to an export prohibition imposed by the other for goods taken from its own territory.

But, as already mentioned, the American note of January 24, 1918, in its general and comprehensive terms, also included the goods which were taken from the United States by the two ships and as far as it covered this ground, it is not possible to deem contrary to the Treaties, even in the light of Separate Article 5 of the Treaty of 1783, the request "that the vessels comply with the regulations of the Government for the control of commodities exported from or taken out of the jurisdiction of the United States". It has not been contested that in those terms the Department of State distinctly pointed to the necessity for the Johnson Line to make application, i. a., for a license as to the goods and commodities taken from the United States and loaded on the two vessels, and here arise several questions which deserve close consideration.

These are:

(a) Whether, with regard to goods obtained in the United States, but already loaded on a Swedish ship, Separate Article 5 of the Treaty of 1783 can be considered as excluding the right of the American Government to demand compliance with the regulations requiring the application for a license for the said goods;

(b) If not, whether the Swedish note of November 24, 1917, may be considered as relieving the Johnson Line from the obligation to make such an application, or as itself constituting the said application;

(c) If not, whether the proper application or applications had already been made at the time;

(d) If not, whether the Johnson Line can rely on the contention that the steps required as to a license were, in fact, without any chance of success in the light of the policy followed by the War Trade Board, and were, therefore, as futile as an application for clearance.

These four points are now to be considered separately:

a. At the hearing counsel for the Government of Sweden, when dealing with the question of stores (Record, p. 2235), contended that, by virtue of Separate Article 5 of the Treaty of 1783, the stores once loaded were freed from the regulations requiring an export license. The American authorities, it was said, took an erroneous view when they relied on their right to require a license before clearing the vessels. From the moment when, without any hindrance on their part, the goods had been loaded, that right had gone, as a consequence of said Article 5; the more so, since, on board, the goods loaded were henceforth mixed up with those which the ships had brought in and for which no license could have been required.

This contention is not supported by the Espionage Act and the Export Proclamations, which, as already observed, apply to all articles therein

mentioned. As far as it relies on Separate Article 5, it goes too far and cannot be accepted. Apart from the reasons already given hereabove, the said contention, which, obviously, could not be asserted solely for the present case, implies a general rule according to which regulations, imposing and making of an application for a license might be avoided and validly disregarded in all cases where, owing to the provision of a treaty, the said license must have been granted. Such a rule, the wide scope and the far-reaching consequences of which are immediately discernible, cannot be laid down, and it is noteworthy that the Swedish note of November 24, 1917, did not object to a license, if such be required for technical reasons, even for the vessels' "own bunkers", but rather claimed that the license be granted unconditionally.

The general rule that limitations imposed by a treaty on the natural liberty of a State are to be strictly interpreted applies with special emphasis to provisions of so exceptional a nature as those of Separate Article 5. This article stipulates that, once on board, merchandises, the export of which is forbidden, can no longer be stopped; that neither the subjects nor their merchandise shall be seized or molested, and that no embargo can be laid on the ships on account of the said goods. It does not go further, and does not allow any inference beyond its strict terms. An inference within its terms is that a license for the said goods would have to be granted, for the refusal thereof would amount to stopping the merchandise and detaining the vessel. For this reason, in the opinion of the Arbitrator, the license, when properly applied for, would have to be granted. From what has been explained at the hearing and is supported by documents in the record (Instructions given by the Bureau of Transportation of the War Trade Board), it appears that no hindrance was laid in the way of the buying and loading of supplies, but that the vessel concerned had to secure a license for the same at the time of sailing. It may be assumed that this policy was adopted because, as long as the ships remained in port, provisions were consumed and new supplies taken, so that the real status as to stores to be exported could not be accurately ascertained before the time of sailing. But, whatever the reason for the said policy, it has not been contended that the agents of the Johnson Line had been left ignorant thereof. As early as July 14, 1917, Mr. Dean, an attorney in New York for the Johnson Line, had been informed that "export licenses will be required covering shipments of any articles on the list mentioned in the President's proclamation". (US I, p. 162), and the same information is alluded to by Mr. Ekström in his letter to his principals of October 10, 1917 (SW III, p. 82).

In other words, the loading of the goods, which might have been "stopped on the spot before they are embarked" (Separate Article 5), was permitted with the understanding that a license remained necessary at the time of sailing, and this requirement was not contrary to the said Separate Article 5. Nor can it be disregarded because of the alleged intermingling with the goods brought into the United States, as there was no impossibility of ascertaining what had been loaded and was still on hand at the time of the application.

On the contrary, it was proper to give the necessary particulars as to the goods on board subject to license, since the fact that they were already on board was precisely the only reason for which the application was entitled to succeed. Lastly, it cannot be said that to require an application for a license amounts to "molesting" the person or goods concerned. The word "molested" in Article 17 of the Treaty of 1783 contemplates an action taken

against the said person or goods because of the fact that these goods were taken on board. It does not apply here.

b. Nor can it be said that the Swedish note of November 24, 1917, which undoubtedly formulated a request under the Treaties of 1783 and 1827, might be considered as a proper application for an export license made on behalf of the Johnson Line.

The object of the note was limited to what it calls "the ships' own bunkers", meaning thereby the bunkers which they had brought with them to the United States. As to these, it requested that no license be required, or that, if required for technical reasons, such license be unconditionally granted. Within these limits the request was justified. But, owing to incomplete information, it did not cover the whole case. Part of the bunkers on board the *Kronprins Gustaf Adolf* had been bought in September, 1917, from an American firm in New York and taken out of the mass of goods in the United States. The fact that it corresponded more or less to what had been previously discharged from the vessel is immaterial. From the juridical point of view, which is here controlling, the Diesel oil discharged in July had been sold to an American buyer in New York and had become American property. The slightly larger amount which was bought from the same American firm in September was not identical with what had been discharged, and, even if it had been so, it was, now, nevertheless, a commodity taken out of the United States.

Besides, there were stores and supplies which were likewise taken out of the United States and which the Swedish request did not mention. More particularly, there is no reason why the application required by the regulations could have been at the time validly superseded and made superfluous by a diplomatic note. Nothing had yet been decided by the American authorities on an actual application by Mr. Ekström. The latter merely relied on what had been said to him as to the conditions to be imposed with regard to the bunkers of the *Kronprins Gustaf Adolf*.

From the letter of Mr. Johnson to the Swedish Foreign Minister (SW App., pp. 156 *et seq.*), it appears that Mr. Johnson considered the matter as a threat of future danger, which, in his opinion, was immediately to be met by preventive action, and his foresight extended to the possibility of a similar danger to the *Pacific*, which was not mentioned in the telegram received by him. The Swedish note was rather an effort to ward off this danger. It did not obviate the taking of proper steps by the Johnson Line under the regulations. In this respect reference may be made to the case cited in the Swedish note of June 16, 1927 (US I, p. 747), and commented upon by J. B. Moore in his "Digest of International Law", Vol. II, p. 1035. In that case the facts were the following:

On May 16, 1896, the Governor General of Cuba had issued an executive order prohibiting, while the abnormal conditions then existing in the island continued, the export of leaf tobacco produced in two provinces of the island, except to Spain. A term of ten days from the date of the order was allowed for the exportation of tobacco previously contracted for; but after the expiration of that term no permits for shipments were to be issued. On hearing of the order, the Government of the United States immediately requested from the Spanish Government an extension of the term of ten days for the exportation of tobacco owned or contracted for by citizens of the United States, at the same time stating that the order was understood to apply only to leaf tobacco contracted for by American citizens. but which

had not yet become their property by delivery and payment of the price; tobacco which had become their "actual property" being "protected from detention by the first clause of Article 7 of the Treaty of 1795".

It need not be considered here how far the treaty relied upon applied in that case. What deserves notice is the telegram sent on May 22, 1896, to the American Minister in Madrid by the Secretary of State, who distinctly says:

"Without any modification of ordinance as issued, why may not Cuban authorities be instructed to receive proof through consul or consul-general of the *bona fide* ownership of tobacco by United States citizens prior to ordinance and such proof being furnished to permit exportation as heretofore."

(Foreign Relations of the United States, 1896, p. 685.)

This passage clearly shows the position taken by the American Government and the steps to be taken by its nationals in conformity therewith.

In the case here quoted claims appear to have been actually filed by American citizens with the Spanish authorities. They were rejected by the Governor-General, who forwarded his decision to Madrid, where, again, no relief was granted (Moore, p. 911).

The situation in 1917 was quite analogous, and the Swedish note could not, and did not, pretend to relieve the owners of the two ships from the obligation of complying with the regulations in force, as far as what they prescribed (i.e. an application for a license for the commodities taken from the United States) was not contrary to the Treaties between the two countries.

If the opposite view had been taken by the Swedish Legation, it would most probably, in reply to the American note of January 24, 1918, have drawn the attention of the Department of State to the fact that, the matter being now in the hands of the Government of Sweden, a regular application was no longer necessary and was to be considered as superseded by the diplomatic interposition of said Government.

These considerations lead to the conclusion that the Swedish note of November 24, 1917, was not, and was not meant to be, the application for a license required by the regulations in force and that it did not have, nor was it meant to have, the effect of relieving the Johnson Line from the necessity of complying with the regulations as far as they were not contrary to the Treaties, i.e., as far as they simply put the Johnson Line under the obligation of making an application for the bunkers and other goods on board the ships which had been taken out of the United States since July 9, 1917.

c. Next comes the question whether, at the time when the ships intended to sail, the proper applications covering these commodities had, in fact, been made. In 1917 Mr. Ekstrom had applied i. a. for 900 tons of Diesel oil (US I, p. 143) and in a letter of August 1, 1917 (US I, p. 141), he had explained that this included (the discrepancy as to the real quantities being here left out) what had been discharged and sold as a consequence of the drydocking of the vessel. The application for 900 tons was renewed on August 6, 1917, without the explanation here referred to. With regard to other bunkers and ship's stores generally, an application for 50 barrels of lubricating oil was made on July 14, 1917 (US I, p. 142), and for ship's stores (US I, pp. 139 and 140) on August 3, 15, and 24, 1917; the latter including separately in two lists the stores and provisions for the home voyage to Sweden and those for a subsequent outward voyage. The applications

concerning the *Kronprins Gustaf Adolf* and made in July and August, 1917, have been mentioned hereabove (p. 1269).

On October 8, 1917, Mr. Hayden, attorney for the Johnson Line in Washington, made an application for stores said to be necessary for the voyage then contemplated of the *Pacific* to Savannah and which, in fact, did not take place (US I, pp. 167 to 169).

It has already been seen that no hindrance was put in the way of the loading of provisions or supplies, but that a license for what was left of them at the time of sailing was to be secured then. In their affidavits (SW II, pp. 30, 38, 40) the masters of the two ships state that throughout the time in question they had no difficulties in purchasing all the foodstuffs that were necessary for use on the vessels. This has been confirmed at the hearing when it has been shown (Record, pp. 2241 *et seq.*) that throughout the period in question important sums were paid each month for supplies bought and taken on board and that in this respect the vessels were well provisioned.

The obligation to comply with the regulations requiring an application for bunkers, ship's stores and supplies which were taken from the United States was not dispensed with by Separate Article 5 of the Treaty of 1783. In the light of this provision the application, if made, was entitled to favorable action, but obviously it could only cover what was actually on board at that time. With regard to both ships it has been seen that in November, 1917, negotiations for cargoes under Belgian Relief charters were pending and that such charters were in fact signed on December 11-13, 1917 (SW App., pp. 162 *et seq.*). At that time there was yet no question of having the ships sail in ballast and Mr. Ekström's letter of January 9, 1918, shows that this last resort was not thought of prior to the said month.

Meanwhile supplies had been loaded on the two ships at different times, and considering the months which had elapsed since the above-mentioned application, the consumption of provisions during these months, and the successive loading of other supplies, it is impossible to say from a legal point of view that the provisions on board the ships at the time when the Johnson Line actually decided that they should sail were those for which applications had already been made in July, August and October, 1917, and were those already covered by the said applications.

d. While admitting that the note of January 24, 1918, pointed out that a license should be applied for, counsel for the Kingdom of Sweden contended that this was no answer, because, at the time when the note was received, the way thus shown was barred by decisions of the American authorities which excluded the very possibility of making an application, and made such a formality appear as entirely futile.

This important point is to be considered

(aa) in connection with a point raised by the American side, namely that applications for clearance should have been made for both vessels, and

(bb) in the light of the rules and regulations issued by the War Trade Board.

(aa) At the hearings, as well as in the note of June 13, 1928, the United States laid great stress on the fact that no application for clearance for either vessel was made to the Collector of Customs, the proper official under the law. This objection is of undeniable weight. A claim for damages asserted by a government on behalf of a national cannot rest on mere

declarations of intentions or of policy on the part of the authorities. The proper foundation for such a claim is an act, a decision taken with regard to such national and of a nature incompatible with his treaty rights.

In the present case, the claim is based on the alleged detention of the *Kronprins Gustaf Adolf* and the *Pacific*. Detention means that departure was not permitted. According to then existing United States statutes, an application for clearance was to be addressed to the Collector of Customs of the port. The anticipation of a refusal, however justified, cannot be accepted as relieving one from the obligation of making the application. On the contrary, the application is the proper way to call forth the decision of the official concerned and, in case of refusal, to give the proper foundation for a claim. Thus, the claim of the Dutch ship *Zee-landia* was heard by the Court of Claims because clearance had been properly asked for this vessel and refused by the Collector of Customs.

On behalf of the Swedish Government it has been argued that, as a matter of fact, the control of the departure of ships was in the hands of the War Trade Board, that clearance could not be obtained without a license granted by the said authority for all goods on board and that, under the rules adopted by the Board, such a license could not be secured. The record shows that, even before February 1, 1918, the War Trade Board exercised an effective control over the clearance of ships, and this control is evidenced by the regulations hereafter mentioned which became effective on that day. But, for a claim based on alleged detention, this in no way affects the necessity of obtaining, from an American authority, an actual decision concerning the very ships in question and resulting in their detention. To give such a decision with regard to the departure of vessels was the duty of the Collector of Customs. There was but one way which would have enabled the Johnson Line to overcome the objection based on the fact that no application for clearance has been made. This was to show that a proper application had been made to the War Trade Board for the goods concerned and that this application—though properly made under Separate Article 5 of the Treaty of 1783, under which it was entitled to have it granted—had been rejected or unduly delayed. Such a decision might actually have effectively barred the way to clearance, but it had to be asked from the War Trade Board, and the stringent rule here laid down cannot be escaped by the sole contention that the rules of the War Trade Board excluded, in fact, any chance that such an application might be favorably received. In support of this contention reference has been made, by the Swedish side, to communications issued by the War Trade Board.

The first document relied upon in support of this contention is the form letter addressed by the War Trade Board to Mr. Ekström on November 1, 1917 (SW App., p. 188), a second copy of which was sent to him on December 5, 1917 (SW App., p. 190), stating that "pending current negotiations, no licenses are being granted at the present time for shipments to Holland, Denmark, Norway or Sweden. Accordingly, all applications now on file for licenses to export to these countries are being returned to the applicants, and the Bureau of Exports will not receive additional applications until further notice."

The question is as to what was meant by the Board, and what was understood by the representative of the Johnson Line, by the word "shipments" in the said letter. This word, as it has been explained at the hearing, may include in a broad sense whatever is loaded on a vessel, but may also have more limited meaning. Its real meaning in the form letter is rather to be

inferred from the evidence. The letter of November 1, 1917, replied to an application for a cargo of bicarbonate of soda (US I, p. 170). The letter of December 5, 1917, replied to a letter of Mr. Ekström of December 3, 1917, requesting a decision on his application for the cargo of nitrate aboard the *Pacific* (see SW App., p. 189).

It is doubtful whether the letter of November 1, 1917, was understood by Mr. Ekström as including bunkers and ship's stores. If that had been the case, so important a fact would certainly have been reported by him to the Johnson Line and by Mr. Axel Johnson to the Swedish Foreign Office. It would also have been noted by Mr. Nordvall, who, in consequence of the telegram of the Swedish Foreign Minister to the Swedish Legation, had a conversation with the War Trade Board and who, on November 9, 1917, wrote to Mr. Ekström (SW App., p. 143) that an application would be necessary for the bunker fuel on board, but who made no mention whatever of the fact that, owing to a general ruling, no such application would be received. Nor does any mention of the said ruling appear in the Swedish note of November 24, 1917, and, if it had been understood on the Swedish side that no application could possibly be made, that fact would certainly have been called to the attention of the Secretary of State, when in his note of January 24, 1918 (SW App., pp. 103-104), he requested the Johnson Line to comply "with the regulations in force for the control of commodities exported from or taken out of the jurisdiction of the United States", thus pointing out that an application should be made for what was on board the ships. In fact, this request would have been—as it has been described by the Swedish side—a mere play on words, but, when applied to a State paper, such a charge requires further substantiation, if it is to be allowed.

Lastly, Mr. Ekström would hardly have written his letter of January 9, 1918 (US II, p. 365), if he had understood that no applications whatever were being entertained by the War Trade Board.

With regard to "bunker oil", two documents were relied upon by the counsel for Sweden in support of the contention that the way was barred for an application for a license covering what was on board the vessels. The first is a memorandum in which, on September 18, 1917, Mr. L. L. Richards, who had assumed charge of the control of bunkers, makes clear his position to the War Trade Board, whose wishes and intentions "he had the greatest difficulty to interpret and understand". (US II, p. 435.) There Mr. Richards states that "the collectors of customs are authorized to grant licenses for bunkers and ship's stores in reasonable quantities except for vessels destined to Norway, Sweden, Greece, Denmark and colonies, possessions and protectorates and except Holland proper and except Norwegian, Swedish, Danish, Dutch and Spanish ships, regardless of destination. All other applications are referred to us here." He adds that he would not grant licenses for "steamers bound to any of the northern neutral countries excepting few cases in which I am informed by Mr. Van Sinderen the cargo has been especially licensed".

A similar decision appears to have been already made on September 14, 1917, pending the final adoption of definite bunkering conditions (US II, p. 438), but there is no evidence that these decisions applied to bunkers already on board the ships concerned. On the contrary, it is almost obvious that they referred to bunkers yet to be delivered, as it is shown by the communication of the War Trade Board of October 5, 1917 (SW App., p. 72), alluded to in the Swedish note of November 24, 1917, and which refers to bunkers to be granted, and not to bunkers already on board.

In fact, the information communicated to the Johnson Line by Mr. Ekström's telegram of the end of October, 1917, appears to emanate from an oral communication by a member of the War Trade Board, and it was a similar conversation which is referred to in Mr. Nordvall's letters to Mr. Ekström of November 9, 1917, and November 21, 1917 (SW App., pp. 143 and 145). As already mentioned above, it is more than doubtful that a claim for damages such as the present may be properly built up on a mere oral ruling. This would mean that an oral intimation by an official as to how he will act in a case has the effect of dispensing with the procedure validly prescribed and the making of applications properly required by regulations in force. Such a rule, which could not but be of a general character, would lead to consequences which immediately show that it cannot be adopted and unreservedly applied. The communications relied upon by the Swedish Government as to the policy and the intentions of a Board may properly call for a protest and entirely justify a note, as that of November 24, 1917. But they cannot do away with the procedure prescribed by the regulations in force. The belief that an application will meet with a refusal cannot be considered as a just and sufficient reason for not making that application according to the regulations, distinctly pointed out, as was done in the American note of January 24, 1918. However natural such a belief may have been in the light of the above-mentioned circumstances, it cannot amount to positive evidence as to what the War Trade Board would have decided ultimately, especially if the application had, as might have been desirable and helpful, called attention to Separate Article 5 of the Treaty of 1783. Should an application, properly made pursuant to the regulations in force, have met with a refusal, or the issuance of a license been based on unacceptable conditions, then the Johnson Line, and, on its behalf, the Swedish Government, would have had a case against the United States, on the strength of the above-named Separate Article 5. Failing an application, it is impossible for the Arbitrator to base his decision on the fact that there were reasons to believe that an application, which was not made, would have been denied.

The same considerations dispose of any inference which may be drawn from the attitude of the War Trade Board towards the Dutch ship *Zee-landia* as showing that an application, even if properly made, would have been rejected. A claim for damages presented by a government on behalf of one of its citizens cannot be based on what has been done in other cases in connection with subjects of a third State. It must rest on actual decisions and measures taken with regard to its own national.

There remain to be mentioned the rules and regulations issued by the War Trade Board in force from February 1, 1918. These rules, which have been printed in the Appendix to the Case of the Kingdom of Sweden, pp. 74 *et seq.* (see also US I, pp. 282 *et seq.*), are too long and detailed to be reproduced here *in extenso*. The War Trade Board declared that licenses would only be given subject to certain conditions stated at length. To some of these conditions the Johnson Line was entitled to object, the more so since, under Separate Article 5 of the Treaty of 1783, the license for the goods on board the *Kronprins Gustaf Adolf* and the *Pacific* was to be granted unconditionally. In this respect it was rightly observed, in the Swedish note of June 16, 1927 (US I, pp. 246 *et seq.*), that "the treaty can hardly contemplate that, as a condition of any one right granted therein, either contracting party may require the waiver of any other right granted".

But the considerations mentioned above apply also here. Even in the light of the new regulations, it cannot be said that they left to the Johnson Line no possibility of applying for a license and asking that it be granted without the conditions and undertakings stated in the regulations and communications issued by the War Trade Board.

Such an exemption has been, in fact, the subject matter of letters exchanged between Mr. Ekström and Mr. Munson concerning a cargo of rock phosphate to be loaded on the ships for Sweden (see Mr. Ekström's letters of February 6, 1918, and February 14, 1918, and Mr. Munson's letter of February 7, 1918, SW App., pp. 199-201). It could with still greater force have been claimed in an application limited to goods with regard to which Swedish subjects could, on the strength of Separate Article 5 of the Treaty of 1783, insist on receiving a license.

Such a request, drawn so as to comply with all those parts of the regulations which were not contrary to the Treaties, was entitled to approval under Separate Article 5. At any rate, there might have been a possibility of holding that it constituted, on the part of the Johnson Line, a compliance with the regulations in force as far as the United States Government had the right to impose them. If rejected, it could have been said to create the basis for a claim, thus giving the Johnson Line material with which to meet the objection resulting from the failure to make an application for clearance. In the light of the Treaties the material point was not the assumed inefficiency of the application here in question. It lay in the very fact of the application by which, complying with the regulations in force, the Johnson Line called forth the actual decision it was entitled to claim under the Treaties, with the effect that a refusal on the part of the War Trade Board could be described as barring the way to an application for clearance and constituting the contravention to the Treaties on which the claim for damages could properly be based.

These considerations apply also to the rules and regulations issued in May, 1918, as reproduced on page 74 of the Swedish Appendix.

X.

It remains now to be seen whether and, if so, at what date, the Johnson Line made the application which it has to show, and, more generally, what steps were taken on its behalf in order to ensure the sailing of the *Kronprins Gustaf Adolf* and of the *Pacific*.

As already mentioned, negotiations were on foot at the time for voyages of the two vessels for the Commission for Belgian Relief under what may be called here "Belgian Charters".

The negotiations appear to have been conducted in London and in Stockholm and it was in the latter place that on December 12/13, 1917, the Charter-Parties were signed, with additional documents, by the Johnson Line and by Mr. E. Sasse for the Commission for Relief in Belgium (SW App., pp. 162 and 174). In accordance with this contract Mr. Lundbohm, one of the Swedish delegates, handed to Mr. Munson of the War Trade Board on December 29, 1917, a list of the Swedish steamers in the United States and of the service in which they were employed. This list mentions the *Kronprins Gustaf Adolf* and the *Pacific* as "chartered for Belgian Relief" (US I, pp. 148 and 149).

After the conclusion of the Charter-Parties Mr. Ekström made repeated efforts to obtain from the Committee for Belgian Relief that they be carried out.

On December 17, 1917 (SW App., p. 213), he asked the said Commission for instructions permitting the vessels to proceed, the *Kronprins Gustaf Adolf* being ready to leave for her port of loading and the *Pacific* being discharged at Norfolk as a preliminary step to her getting ready to load. The Commission in New York answered, on December 18, 1917, that they had as yet no advice from the London office as to the chartering of the vessels. A new application of Mr. Ekström on January 8, 1918, met with the same reply and, though Mr. Munson, of the War Trade Board, was at the time not prepared to grant licenses for the necessary bunkers, there is no evidence to show that the negative attitude of the Commission for Relief in Belgium is to be ascribed to the American Government. In his letter of January 16, 1918, to Mr. Munson, Mr. Ekström writes that the Commission "now proposes to cancel the Charter-Parties owing to the fact the British authorities at present wish them to do so". The same information appears in the letter of January 18, 1918, of the Johnson Line to the American Minister at Stockholm (SW App., p. 176).

On January 19, 1918, the following letter was written by Mr. Ekström to the Johnson Line:

"I carefully note your instructions to claim demurrage from the United States Government on account of detention of this ship from the date she was ready to load. However, before following these instructions I took the liberty in giving you my opinion in the matter, hoping that this would alter your decision. I have come to the opinion, expressed in my cable of to day No. 40, after discussing the matter with Mr. Reutersward of the Swedish Legation and also United States officials during a visit in Washington yesterday.

As you are aware the Swedish Legation protested against the bunker proclamation in so far as *Kronprins Gustaf Adolf* was concerned and claimed that this ship should be allowed to leave United States free from the general stipulations, on the ground that she has brought her bunkers with her from Sweden. No answer has as yet been received to this request but I do not doubt that the United States authorities will consider the claim entirely justified. However, I understand it is in your interest that the ship should be allowed to leave with a cargo and not empty. As soon as a cargo has been arranged for the ship the authorities are in a position to stipulate that the cargo will be licensed only provided the ship that carries the cargo will guarantee to return to the States. So it was in the case of S.S. *Atland*, which brought the cargo of rye to Sweden.

Therefore, in order to establish a firm legal basis for a claim of demurrage you would have had to insist upon the vessel being allowed to leave this country empty, but even in such a case the United States Government could prevent her from leaving by refusing a new supply of stores and provisions.

In view of this, and considering that a claim for demurrage would not help us in our efforts to secure the good will of the United States Government, I advise against such action and I hope you will agree with me in this case."

It appears from this letter that Mr. Ekström had been directed by his principals to claim demurrage from the United States on account of the detention of the *Kronprins Gustaf Adolf* from the date she was ready to load. This claim is referred to also with regard to both ships in the said letter of the Johnson Line to the American Minister at Stockholm.

Before carrying out his instructions, Mr. Ekström wanted to give his principals his opinion on the matter, an opinion at which he had arrived after discussing the matter with a member of the Swedish Legation. This opinion was stated by Mr. Ekström in his cable of January 9, 1918, which is not in the record, but the contents of which may be accurately inferred from the letter of January 9, 1918, quoted above. Mr. Ekström objects to the idea of a return in ballast and advises that a cargo be arranged for the ship, even if the authorities should insist on receiving a guarantee that the ship would return to the United States before granting a license. With regard to a possible claim for demurrage, Mr. Ekström points out the necessity of first establishing a firm legal basis for the same and observes that for that purpose the Johnson Line should insist upon the vessel's being allowed to leave the United States empty. Even in such a case,—as he warns his principal,—the American Government could prevent a departure by refusing a new supply of stores and provisions. Concluding, Mr. Ekström advises against such an action and gives renewed expression to the hope that the Johnson Line will agree with him.

For the first time the question of sailing in ballast was thus clearly raised and in this connection it is convenient to recall that under the Treaties the American Government was under no obligation to allow either of the ships to load a cargo of goods taken from the United States; but that on the other hand, the Johnson Line had the right to demand that both vessels be allowed to leave in ballast and with such shipments as they had, without resorting to any fraudulent practices, already loaded, and provided that all American laws and regulations, not contrary to the Treaties, were duly complied with. In this respect Mr. Ekström understood that, in order to ensure the sailing, some formal action was yet to be taken.

It is probable that the letter of January 9, 1918, had not reached the Johnson Line in Stockholm when, on January 19, 1918, the latter sent by telegram the following instructions to Mr. Ekström:

Pacific Gustaf Adolf consider necessary make formal request to allow vessels go home empty with Diesel oil aboard as remaining alternative in case Belgian Relief not delivering cargo and United States not supplying the threehundredfifty tons bunkeroil each vessel according promises to Belgian Relief London before charters were signed. Consult your lawyer order get everything formally well put forward." (SW App., p. 149.)

At the hearing the Arbitrator has been asked by the Swedish side to disregard the attitude of Mr. Ekström and rely rather on what was the undoubted intention of Mr. Johnson. It is not possible to adopt that view. Mr. Ekström was the authorized representative of the Johnson Line in the United States. It may well be that he did not carry out the instructions of his principal, because, as was admitted by the Swedish side at the hearing, he himself considered the situation in another light and wanted to get cargoes for the ships. In considering a case of an international character like the present one, where he must determine whether the United States acted in contravention to the existing Treaties, the Arbitrator must, of course, rely

on what was done or not done by the representative of the Johnson Line in the United States.

It appears from the letter Mr. Ekström wrote the Johnson Line on February 6, 1918, that the Belgian Commission did not put into effect the Charter-Parties signed in December, 1917. He mentions a new proposal made by him and writes in this respect as follows:

"I consider that my proposal should be more to your advantage than if the whole matter should be brought to a standstill by making another formal request to the Authorities to allow the vessels to go home empty with the amount of Diesel oil they have on board now. Of course I have made a request to that effect previously but same has been refused and as said above the State Department does not take the view that our treaty with the U. S. justifies the request. I have several times pointed out to the Authorities the circumstances connected with these ships and although they have promised to be lenient in treatment of the vessels it is absolutely impossible to make them allow the vessels go home empty on account of the fact that it is so utterly scarce of tonnage and that they consider it to be a sin to waste tonnage in that way." (SW III, p. 92.)

There is no evidence tending to prove whether and, if so, how, Mr. Ekström made an application shown to have been necessary, and covering the goods obtained in the United States.

He states that he has made a request previously and also that he has pointed out to the authorities several times the circumstances connected with these ships, but the whole tenor of his letter leaves doubt as to what had actually been done. On the other hand, he shows himself disinclined to make another formal request "which would bring the whole matter to a standstill".

Considering that, during the whole period in question, any point raised was the subject matter of written communications, observations, suggestions, proposals or requests, clearly set out in writing, the complete absence of any writing embodying what the Johnson Line had directed Mr. Ekström to ask for is a fact which cannot be simply disregarded, the more so as it leaves unanswered the question as to the extent of the request, if made.

The same applies to the letter addressed to Mr. Munson by Mr. Dykman, one of the attorneys employed by the Johnson Line, on February 26, 1918 (US II, p. 474).

In writing that "permission has been refused the ships to take a cargo under charter to the Belgian Relief Commission and even to go home empty", Mr. Dykman refers to what he learned from Mr. Dean, another attorney acting for the Johnson Line, and the information thus merely given orally cannot be considered as sufficient evidence as to what Mr. Ekström had done.

On February 14, 1918, Mr. Ekström wrote the Secretary of State a letter in which he complained of the difficulties encountered by him in his endeavors to carry out the Belgian Charters. Mr. Ekström also added:

"One of the most important features in the policy adopted by the War Trade Board seems to be to force neutral ship-owners to sign the general bunker regulations effective on the 1st of February. The War Trade Board therefore refuses to let the two ships move until an undertaking has been given with regard to all vessels belonging to the Johnson Line. This is altogether unreasonable, for the Johnson Line has more

than fifteen ships lying in Sweden, which are not bound by any undertaking whatsoever, and on account of the treatment of the *M.S. Pacific* and the *M.S. Kronprins Gustaf Adolf* by the War Trade Board my principals naturally feel disinclined to enter into any agreement for the remainder of their vessels. On the other hand if the ships lying here are treated in a fair way it is no doubt that the Johnson Line will also employ those of their ships, which are now tied up in Sweden, partly for the benefit of the Allies.

On account hereof I hereby beg you to allow the ships lying in the States to proceed empty with the amount of fuel oil they had on board on arrival in the United States and that sufficient quantities of food-stuffs are allowed to be taken aboard the vessels in order to enable them to reach Sweden. I understand that such requests have been addressed to you by the Swedish Ambassador on the 24th of November, 1917, with reference to treaties existing between the United States and Sweden. I have also been informed that the State Department does not recognize those treaties as having effect on these two vessels.

However, there are also other factors than treaties to be taken into consideration, one of which is the rights of individuals which are deeply involved in this case. A refusal to allow two ships, belonging to a neutral owner, to use their own fuel for proceeding to their home country and to give the neutral subjects employed on board these same ships sufficient of food for reaching their home country would no doubt be a serious interference with the right of individuals.

My principals are still willing to execute the voyages for the Commission for Relief in Belgium described above and only the refusal of the War Trade Board to grant facilities for the execution of these voyages is the reason for their request to have the ships to go home empty to Sweden." (US I, pp. 200 and 201.)

Here again the question arises as to whether this letter might not be considered as constituting an application, sufficient in form and contents. Whatever may be thought of the "other factors than treaties", to which Mr. Ekström seeks to appeal, the Arbitrator must nevertheless decide this question strictly in accordance with the principles of law involved. In the light of the considerations already stated it cannot be said that the language of Mr. Ekström's letter, as it stands, obligated the War Trade Board to which (as appeared at the hearing) it was forwarded, to regard it as a definite and proper application for a license concerning the provisions taken on board, even while rejecting the demand for further foodstuffs, and to act forthwith thereon. Mr. Ekström himself, who throughout the period concerned had advocated the policy of obtaining cargoes, had presented his request as an alternative to the negotiations pending for the carrying out of the Belgian Charters. He continued negotiations for cargoes with Mr. Munson, after having been informed that his letter was in the hands of the War Trade Board, and also with the Commission for Belgian Relief, and he never referred later on to his letter, nor asked for a decision concerning the said letter. (SW App., pp. 201 *et seq.*)

XI.

It remains now to be seen whether at any later date the necessary application was made on behalf of the Johnson Line and for that purpose the

further events affecting the *Kronprins Gustaf Adolf* and the *Pacific* are to be examined as far as they may be relevant to the case.

On January 29, 1918, an agreement called *modus vivendi* was signed by representatives of the Allied and Associated Powers, by the Swedish Minister in London and by Mr. Chadbourne, a member of the War Trade Board (US II, p. 360).

On behalf of the United States Government it has been contended that by signing the *modus vivendi* Sweden waived any claim it might have had under the Treaties as to the *Kronprins Gustaf Adolf* and the *Pacific*. This view cannot be accepted. A renunciation to a right or a claim is not to be presumed. It must be shown by conclusive evidence, which in this case does not exist. On the contrary, on the very day following the signing of the *modus vivendi*, the Swedish Minister had requested the Secretary of State to indicate how the State Department interpreted the articles of the Treaties relied upon in the note of November 24, 1917, and he had also communicated to the Counsellor to the said State Department the telegram of the Johnson Line of January 19, 1918. This shows that the Government of Sweden did not, in any respect, waive the claim it had asserted and this view is confirmed by the further diplomatic correspondence.

The *modus vivendi* deals with a considerable number of separate points, but in the main its object was to provide Sweden with commodities which were bitterly needed in that country, against facilities granted by the Swedish Government for the use of Swedish tonnage by the Allied and Associated Powers. The relevant provisions relating thereto run as follows:

"2. 25,000 tons phosphate rock shall be permitted to be exported immediately from United States to Sweden.

3. Permission shall be given to export from United States to Sweden 10,000 tons illuminating oil—exclusive of 5500 tons to be exported from United States to Sweden in connection with the Christmas ships—and five thousand tons fuel oil.

9. It is understood that facilities for the importation and release of the above-mentioned steamers and goods will be granted without delay subject to clause 8 of the provisional Swedish tonnage arrangement as stated below.

10. Should the Swedish Government desire to utilize Swedish vessels now lying in North and South American ports which are subject to clause 3 of the provisional tonnage arrangement below to transport the commodities mentioned above permission to do so will be granted provided an equivalent amount of Swedish tonnage now in Sweden shall be simultaneously dispatched from Sweden to United States ports. In the event of any such vessels having left Sweden failing to arrive the vessel released from the United States in anticipation of her arrival will be required to return after discharged. Vessels arriving in United States ports under this arrangement shall be subject to the provisions of clause 3 of the provisional Swedish tonnage agreement below unless required for the transport of cargo to Sweden under this agreement in which case permission will be granted for their return to Sweden on the terms stated in the first sentence of this clause.

11. The Swedish Government agree to the terms of the provisional Swedish tonnage arrangement attached hereto which shall form part of this agreement.

PROVISIONAL SWEDISH TONNAGE ARRANGEMENT.

Pending the termination of the present negotiations the Swedish Government will:

First. Permit all Swedish ship-owners to charter their ships to the Commission for Relief in Belgium without imposing any conditions.

Second. Grant licenses for all Swedish ships now idle in Allied European ports to be chartered for the period of three months for employment in the war zone. A list of these ships will be drawn up and agreed upon.

Third. Grant licenses for all Swedish ships idle in American, North and South, ports for a period of four months for employment in Allied interests outside European waters subject to the reservation contained in clause 10 above. A list of these ships will be drawn up and agreed upon besides ships on time charter to the Allies. This list will include vessels now trading to or from Allied ports and vessels at present trading between Sweden and Allied countries in Europe as well as vessels at present chartered to the Commission for Relief in Belgium."

From the time when the *modus vivendi* became effective, the position of the two ships *Kronprins Gustaf Adolf* and *Pacific* may be considered under three possible heads:

(a) They were, or rather remained, chartered by the Commission for Belgian Relief, under the charters already signed in December, 1917, or under a new agreement;

(b) They were to serve for the transport of commodities to Sweden under paragraph 10 of the *modus vivendi*;

(c) They were used neither under what may be called here "Belgian Charters", nor under Article 10 of the *modus vivendi*, in which case the provisions of the Treaties of 1783 and 1827 remained applicable, unaffected either by obligations assumed by the Johnson Line under the Belgian Charter, or by the working of paragraph 10 of the *modus vivendi*.

XII.

With regard to what happened after February 1, 1918, considered under these three headings, the documents submitted to the Arbitrator show the extraordinary and almost hopeless confusion with which events developed. It is extremely difficult to see through all these documents and follow the courses which were pursued and which very often are completely entwined.

(A)

1. The first line to be followed was naturally the carrying out of the service for Belgian Relief, according to the charters and, as already mentioned, the Johnson Line and its agents in New York made repeated efforts to do so. The failure of these endeavors is the more striking, as on the part of the American authorities, at the moment when events took another direction, great stress was repeatedly laid on the needs of the Belgian Relief and the necessity of meeting them. Already in October, 1917, the Belgian

Relief Committee had been anxious to charter Swedish steamers lying in ports of the United States, and in the correspondence relating hereto (see the telegrams exchanged between the Swedish Delegates and the Swedish Legation on one side, and the Foreign Office of Sweden on the other side [SW App., pp. 136 and 137]) the two vessels *Kronprins Gustaf Adolf* and *Pacific* had been specially mentioned as available for that purpose. At the time when the Belgian Charters were signed, the license of the Swedish Government for carrying them out had been granted and it remained in force until the end of February, 1918. Ample time was, therefore, given to the proper authorities (British and American) to give their approval and provide the facilities which were necessary and had been reserved. The record shows that in his most strenuous endeavors Mr. Ekström met on the part as well of the Belgian Relief Committee as on that of the said authorities with an attitude which frustrated his efforts.

The Commission for Belgian Relief, which had representatives at New York and Washington, D.C., had already on December 17, 1917 (SW App., p. 213), been informed that the *Kronprins Gustaf Adolf* and the *Pacific* had been secured for the said Commission and chartered for two voyages. Mr. Ekström added that the *Kronprins Gustaf Adolf* was ready to proceed to the port of loading and asked for instructions. The Commission answered that it had no information from London concerning the charters and later on, with regard to the *Pacific*, that it had no interest in the movements of this ship.

On February 11, 1918, the Commission informed Mr. Ekstrom that the approval of the War Trade Board had been obtained for three other Swedish ships, but that Mr. Gray had been unable to effect the arrangement urged by Mr. Ekström concerning the *Kronprins Gustaf Adolf* and the *Pacific*.

On February 20, 1918, Mr. Ekström informed the Commission that the licenses granted by the Swedish authorities would soon expire and that after their expiration the Swedish authorities would require the two ships for cargo for Sweden. (See the correspondence referred to in SW App., pp. 213 et seq.)

2. Mr. Ekström had also applied directly to the War Trade Board. On January 16, 1918, he referred to the provisions of the Charter-Parties, and noted that, in a conversation, Mr. Munson of the said Board had declared that for the moment he would not give the vessels bunker licenses for the fuel which was provided for in the Belgian Charters. Mr. Ekström also mentioned the fact that the Commission proposed to cancel the Charter-Parties, because the British authorities wished them to do so, and he urged Mr. Munson to grant bunker licenses. Failing such permission, Mr. Ekström asked for useful work and declared the readiness of the Johnson Line to complete such a number of trips as might be deemed desirable, provided the vessels be then free to proceed to Sweden without the usual guarantees of return to the United States and that the ships be provided with sufficient bunkers and stores for the home voyage to Sweden. Mr. Ekström added that for the moment the two ships had sufficient quantities of Diesel oil to proceed to Sweden.

Mr. Ekström alluding to the request in the Swedish note that the ship be allowed to go home immediately without an undertaking to return to the United States, added that "under such circumstances it is fair on the part of the Johnson Line that they offer to let the ships do some service for the Allies before going home to Sweden", and he asked for a definite proposal

along this line, thus showing that at this time he did not yet seriously contemplate a return in ballast, but wanted the ships to be used. (SW App., pp. 194 to 196.)

The further correspondence between Mr. Ekström and Mr. Munson is to be found in SW App., pp. 196 *et seq.* On January 24, 1918, Mr. Munson declared that "Inasmuch as these negotiations (concerning the *modus vivendi*) are well on their way, it seems unnecessary to go further into this matter at the present time." (SW App., p. 198.)

On February 4, 1918, Mr. Ekström informed Mr. Munson that the Johnson Line wished to load cargoes for Sweden under the *modus vivendi* and asked for such amounts of Diesel oil as the vessels had on board when arriving in the United States and for foodstuffs in sufficient quantities for the ships to reach Sweden. (SW App., p. 198.) Two days later, after a visit to the War Trade Board, he laid before Mr. Munson two alternatives, one of which relates to the *modus vivendi*. He added "it is clearly understood that as both the *Pacific* and the *Gustaf Adolf* were to use their own bunker fuel on the way home, the owner or his representative will not have to sign the general bunker agreement". (SW App., p. 200.)

Mr. Munson, contemplating other conditions in his letter of February 7, 1918, Mr. Ekström wrote again on February 14, 1918. (SW App., pp. 200 and 201.) He also asked for particulars as to the bunker forms, the signing of which would be required of him.

Replying to that letter, Mr. Munson referred Mr. Ekstrom to the Bureau of Transportation of the War Trade Board, and from the letter of Mr. Ekström to Mr. Munson of February 21, 1918, it appears that Mr. Ekström was handed for signature, "in order that the vessels be allowed to proceed", documents which, as he declares, were unacceptable to the Johnson Line. (SW App., pp. 202, 203.)

3. Meanwhile efforts had been made in another direction. Already on January 24, 1918, Mr. Ekström had asked for the assistance of the United States Food Administrator, whom he understood to be interested in the Belgian Charters. On the same day he was told that nothing could be done in the matter, because the Administrator had been asked to keep his hands off, for the time being at any rate. (SW App., pp. 226 and 227.)

4. On February 28, 1918, it looked as if the parties were reaching an understanding (see letter Munson to Ekström February 28, 1918, and reply of Ekström March 2, 1918, US I, pp. 204 to 208), but even then there remained some difficulties, for Mr. Munson appears to have assumed that the *Pacific* and *Kronprins Gustaf Adolf* would sail for Rotterdam with their own bunkers, while Mr. Ekström relied upon the clauses in the Charter-Parties providing that the ships were to obtain 350 tons of suitable Diesel oil without any conditions being imposed.

5. All the negotiations here referred to were as to cargoes and no application appears to have been made, such as was contemplated above. (pp. 1286 *et seq.*).

(B)

At the end of February, 1918, the license granted by the Swedish Government for trips under Belgian Charters expired and on March 8, 1918, Mr. Ekström informed Mr. Munson that the Swedish Government had chartered both ships for cargoes under the *modus vivendi* agreement. This

was undoubtedly the right of the Swedish Government, even in the light of Paragraph 3 of the Provisional Tonnage Agreement. The Relief Commission had had sufficient time, i.e., the full month of February, 1918, to complete arrangements concerning the Belgian Charter-Parties which had been signed on December 12, 1917.

However, from that moment the American authorities were bent upon claiming the two ships for trips for the Commission for Relief in Belgium. As an alternative the War Trade Board made the release of these ships subject to conditions which it thought it could impose according to the *modus vivendi*, but which in fact were unwarranted. In this respect it is necessary to summarize here the discussion which arose with regard to two points. It was held by the American Government that, in order that the two ships might be allowed to proceed to load for Sweden under the *modus vivendi*, new steamers should be chartered to the United States Shipping Board under four months' charters. (See i. a. letters Munson to Ekström, March 16, 1918, SW App., p. 208, US II, p. 216.) As to this the Swedish Government had observed to the American Minister at Stockholm (see telegram of Minister Morris to the Secretary of State, February 18, 1918, SW III, No. 12), that, if the new bunker regulations were applied to the ships employed under the *modus vivendi*, Sweden could not carry out that agreement and that it was not acceptable to it that American authorities applied to ships carrying *modus vivendi* cargoes, bunker regulations issued after the agreement had been negotiated.

The American point of view was maintained by the American authorities. On February 20, 1918 (SW III, No. 13), the Secretary of State cabled to the American Minister at Stockholm: "Steamers *Crown Prince Gustaf Adolf* and *Pacific* will be released promptly on the naming of the exchange vessels which are to be sent out from Sweden to replace same and signing proper bunker forms."

The Swedish Foreign Office tried to reach a compromise between the American point of view and the objections of the Swedish ship-owners to the new bunker regulations. The conditions under which the Swedish owners were willing to agree to the said regulations were communicated to the Secretary of State by a telegram of Minister Morris of February 27, 1918 (SW III, No. 14).

On March 6, 1918, the Secretary of State agreed generally to the proposed conditions, but two difficulties remained. The first appears in a letter of Captain Fisher of the British War Mission to Mr. Chadbourne, dated Washington, D.C., April 3, 1918, which runs as follows (SW III, No. 26):

"The question has been raised as to the proper interpretation of this agreement in respect of ships sailing from Sweden to the United States against the sailing of corresponding ships from this side to Sweden.

The agreement provides (*vide* clause 10, last paragraph) that these ships 'shall be subject to the provisions of clause (3) of the provisional tonnage agreement' (i.e., chartered for four months for allied service outside Europe) 'provided they are not required for the transport of cargo to Sweden under the agreement, in which case permission will be granted for them to return to Sweden on the terms stated in the first sentence of clause 10' (i.e., they will only be released against the sailing of similar ships from Sweden). If the releasing ships do not sail or if sufficient cargo is not available under the agreement then it would seem that the vessels fail to be chartered for allied service.

We understand that the question has been raised, presumably by the Shipping Board, whether the ships now proceeding or about to proceed from Sweden to the United States—viz., *Texas*, *Nordland*, *Andalusia*, *Liguria*, *Masilia*, *Algeria*, *Kronprincessen Margareta*, *Oscar Frederick*, *Drottning Sophia*, *Kronprins Gustaf*—should be required to be chartered for allied service on their arrival in United States ports. I am instructed to inform you that the Swedish Minister in London has protested against this proposal pointing out that the ships in question are required for the carriage of *modus vivendi* supplies to Sweden, and that under the agreement Sweden has a prior right to the service of the ships, provided they are released by the simultaneous departure of other vessels from Sweden.

London points out that Count Wrangel's interpretation of the agreement is correct. . . ."

Another difficulty is the subject matter of a letter of the American Ambassador in London to the Secretary of State, dated April 13, 1918 (SW III, No. 36).

"The Swedish Minister showed me this morning a telegram he had received from America stating that no further Swedish ships would be released with *modus vivendi* cargoes until replacing steamers sent out were chartered to the United States Shipping Board for four months. According to the *modus vivendi*, I would point out that clause 10 of the *modus vivendi* and clause 3 of the provisional Swedish tonnage arrangement are those that determine this question. The latter clause does not contain a guaranty from the Swedish Government for time chartering of replacing steamers, but only an undertaking to grant licenses if such licenses be applied for. The British Foreign Office takes this view also. . . ."

The controversy gave rise to protracted discussions and it was on April 17, 1918, that the Department of State informed Ambassador Page (SW III, No. 42) that

"After consideration by counsel we are prepared to accept the interpretation placed upon the *modus vivendi* by the Swedish Government and the British Foreign Office to the effect that the Swedish Government did not obligate itself to charter to the United States Shipping Board for four months the replacing steamers to be sent from Sweden under clause 10 of the *modus vivendi* and clause 3 of the provisional tonnage arrangement. We are accordingly withdrawing our demand that such chartering should occur as a condition to releasing the *modus vivendi* cargoes from this side."

In spite of this declaration the discussion continued until May and even June, 1918, and the erroneous position of the American authorities may be considered as the reason which prevented Swedish ship-owners from offering their boats for the purpose of replacing in America the ships which were to be released there.

The Charter-Party for the *Pacific* signed in Stockholm on March 8, 1918, under the *modus vivendi* agreement, has been submitted to the Arbitrator. The Charter-Party for the *Kronprins Gustaf Adolf* could not be produced, but in the light of all the circumstances there is no doubt, and the Arbitrator

is satisfied, that the same Charter-Party had been signed for the *Kronprins Gustaf Adolf*.

In April, 1918, the Johnson Line and its representative tried again to secure the carrying out of the Belgian Charters. The Swedish Government who had at first insisted that the *Kronprins Gustaf Adolf* and the *Pacific* be used under the *modus vivendi*, appears to have been willing later on to consent thereto, but all endeavors led to no result. (SW App., pp. 221 *et seq.*, SW III, No. 53.)

Throughout this whole period the negotiations related to cargoes and facilities to be obtained from the United States, no application was made either for clearance of the two vessels or for a license concerning the provisions taken on board in view of a sailing in ballast. As to the *modus vivendi* agreement the Arbitrator is not called upon to decide whether it has or has not been properly carried out. No such question has been put to him or is included in the questions which he has to answer. A decision on this point is outside his jurisdiction under the Special Agreement of December 17, 1930.

The final chartering of the two vessels by the French and Italian Governments need not be discussed here as it has no bearing on the rights of the Johnson Line under the Treaties.

XIII.

In view of all the above considerations and particularly of the fact that the jurisdiction of the Arbitrator was limited to an examination of the question as to whether the ships were detained in contravention of the Swedish-American Treaties of April 3rd, 1783, and July 4th, 1827, and not otherwise, it follows that, in accordance with a strict interpretation of the Treaties, the first question propounded in Article I of the Special Agreement of December 17th, 1930, between the United States and Sweden must be answered in the negative. As a consequence the second and third questions need not be answered.

THE ARBITRATOR THEREFORE

DECIDES :

That the Government of the United States did not detain the Swedish motor ship Kronprins Gustaf Adolf between June 23, 1917, and July 12, 1918, and the Swedish motor ship Pacific between July 1, 1917, and July 19, 1918, in contravention of the Swedish-American Treaties of April 3rd, 1783, and July 4th, 1827.

Washington, D.C., July 18, 1932.

EUGÈNE BOREL,
Arbitrator.

ROBERT PERRET,
Secretary.
