case, an opinion which in California appellate theory ceased to exist [11] when the Supreme Court of the State took jurisdiction and wrote an opinion basing invalidity on the Fourteenth Amendment, rather than on the general language of the United Nations Charter and the goals (not norms) of the Universal Declaration of Human Rights.

COVEY T. OLIVER

"TREATY-INVESTOR" CLAUSES IN COMMERCIAL TREATIES OF THE UNITED STATES

The entry of aliens into the United States is the subject of very limited provisions of commercial treaties. Congressional power has, however, found expression in certain legislative provisions establishing permissive bases for useful clauses in such treaties. A recent example of this is that part of the Immigration and Nationality Act of 1952,[1] which excepts from the category of immigrant (for the purposes of the Act):

> an alien entitled to enter the United States under and in pursuance of the provisions of a treaty of commerce and navigation between the United States and the foreign country of which he is a national, and the spouse and children of any such alien if accompanying or following to join him (i) solely to carry on substantial trade, principally between the United States and the foreign state of which he is a national; or (ii) solely to develop and direct the operations of an enterprise in which he has invested, or of an enterprise in which he is actively in the process of investing, a substantial amount of capital. . . .[2]

Three recently signed commercial treaties of the United States (that with Japan, signed April 2, 1953,[3] that with the Federal Republic of Germany, signed October 29, 1954,[4] and that with the Republic of Haiti, signed March 3, 1955[5]) contain wording which is relatable to the statutory provisions quoted above. The German treaty, after a general statement that "Nationals of either Party shall, subject to the laws relating to the entry and sojourn of aliens, be permitted to enter the territories of the other Party, to travel therein freely, and to reside at places of their choice," provides in the second sentence of the same paragraph that:

> Nationals of either Party shall in particular be permitted to enter the territories of the other Party and to remain therein: (a) for the purpose of carrying on trade between the territories of the two Parties and engaging in related commercial activities; (b) for the purpose of developing and directing the operations of an enterprise in which they have invested, or in which they are actively in the process of investing, a substantial amount of capital.[6]

[11] Sei Fujii *v.* State of California, 38 Cal.(2d) 718, 242 Pac.(2d) 617 (1952), 46 A.J.I.L. 559 (1952). See Fairman, "Finis to Fujii," *ibid.* at 682.

[1] P. L. 414, 82nd Cong., 2nd Sess., 66 Stat. 163.

[2] Sec. 101 (a) (15) (e); 8 U.S.C. § 1101 (a) (15) (E).

[3] T. I. A. S. 2863. [4] Sen. Exec. E, 84th Cong., 1st Sess.

[5] Unofficial text in U. S. Dept. of State Press Release No. 117 (March 3, 1955).

[6] The protocol accompanying the treaty contains in par. 2 the following: "The provisions of Article II, paragraph 1 (b), shall be construed as extending to nationals of either Party seeking to enter the territories of the other Party solely for the purpose of developing and directing the operations of an enterprise in the territories of

Retaining the well-known concept of treaty merchant,[7] these recently negotiated treaties add that of treaty investor. The Immigration and Nationality Act of 1952 has language concerning treaty merchants which varies slightly from that in Section 3(6) of the Immigration Act of 1924 as amended in 1932.[8] By the new language, the trade in which the nonimmigrant engages must be "substantial" in nature and must be carried on "principally" between the United States and the foreign state of which the trader is a national.[9] In the treaty practice itself there has been a change (seen first in the treaty signed with Uruguay in 1949, then in that signed with Greece in 1951, and in all of the commercial treaties which the United States has signed since that time) from most-favored-nation commitments concerning treaty merchants to less restricted language.[10]

Over some three decades the treaty-merchant provisions of statutes and treaties have apparently worked well.[11] The plan has been particularly

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such other Party in which their employer has invested or is actively in the process of investing a substantial amount of capital: provided that such employer is a national or company of the same nationality as the applicant and that the applicant is employed by such national or company in a responsible capacity."

The language of the comparable section of the treaty with Japan is as follows: "Nationals of either Party shall be permitted to enter the territories of the other Party and to remain therein: (a) for the purpose of carrying on trade between the territories of the two Parties and engaging in related commercial activities; (b) for the purpose of developing and directing the operations of an enterprise in which they have invested, or in which they are actively in the process of investing, a substantial amount of capital; and (c) for other purposes subject to the laws relating to the entry and sojourn of aliens."

Art. II, par. 1 (b), of the treaty with Haiti has wording similar to that in Art. II, 1 (b), of the Japanese treaty, but the accompanying protocol (par. 1) follows the wording in par. 2 of the protocol accompanying the German treaty.

In each of the three treaties there is, as a final paragraph of the article containing the treaty-investor clause, the following: "The provisions of the present Article shall be subject to the right of either Party to apply measures that are necessary to maintain public order and protect the public health, morals and safety."

[7] See, on this concept, Robert R. Wilson, " 'Treaty-Merchant' Clauses in Commercial Treaties of the United States," 44 A.J.I.L. 145–149 (1950).

[8] 8 U. S. C. (1948) Sec. 203(6).

[9] There is little in the legislative history of the new Act to indicate the purposes of these additions. A subcommittee of the Senate Judiciary Committee conducted an extensive investigation of the entire immigration system of the United States. Only small sections of its report (pp. 562–567, and statistics at pp. 903–905, in Sen. Rep. No. 1515, 81st Cong., 2nd Sess.) relate to treaty traders. Possibly relevant is a statement (in a "Synopsis of the Principal Recommendations for Changes in the Immigration and Naturalization Laws," App. II, pp. 805–810, at p. 806) that "The nonimmigrant classes are more closely and exactly defined."

[10] Compare the language of Art. II, par. 3, of the commercial treaty which the United States signed with Greece on Aug. 3, 1951 (Sen. Exec. J., 82nd Cong., 2nd Sess.), in which there is provision for admission of treaty merchants on a most-favored-nation basis, with that of Art. II, par. 1(a), of the treaty signed with Israel on Aug. 29 of the same year (T. I. A. S. 2948), which does not specify the most-favored-nation standard in the matter of admitting treaty merchants. U. S. legislation does not direct that this standard be used in the treaties.

[11] See the observation at p. 567 of the report, cited in note 9 *supra*, that "It is the opinion of the subcommittee that the basic statutory provisions controlling the entry

useful for traders from populous states which have had, under United States immigration restrictions, relatively small quotas. Being nonimmigrants, the treaty merchants are, of course, admitted outside of quotas.

Certain business groups in the United States have advocated the broadening of such provisions as those concerning treaty merchants. Given permissive legislation by Congress, such broadening would not involve any departure by the United States, in its treaty policy, from the fundamental principle of mutuality. At the same time, its advocates have urged, it might make it possible for American firms to send abroad, for sojourn over a considerable period of time, executive, managerial and technical personnel needed for the effective operation of American business enterprises in foreign countries.[12] A move in this direction also makes more

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of aliens as treaty traders under a nonimmigrant status are satisfactory in most instances."

The status has always been a regulated one. With the going into effect of the new (1952) legislation, there has been some change in the applicable administrative regulations. *Cf.* 22 C.F.R. Sec. 41.70 with 22 C.F.R. Sec. 42–140. Whereas under the old regulations a treaty trader had the burden of establishing the status of a nonimmigrant under Sec. 3(6) of the Act of 1924, under the new regulations such a person has the burden of establishing not only that he is entitled to classification as a treaty trader within the meaning of the new Act, but also that he is not ineligible to receive a visa as a nonimmigrant under the provisions of instructions to consular officers implementing Sec. 212 of the Act. He must also establish, *inter alia*, that he "intends in good faith, and will be able, to depart from the United States upon the termination of his status" (22 C.F.R. 41.71 (b) (2)). By another part of the regulations, "If he is employed or to be employed, his employer shall be a foreign person or organization and he shall be engaged in duties of a supervisory or executive character, or if he is, or is to be, employed in a minor capacity, he has special qualifications which make his services essential to the efficient operation of the employer. An alien employed solely in a manual capacity shall not be entitled to classification as a treaty trader." (22 C. F. R. Sec. 41.71 (b) (3).)

Administrative regulations also provide that a trader or dependent admitted to the United States under the Immigration Act of 1924 without limitation of time shall make a report annually on the anniversary date of his original admission to the United States to the district director or officer in charge having jurisdiction over the place where the alien resides in the United States indicating that he (a) continues to be eligible for readmission to the country whence he came or for admission to some other country, and (b) that he has fulfilled and will continue to fulfill all the conditions prescribed by another section of the regulations applicable to such matters as passports and work.

Some recent judicial decisions have involved rulings as to whether residence in the United States by a treaty merchant or the son of such a merchant might be considered residence for the purpose of the later naturalization of the person. See, for example, *In re* Jow Gin, 175 F. 2d 299 (1949); U. S. *v.* Lee Cheu Sing, 189 F. 2d 534 (1951); U. S. *v.* Lin Yiu, 190 F. 2d 400 (1951); U. S. *v.* Jeu Foon, 193 F. 2d 117 (1951); Petition of Wong Choon Hoi, 71 F. Supp. 160 (1947); Petition of Moy Jeung Dun, 101 F. Supp. 203 (1951); Yee Shee Dong, 104 F. Supp. 123 (1952); U. S. *v.* Kwan Shun Yue, 194 F. 2d 225 (1952); U. S. *v.* Kwai Tim Tom, 201 F. 2d 595 (1953).

[12] See, on this point, text of letter from the President of the National Foreign Trade Council to the Chairman of the Senate Foreign Relations Committee, dated June 1, 1948, and reproduced in Revision of Immigration, Naturalization and Nationality Laws, Joint Hearings Before the Subcommittees of the Committees on the Judiciary, Congress of the United States, 82nd Cong., 1st Sess., on S. 716, H. R. 2379, and H. R. 2816, at 318, 319.

meaningful the provisions already in a number of commercial treaties, but largely illusory under excessively restrictive immigration curbs, whereby enterprises of one party in the territory of the other may "employ agents of their choice regardless of nationality." [13]

It is, of course, possible for Congress to confer rights with respect to entry of treaty merchants even from states which do not have commercial treaties in force with the United States. It has in fact recently done this in the case of the Republic of the Philippines,[14] under a plan of reciprocity by agreement to be entered into by the President of the United States and the President of the Philippines.

It was natural that provisions concerning treaty merchants should be included when new legislation on immigration was introduced (as S. 3455) by Senator McCarran on April 20, 1950, but the exact point at which treaty-investor provisions were added to the proposed legislation is not clear. In a speech in the Senate on May 13, 1952, Senator McCarran said, in part:

> After the introduction of Senate bill 3455, copies of the bill were circulated to interested governmental and nongovernmental agencies for study and comment. . . . Furthermore, a number of nongovernmental agencies submitted analyses and suggestions on the bill. In the course of numerous conferences over a period of several weeks, the various suggestions and analyses were considered, and Senate bill 3455 was further refined and each of the thousands of provisions was checked and rechecked. Thereafter, on January 29, 1951, I introduced in the Senate, Senate bill 716, which was a refinement and modification of my original bill, S. 3455.[15]

The provisions on treaty investors apparently emerged in the course of the "refinement and modification," for they appeared in S. 716. In the hearings on this bill, only one witness testified on the treaty-investor wording.[16] Recommending favorable consideration of it, he proposed still another classification of nonimmigrant, namely, one admitted "solely to perform administrative, technical or confidential functions for an enterprise of the foreign state of which he is a national or for a domestic enterprise controlled by nationals of that foreign state." [17] There was no such provision, however, in the Act as it was finally passed.

Like that of treaty merchant, the status of treaty investor is a regulated one. Administration is partly by the Department of State [18] and partly by the Department of Justice.[19] The former has issued detailed regulations setting forth, among other things, that the alien is to establish specifically that he is not applying for a nonimmigrant visa in an effort to evade

[13] See, for example, Art. I, par. 2(c) of the commercial treaty between the United States and Italy, signed Feb. 2, 1948 (T. I. A. S. 1965).

[14] P. L. 419, 83rd Cong., 3rd Sess., 68 Stat. 264 (approved June 18, 1954). This legislation applies both to treaty merchants and treaty investors.

[15] 98 Cong. Rec. 5089.

[16] Charles R. Carroll, representing the National Foreign Trade Council.

[17] Hearings, cited in note 12 *supra*, at 317.

[18] Sec. 104(a) of the Act; 8 U. S. C. A. Sec. 1104.

[19] Sec. 103 of the Act; 8 U. S. C. A. 1103.

the quota or other restrictions which are applicable to immigrants, that he intends in good faith and will be able to depart from the United States upon the termination of his status, and that the enterprise is one which actually exists or is in active process of formation, and is not a fictitious paper operation.

In the case of the Department of Justice, the admission regulations of the Immigration and Naturalization Service apparently draw no distinction between treaty traders and treaty investors insofar as what is required of the alien is concerned. Under these regulations, one of the reasons for which a "trader or dependent" may be deemed to have failed to maintain status is his changing from activities of a treaty trader to those of a treaty investor, or *vice versa,* without previously obtaining consent to do so from the district director having administrative jurisdiction over the district in which the alien resides.[20] A "trader" under the 1952 Act is not required to submit an annual maintenance-of-status report to the director of immigration of his district, such as that required of traders and dependents under the 1924 Immigration Act. Regulations prescribe that the maximum time period for which a nonimmigrant may be admitted initially into the United States shall be whatever the admitting officer deems appropriate in order to accomplish the intended purpose of the alien's temporary stay in the United States;[21] a separate provision relates to application for extension of temporary admission.[22]

The new provisions of statutory law and treaties concerning treaty investors have not been in effect for a sufficient length of time to justify any final conclusions as to their practical utility. Much will depend upon the manner in which they, and the administrative regulations implementing them, are applied. It seems clear that the objective in mind is thoroughly sound. It is to be hoped that the plan of the new treaty clauses will fit in constructively with other moves aimed at promoting foreign investment and improving the world economic situation.

ROBERT R. WILSON

PLURALISM OF LEGAL AND VALUE SYSTEMS AND INTERNATIONAL LAW

A life dedicated to the study of international law, long studies on philosophy of law and more recent studies in comparative law have convinced this writer that any legal order, and hence international law, in order to be fully understood, must be studied from three approaches: analytical, sociological-historical and axiological. The analytical approach, the lawyer's approach par excellence, is indispensable; but it alone is not sufficient; it must first be supplemented—supplemented, not replaced—by the sociological-historical approach.[1] It must, second, be supplemented by an

[20] 8 C.F.R. Sec. 214e.4(a) (2).

[21] *Idem,* Sec. 214.1.

[22] *Idem,* Sec. 214e.5.

[1] Max Huber, Dietrich Schindler, J. L. Brierly. The true sociological approach has, of course, nothing to do with current "neo-realism." It is interesting to note that three very different writers put strong emphasis on this approach: Julius Stone, Legal Controls of International Conflict (New York, 1954); Mariano Aguilar Navarro, Derecho