SWEDEN

SPECIAL AGREEMENT BETWEEN THE UNITED STATES AND SWEDEN FOR THE ARBITRATION OF CLAIMS GROWING OUT OF THE ALLEGED DETENTION OF THE MOTORSHIPS "KRONPRINS GUSTAF ADOLF" AND "PACIFIC," SIGNED DECEMBER 17, 1930 [1]

658.119/1017

The Swedish Minister (Boström) to the Secretary of State

WASHINGTON, June 16, 1927.

SIR: I have the honour to present to you the claim of my Government on behalf of the Rederiaktiebolaget Nordstjernan, a Swedish corporation, on account of the detention by American authorities of the Motorship *Kronprins Gustaf Adolf* from October 27, 1917, to July 12, 1918, and the Motorship *Pacific* from September 14, 1917, to July 19, 1918. Both vessels belonged at the time in question to the corporation and were of Swedish registry.

At the time when these detentions occurred, the matter formed the subject of an interchange of views between the then Minister of Sweden, Mr. Ekengren, on the one hand, and Mr. Lansing and Mr. Polk, on the other, resulting in a divergence of opinion which I am hopeful that a fuller consideration of the matter at this time may remove.

As is more fully stated in the document which is handed you herewith,[2] these two Swedish vessels entered American east-coast ports in the summer of 1917. The *Kronprins Gustaf Adolf* was in ballast; the *Pacific* carried a cargo of nitrate of soda, the property of a Swedish company, consigned to its owner in Sweden. Both vessels carried with them and had at all times sufficient fuel oil in their bunkers to return to Sweden. The American authorities refused, unconditionally, to permit the *Pacific* to continue her voyage with her cargo. After some discussion this cargo was discharged. However, the American authorities refused to allow either vessel to leave American waters with their bunker oil. This refusal was put upon the ground that before these vessels could depart from American waters,

[1] For records of the arbitration of this case, see Department of State Arbitration Series No. 5, *Arbitration Between United States and Sweden Under Special Agreement of December 17, 1930: The "Kronprins Gustaf Adolf" and the "Pacific"*, in six parts (Washington, Government Printing Office, 1932–1934).

[2] Department of State Arbitration Series No. 5 (1), p. 253.

carrying their bunker oil, they must obtain a so-called "export license" for this bunker oil.

As a condition precedent to the granting of such a license and of permission to depart from American waters it was required by the American authorities:

(1) That the voyage and trade of the vessel be approved by the War Trade Board—an agency of the President of the United States—and that if under charter, the charterer and the terms and conditions of the charter be approved by the same Board;
(2) That the owner of the vessel file with the War Trade Board a list of all vessels owned or controlled by him and enter into an agreement providing, among other things, that:
(*a*) None of such vessels be chartered to any German, or trade with any German port, or any country allied with Germany, or carry any cargo which came from, through, or was destined to Germany or her allies; and that
(*b*) None of such vessels carry cargo to any port not approved by the War Trade Board, or carry any cargo or embark on any voyage, or be laid up in port without the approval of the War Trade Board; and that
(*c*) No vessel be bought or sold without the consent of the War Trade Board, which might also direct the owner to discharge any master, officer, or member of the crew of any of his vessels; and that
(*d*) A report be furnished to the War Trade Board each month, showing in detail the movements of the owner's vessels.

The War Trade Board refused to approve a voyage by the vessels in question to Sweden. The owner, while willing to undertake other voyages, refused to enter into an agreement of the character mentioned above. For this reason, an export license for the bunker fuel carried by the two vessels on their arrival in the United States was refused and the departure of the two vessels was not permitted by the American authorities, until July, 1918.

In connection with the aforementioned interchange of views in this matter Mr. Ekengren respectfully directed Mr. Lansing's attention—in his communications of November 24, 1917,[3] January 30, 1918,[4] and April 30, 1918[5]—to certain clauses in the Swedish-American treaties of 1783 [6] and 1827 [7] then in force, which at that time appeared to my Government, and still appear—with the greatest deference to the views expressed by Mr. Lansing—to have a most important bearing upon this matter. In his first mentioned letter Mr. Ekengren thus referred to Art. 17 of the Treaty of 1783, according to which Swedish property was exempted from every kind of embargo or deten-

[3] Department of State Arbitration Series No. 5 (3), appendix, p. 102.
[4] *Ibid.*, p. 104.
[5] *Ibid.*, p. 106.
[6] Miller, *Treaties*, vol. 2, p. 123.
[7] *Ibid.*, vol. 3, p. 283.

tion in the United States. In his reply of June 26, 1918,[8] Mr. Lansing stated that this article, while forbidding both the laying of an embargo and the detention of ships, vessels and merchandises in general, by seizure, by force or by any such manner, did 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 that country, to the Swedish motorships in question. Mr. Lansing furthermore stated that these vessels could not be held to have been the subject of any embargo or detention, the Government of the United States having merely required the licensing of certain commodities desired to be removed from the jurisdiction of the United States.

I am now directed to inform you that my Government does not see its way to agree with the views expressed in these statements of Mr. Lansing. It is, on the contrary, the opinion of my Government that by forbidding—even if only conditionally—the vessels to proceed from American territory with the bunker fuel carried at the arrival and *indispensable for the navigation of the ships*, the ships themselves were in fact subject to detention in the sense of Article 17 in the Treaty of 1783. Such commodities and objects aboard a vessel, destined exclusively for its navigation, as bunker oil and bunker coal or screws and other parts of the engine, compasses, etc., must in this respect be deemed to constitute parts of the ship itself. The detention of the bunker fuel would, indeed, seem no more justifiable than, for instance, an export prohibition of sails, if applied to sails carried by a ship calling at a port where such a prohibition were in force. I trust that you will concur with the opinion of my Government that such a regulation, depriving the ship of the means of navigation already at its disposal, would be wholly inacceptable.

Quite apart from this question—whether the ships as such were detained in violation of the rules laid down in Article 17 of the treaty aforementioned—this must, anyway, be held to have been the case with the commodities carried by the vessels. You will not fail to observe that the vessels in question, both carrying bunker fuel for their own use, and the *Pacific* moreover a cargo of nitrate, arrived at American east-coast ports already on June 23, 1917, and July 1, 1917, respectively, whereas the first proclamation forbidding the export of oil and nitrate was issued on July 9, 1917.[9] In these circumstances and on the strength of the clause aforementioned, the Swedish Government feels entitled to claim that these export-proclamations ought not to have prohibited the re-export of Swedish property carried on board Swedish vessels which had entered American ports before the issuing of these regulations.

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[8] Department of State Arbitration Series No. 5 (3) appendix, p. 107.
[9] 40 Stat. 1683.

This opinion of my Government seems to be in close accordance with the views expressed by the Government of the United States in a similar case, referred to in "A Digest of International Law", Volume VI, Par. 1035, (particularly pages 910–912), by Mr. J. B. Moore, the renowned American lawyer. My Government has observed that in the case quoted, your Government claimed—on the strength of an international clause almost identical with Art. 17 in the Swedish-American treaty and concluded during the same period as the treaty just mentioned—the exemption from an export-prohibition issued in a foreign country of all goods which, prior to the date of the going into effect of this prohibition, were the actual property of American citizens.

Admitting this construction of the word "detention", the prohibition of the re-export of the commodities carried by the Swedish vessels now in question seems not to have been justified. Whereas, on the other hand, it has furthermore been confirmed by Mr. Lansing in his letter of June 26, 1918, that the fact that these vessels were not permitted to leave the United States was entirely due to the prescriptions regarding the export of the fuel carried—and thus in no way based on any legal regulations forbidding the clearance of the ships as such—the arguments now laid before you would seem sufficient to prove that the detention of the ships was scarcely in conformity with the treaties aforementioned.

This opinion seems, however, to be strongly supported by certain other articles of the same Treaty of 1783, viz., Articles 7–10, which seem to have a most important bearing upon this matter. These articles guarantee to the subjects and inhabitants of both countries complete freedom to navigate with their vessels either in time of peace or war, without regard to those to whom the cargo may belong, from any port whatever, and to sail and trade with their vessels and to carry on commerce not only directly from ports of an enemy of either country to neutral ports but between enemy ports. This liberty of navigation extends to all merchandises, except those expressly listed in Article 9 and Article 10 as contraband.

Neither the cargo of the *Pacific* nor the bunker oil carried by both vessels is listed as contraband. Indeed, by Article 10, oil is expressly excluded from the list of prohibited goods.

In this connection I beg to draw your attention, first, to the letter of the War Trade Board, dated November 1, 1917, appearing as Annex V (*e*) [10] of the Claim. By this letter an export license for the cargo of the *Pacific* was unconditionally denied because, it was stated, no licenses were being granted at that time for export to certain countries, including Sweden. Quite apart from the question

[10] Department of State Arbitration Series No. 5 (1), p. 268.

as to whether such action constituted an embargo or detention of the vessel and its cargo, you will not fail to observe that by this action the *Pacific* was not accorded that freedom of navigation with its cargo which is specified in Article 7 of the Treaty of 1783.

I also beg to direct your attention to the situation common to both vessels. The vessels were refused permission to depart in ballast. The reason for the refusal was the necessity of obtaining an export license for the bunker oil brought into American waters by the ships. The reason for the refusal of the export license was (1) that the voyages to Sweden were not approved by the War Trade Board, and (2) that the owner would not enter into an agreement affecting all its vessels and greatly limiting their freedom of navigation and commerce. You will note that in order to obtain the necessary permission for the vessels to depart from American waters, the owner was required to give up the rights secured to him by Articles 7, 8, 9 and 10 of the Treaty of 1783, not only as to the particular vessels in American waters, by abandoning the voyage to Sweden and undertaking a voyage approved by the War Trade Board, but as to all his vessels, wherever situated. The owner being unwilling to surrender these rights, the vessels were detained by force in ports of the United States.

It is unnecessary to point out in view of your great experience in the construction of legal documents, that, as the Supreme Court of the United States of America has said, such documents are not to be construed so as to be self-destructive. The treaty can hardly contemplate that, as a condition to the exercise of any one right granted therein, either contracting party may require the waiver of any other right granted. It is, therefore, the view of my Government—in which I venture to trust that you will concur—that the detention of a vessel, or of the commodities carried by such a vessel, of either contracting party in a port of the other, forbidden by Article 17 of the Swedish-American Treaty, cannot be justified on the ground that the detention might have been terminated, had the owner agreed to waive rights guaranteed by Article 7.

I, therefore, submit the claim for compensation for loss and damage arising from the detention of the vessels referred to, in the belief that you will find it founded upon the principles of law and equity.

Awaiting your views upon this matter, and with renewed assurances of my highest consideration, I have [etc.]

W. BOSTRÖM

411.58J63/11

The Secretary of State to the Swedish Minister (Boström)

WASHINGTON, June 13, 1928.

SIR: Adverting to recent conferences which you had with members of the Department to discuss the claim of your Government in behalf

of the Rederiaktiebolaget Nordstjernan, a Swedish corporation, on account of the alleged detention of the motor ship *Kronprins Gustaf Adolf* from October 27, 1917, to July 12, 1918, and the motor ship *Pacific* from September 14, 1917, to July 19, 1918, I have the honor hereby to answer your note of June 16, 1927, in regard to the claim.

It appears that the *Kronprins Gustaf Adolf* arrived at the port of New York on June 23, 1917, and that about October 27, 1917, the owners of the vessel were 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 which was on board when the vessel entered the port. It appears that on July 1, 1917, the motor ship *Pacific* arrived at the port of Newport News, Virginia, with a cargo of nitrate and that on September 14, 1917, application was made for a license to export the cargo of the vessel to Sweden.

In the note of your Legation dated June 16, 1927, the circumstances under which the vessels entered the ports of the United States and the efforts of the owners of the vessels and of your Legation to obtain licenses for the exportation of the cargo of the *Pacific* and for the exportation of fuel oil carried by both vessels on entering the United States were reviewed. The position was taken in your note and enclosure thereto that the Export Administrative Board and later the War Trade Board, in refusing to grant licenses for the exportation of the cargo of the *Pacific* and for the fuel oil carried by both vessels, detained the ships and the commodities thereon contrary to Article XVII of the Treaty of 1783 and denied the subjects of Sweden freedom of navigation of vessels contrary to Articles VII, VIII, IX and X of the Treaty.

It is understood that your Government predicates the claim on behalf of the owners of the *Kronprins Gustaf Adolf* and the *Pacific* on the refusal of the War Trade Board to grant licenses, and that your Government contends that the action of the War Trade Board in refusing to grant licenses constituted detention of the vessels and denial of freedom of navigation.

The formalities required of vessels in ports of the United States to depart for foreign ports are prescribed by Section 4197, Revised Statutes of the United States. The Section cited reads as follows:

"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 journey to such foreign port without delivering such manifest and obtaining a clearance,

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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 offense."

It will be observed from the foregoing that the Collector of Customs is the official to whom application should be made for clearance for vessels. As indicated by the enclosure to your note of June 16, 1927, the War Trade Board was created by Executive Order for the purpose among others of effectuating Title VII of an Act approved June 15, 1917.[11] Section 3 of that Title read as follows:

"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 forbidden cargo shall be forfeited to the United States."

Section 3, Title VII, of the Act of June 15, 1917, conferred upon the Collector of Customs authority to refuse clearance to vessels in some circumstances. Although Title VII of the Act of June 15, 1917, constituted the authority of law for the licensing of exports that Title contained no provision by virtue of which the War Trade Board could properly have detained vessels or denied freedom of navigation. Nor were such powers conferred upon the War Trade Board by any other provision of law. It may be observed, moreover, that no showing has been made that officials of War Trade Board detained the vessels or denied them freedom of navigation. The only conceivable way by which the vessels could have been lawfully detained would have been for the Collectors of Customs at the two ports to have refused clearance and to have forbidden the departure of the vessels. It is not contended, and the records do not disclose, that application for clearance was ever made to the Collectors of Customs. In the absence of a showing that such action was taken, it is scarcely necessary to consider whether refusal of clearance and the forbidding of the departure of the vessels without clearance would have been warranted by law or would have been in violation of the provisions of the treaties to which you refer. It may be stated,

[11] 40 Stat. 217.

however, that had the vessels been denied clearance and had their departure been forbidden, there was yet an appeal to the Secretary of Commerce. Had he sustained the Collectors of Customs, the question whether such action was warranted by law and was in violation of the provisions of the treaties would have been for determination by the competent courts in proceedings instituted by the owners of the vessels.

Reference is made in your note of June 16, 1927, to the correspondence exchanged between the Secretary of State and your Legation from November 24, 1917, to June 26, 1918.[12] In the course of that correspondence your Legation expressed the view that the export regulations of the United States did not apply to bunker fuel on board vessels when they entered ports of the United States, and that it was contrary to the provisions of Article XVII of the treaty of 1783 and Article XII of the treaty of 1827 to apply those regulations to bunker fuel for vessels of Sweden. The Secretary of State advanced the view that the Articles of the treaties mentioned were not applicable in the circumstances attending the *Kronprins Gustaf Adolf* and the *Pacific*.

The question whether Title VII of the Act approved June 15, 1917, and the regulations issued thereunder, applied to bunker fuel and cargo brought into the ports of the United States on the *Kronprins Gustaf Adolf* and the *Pacific* and the relation of the provisions of the treaties to which you have referred to Title VII of the Act of June 15, 1917, could have been authoritatively determined only in the course of appropriate proceedings instituted in the competent court by the owners of the vessels. The War Trade Board adhered to the view that Title VII of the Act of June 15, 1917, and the regulations issued pursuant thereto, applied to the cargo and bunker fuel brought into the ports of the United States on board the vessels concerned. The Secretary of State in his note of January 24, 1918,[13] expressed the view that the provisions of the treaty to which attention had been called by your Legation had no application in the circumstances attending the vessels. The issue was susceptible of judicial determination. The owners of the vessels failed to take the necessary steps to have their rights determined in that manner. Considering that the rights of the owners of the two ships were susceptible of judicial determination and that they failed to resort to the available judicial remedy, the Government of the United States can not receive with favor a claim in their behalf.

In reaching the conclusion announced above, the Department has not failed to give due consideration to the memorandum which ac-

[12] See footnotes 3, 4, 5, and 8, pp. 819, 820.
[13] Department of State Arbitration Series No. 5 (3), appendix, p. 103.

companied your note of March 7, 1928,[14] and to subsequent communications on the subject.

In part one of the memorandum which accompanied your note of March 7, 1928, the proposition is advanced that there was no legal remedy open to the claimant in the courts of the United States by which the claimant could have obtained either the right to take the vessels in ballast out of the United States or reparation for their detention. This proposition is discussed in the memorandum under four subdivisions. It is asserted

1. That Title VII of the Act of June 15, 1917, applied to all articles within the territorial jurisdiction of the United States whether on board a foreign vessel or not.
2. That the War Trade Board to which the President, by Executive Order of October 12, 1917, delegated his authority, under Title VII of the Act of June 15, 1917, applied the regulations to cargoes and bunkers brought in by foreign vessels to ports of the United States.
3. The treaty with Sweden being one hundred years prior to the Act of June 15, 1917, the United States courts were bound to enforce the statute and not the treaty.
4. The courts of the United States could have given the Swedish owners no redress.

Considering these several assertions in the order in which they are stated above, it may be said, with respect to the first assertion, that the question whether Title VII and the regulations issued pursuant thereto applied to bunker fuel and cargo on vessels coming into the United States was one for judicial determination. In the note which the Swedish Legation addressed to the Secretary of State on November 24, 1917, the view was expressed that the regulations issued pursuant to Title VII of the Act of June 15, 1917, had no application to bunker fuel on board vessels when they arrived in the United States. The War Trade Board adhered to the opposite view. The proper procedure for the owners of the vessels to have pursued would have been to apply for clearance to the Collectors of Customs at the ports which the vessels had entered. Had the Collectors of Customs denied clearance, and been sustained in such action on appeal by the owners of the vessels to the Secretary of Commerce, action would have been available to the owners in the courts of the United States to recover damages for the refusal to grant clearance to the *Kronprins Gustaf Adolf* and the *Pacific*. This action would have brought in question the scope and effect of Title VII of the Act of June 15, 1917, and the regulations issued thereunder, with respect to those two vessels. The question whether Title VII of the Act of June 15, 1917, and the regulations issued thereunder applied to the cargo and bunker fuel brought into ports of the United States by the *Kronprins Gustaf Adolf* and the

[14] For text of this note, see Department of State Arbitration Series No. 5 (1), p. 303; enclosed memorandum not printed.

Pacific or whether the Title and the regulations did not apply to those vessels was one which, as already stated, could have been authoritatively determined only by appropriate action in the competent courts. The owners of the vessels failed to institute the necessary proceedings to have the question adjudicated. The Government of the United States can not consider as established the proposition that Title VII of the Act of June 15, 1917, applied to the two vessels.

With respect to the second assertion advanced in part one of the memorandum, it is pertinent to reiterate that the War Trade Board possessed no authority to detain vessels or cargoes. The authority of the War Trade Board was limited to granting or refusing to grant export licenses. The authority to grant or refuse clearance rested with the Collectors of Customs. Had the owners of the vessels applied for clearance and had clearance been refused, their remedy would have been by appropriate action in the courts, as previously suggested. While the War Trade Board adhered to the view that Title VII of the Act of June 15, 1917, applied to the *Kronprins Gustaf Adolf* and the *Pacific*, the decision of the War Trade Board was not final and its attitude did not constitute detention. The position of the War Trade Board with respect to the scope and effect of Title VII of the Act of June 15, 1917, and the regulations issued thereunder, could have been brought in judicial review had clearance of the vessels been refused. The Government of the United States does not consider that the action of the War Trade Board in regard to the two vessels to which this discussion relates afforded grounds for a claim against the Government of the United States.

With respect to the third assertion advanced in part one of the memorandum, it may be said that the relation of the treaties and the Act of June 15, 1917, was susceptible of judicial determination. The courts were competent to consider what application, if any, the treaties with Sweden had in the circumstances attending the two vessels. By proper diligence the owners of the vessels could have had the question judicially determined. They failed to take the necessary steps to have this done. The Government of the United States does not accede to the proposition that the treaties exempted Swedish vessels from the operation of Title VII of the Act of June 15, 1917, even if it be assumed that Title VII applied to bunkers on those vessels, or that if the treaties did entitle the vessels to exemption from the operation of Title VII and complementary regulations, the treaties would have been disregarded had the matter been presented to the courts.

The Government of the United States does not concur in the fourth assertion set forth in part one of the memorandum, but maintains that the courts were competent to afford redress had the owners of the two vessels been entitled to relief. As has been emphasized in the foregoing, the proper procedure for the owners of the vessels to have

taken was to apply to the Collectors of Customs for clearance. Had clearance been denied, the owners could then have appealed to the Secretary of Commerce and, if necessary, to the courts, and could have had determined whether Title VII of the Act of June 15, 1917, and the regulations issued thereunder, applied to the two vessels, as well as the bearing of the treaties on the rights of the owners and the status of the vessels. As bearing on the power of the courts of the United States to review the action of Collectors of Customs in refusing to grant clearance to vessels, reference may be made to *Hendricks* v. *Gonzalez*, reported in 67 Federal Reporter, page 351. The decision is interesting also in relation to the power of the courts to grant redress for withholding clearance without justification of law.

In part two of the memorandum the proposition is advanced that there is no impediment to the presentation of the claim of the owners of the *Kronprins Gustaf Adolf* and the *Pacific* through diplomatic channels, and in support of this proposition the assertions are made

1. That the War Trade Board was the agent of the President and an authority for whose conduct the Government of the United States was responsible.
2. That there was no legal remedy which should have been exhausted prior to diplomatic interposition.

The answer to the assertions advanced in part two of the memorandum is apparent from what has been said in the course of this note. The War Trade Board had no authority to detain vessels or cargoes. It was without means of detention and no showing has been made that the War Trade Board attempted to detain the two vessels or cargoes concerned in this discussion. The War Trade Board was authorized only to grant or refuse to grant licenses for export. The War Trade Board may or may not have been mistaken in its interpretation and application of the law. This question could and should have been submitted to the courts for decision. The action of the War Trade Board, however, did not find expression in the detention of the vessel or cargo. The allegation that the War Trade Board detained the vessels and cargo can not, therefore, be accepted as a basis for a claim.

The impression under which you seem to be laboring that there was no legal remedy which should have been exhausted has doubtless been dispelled by what has heretofore been stated in this communication. It is obvious that the owners of the *Kronprins Gustaf Adolf* and the *Pacific* had available a remedy in the courts by which they could have had adjudicated their rights under the laws of the United States and under the treaties. The Government of the United States considers that it was incumbent upon the claimants to exhaust that remedy. Failure to do so leaves them by their own omission without redress. In these circumstances the Government of the United States can not entertain a claim in behalf of the owners. To do so would be

to ignore the remedies established by the Government pursuant to the sovereign right of the State. Whether the remedies established by the laws of the United States are to be employed or ignored is a matter of vital concern to the Government of the United States.

In conclusion I respectfully submit that the allegation that the United States, acting through the War Trade Board, detained the *Kronprins Gustaf Adolf* and the *Pacific* finds no support in the record presented to this Department; that the vessels mentioned were not detained by the War Trade Board or by any other authority of the Government of the United States; that had there been any attempt to detain the vessels the owners would have had access to the courts of the United States; and that the claim on behalf of the owners must be rejected for lack of legal basis.

Accept [etc.] FRANK B. KELLOGG

411.58J63/13

The Swedish Minister (Boström) to the Secretary of State

WASHINGTON, October 31, 1928.

SIR: Your Excellency's note of June 13, 1928, by which you replied to my note of June 16, 1927, containing the claim of my Government on behalf of the Rederiaktiebolaget Nordstjernan, a Swedish corporation, on account of the detention by the United States of the Motor Ship *Kronprins Gustaf Adolf* from October 27, 1917, to July 12, 1918, and the Motor Ship *Pacific* from September 14, 1917, to July 19, 1918, has been accorded the most careful consideration by my Government. Inasmuch as my Government with the deepest regret find themselves unable to agree with the conclusions reached in your note, I have the honour to present to You the views of my Government thereupon.

The conclusions reached by Your Excellency appear to be five in number, as follows:

1. The Collector of Customs was the official vested with authority to grant or refuse clearance, and no such authority was reposed in the War Trade Board. Since the record discloses no application for clearance to a Collector of Customs and refusal thereof by him, there was no detention of the vessels by the United States.

2. Even if there had been a refusal of clearance by a Collector of Customs, the United States would not have been responsible for his conduct in the absence of an appeal to the Secretary of Commerce.

3. The question whether Title VII of the Act of June 15, 1917, applied to bunker oil brought by a foreign vessel into American waters, was a question for the courts to decide. The Government of the United States cannot consider as established that the statute did so apply.

4. The question whether the treaty of 1783 was applicable to the vessels in question and entitled them to the right to depart without

export licenses under the conditions existing was susceptible of judicial determination.

5. The Government of the United States do not accede to the view that the treaties exempted Swedish vessels from the operation of Title VII of the Act of June 15, 1917, under the circumstances in the present case.

Considering these several conclusions in the order in which they are stated above, it may be said, with respect to the *first conclusion* that Your Excellency seems to have somewhat misconceived the position of my Government. My Government do not contend that the War Trade Board detained the vessels. They do contend that the Government of the United States of America detained them. You point out that Section 1 of Title VII of the Act of June 15, 1917, constituted the authority of law for the licensing of exports, which licensing was a condition precedent to lawfully taking such commodities out of the United States, that this authority to license was vested in the War Trade Board, but that the authority to refuse clearance to a vessel unlawfully taking any article out of the United States remained in the Collectors of Customs by Section 3 of the Act.

A Collector of Customs is a minor official of the United States in the Department of the Treasury. Under the statute his duty was absolute to refuse clearance to any vessel attempting to depart without an export license when such was required. On June [*July*] 9, 1917, the President proclaimed that no bunker oil should be taken out of the United States unless an export license had been granted therefor. The War Trade Board having thereafter refused an export license to the two Swedish ships for their bunker oil, my Government made demand upon the Government of the United States, by the note of this Legation to the Secretary of State, dated November 24, 1917, that the vessels be permitted to proceed on their journeys. The United States Government, through the Acting Secretary of State, replied on January 24, 1918, as follows:

"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."

Thus the Government of the United States declined to permit the departure of the vessels unless and until export licenses were granted for their fuel oil. The vessels were detained not by reason of the de-

cision of some minor official but of that of the Government of the United States.

It is unnecessary to point out to Your Excellency that after that Government had determined that the vessels must comply with the regulations requiring export licenses as a condition precedent to their departure, nothing could have been more futile than to have applied to a minor official of the same Government, the Collector of Customs, for the right to depart without such licenses. No such demand was necessary in order that the responsibility for the detention should attach to your Government. "Lex neminem cogit ad vana seu inutilia"—the law will not force anyone to do a thing vain or fruitless.

The demand of my Government upon the Government of the United States that the vessels be permitted to depart therefrom was a demand upon that Government and all its officials from the highest to the lowest that they permit that departure without condition. When this was refused, the vessels were, in the view of my Government, detained by the authority of the Government of the United States and it became unnecessary, in order to preserve the rights of the owners, to go through the vain and useless formality of making the same demand upon a minor official.

With respect to the *second conclusion*—that even if the Collector of Customs had refused clearance an appeal lay to the Secretary of Commerce—it is only necessary to recall again that the note of January 24, 1918, already referred to, stated "the view of this Government" to be that the Swedish owners must "comply with the regulations of the Government["] pertaining to export licenses before the vessels could be permitted to depart. The Secretary of Commerce was a member of "this Government" the views of which were thus expressed. It is surely not the position of Your Excellency that, after an appeal had been made to the Government and a decision had been taken, it was necessary or proper to appeal to a single member of that Government in order that the decision that export licenses were an essential prerequisite of the right to depart should be the decision of the Government of the United States. Here again the maxim, *Lex neminem cogit ad vana seu inutilia*, is applicable. In the view of my Government no principle of law requires such a vain and useless step.

Both of the foregoing conclusions relate solely to matters of procedure. Your Excellency, I am sure, cannot doubt that the Government of the United States considered upon its merits the demand of my Government that the vessels be permitted to depart from the United States without the exaction of conditions, which in the view of my Government, deprived their owners of rights guaranteed to them by treaty, and in a most solemn manner communicated to my Government its decision that the vessels would not be permitted

to depart until their owners met these conditions. You object now for the first time that this demand was made directly to the Government of the United States through Your Excellency's predecessor and the reply made directly by him to my predecessor instead of the demand being made to a minor official of the United States and through his superior to the Government.

Your Excellency does not object that the Government was deprived, by any omission of the Swedish owners, of any opportunity to consider the question presented carefully or to weigh any considerations affecting it. Nor do You point out that at the time the demand was made, your predecessor raised any question as to the propriety of the procedure adopted or suggested any other procedure which should have been followed in order properly to bring the question before the Government of the United States for its decision. Under these circumstances my Government believe that a principle of law universally recognized and announced in the United States by Your Supreme Court renders the procedural objections referred to above ineffective as defenses to the present claim. In the case of *Doane* v. *Glenn* appearing in Wallace's Reports, Volume 21, on page 33, at page 35, the Court said:

"When such objections, under the circumstances of this case, are withheld until the trial is in progress, they must be regarded as waived . . . This is demanded by the interests of justice. It is necessary to prevent surprise and sacrifice of substantial rights. It subjects the other party to no hardship."

The *third conclusion* referred to above is that Your Excellency's Government cannot consider it as established that Title VII of the Act of June 15, 1917, applied to bunkers brought into American waters and that this question should have been submitted to the courts of the United States. My Government must confess their inability to follow the positions taken by the Government of the United States upon this subject. My Government were informed by Mr. Polk, in his note of January 24, 1918, that these vessels must comply with the regulations of his Government pertaining to export licenses. They were again so informed by Mr. Lansing in his note of June 26, 1918. In the latter note Mr. Lansing was explicit and said:

"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 custom house of the United States and never left the ship on which it came into the territorial waters of this country."

It seems clear to my Government, therefore, that at the time these notes were written the Government of the United States considered it established beyond all question that Title VII of the Act of June 15,

1917, applied to all articles within the territorial jurisdiction of the United States. Furthermore, my Government are aware that Title VII of the Act of June 15, 1917, was administered by the agencies of the United States in charge of its enforcement throughout the entire period of its existence as applicable to articles brought into the United States merely in transit. As instances of this, I refer Your Excellency to War Trade Board Ruling 101, (War Trade Board Journal, June, 1918, page 12) and War Trade Board Ruling 199, Journal, September, 1918, page 6.

It is not the understanding of my Government that You repudiate the action of your predecessor, Mr. Lansing, in his statement that the view of the Government of the United States was that the Act of June 15, 1917, was applicable to the bunker oil in question. My Government, therefore, find it difficult to follow the conclusion stated in Your Excellency's note that your Government cannot accept it as established that the law did so apply.

Similarly, my Government are unable to concur in the conclusion that the only authoritative determination which could have been had on the question as to whether Title VII of the Act of June 15, 1917, and the regulations issued thereunder applied to the bunker fuel brought into American ports by the Swedish vessels was in the course of judicial proceeding. The determinations made by the Government of the United States and communicated to my Government in the notes of November 24, 1917, and June 26, 1918, purported to be, and were, authoritative. My Government must reasonably have been expected to consider the statement of the Government of the United States as authoritative even if it had not been confirmed by the courts. There is no law of the United States, so far as I am aware, which provides that no act of the executive branch of the Government is authoritative until it has been confirmed by the courts. And there is no such rule of international law.

I am, therefore, unable to escape the conclusion that neither the law of the United States nor the law of nations imposed any duty upon the Swedish shipowners to institute any proceeding in any court of the United States to determine whether or not the action of the Government of the United States in refusing to permit the ships to depart without export licenses under the circumstances in question was in accord with the provisions of the Act of June 15, 1917. Whether any court of the United States had jurisdiction to secure to the Swedish shipowners the rights which they claimed under the treaty will be discussed below.

In respect to the *fourth conclusion*—that the question whether the provisions of the treaty were applicable to the vessels under the circumstances in question was capable of judicial determination—Your

Excellency cannot be unaware that although the courts of the United States had jurisdiction to determine that the terms of the treaty were not applicable because of the subsequent legislation of June 15, 1917, they had no jurisdiction to enforce those treaty provisions in the face of that subsequent legislation. The decisions of your Supreme Court leave no doubt upon this question. In *Whitney* v. *Robertson*, reported in Wallace's Reports, Volume 124, page 190, that Court said:

"If the country with which the treaty is made is dissatisfied with the action of the legislative department, it may present its complaint to the executive hand of the Government and take such other measures as it may deem necessary for the protection of its interests. The Courts can afford no redress. Whether the complaining nation has just cause of complaint or whether our country was justified in its legislation are not matters for judicial cognizance."

It is, therefore, clear to my Government that no matter how earnestly the Swedish shipowners might have presented to the courts their complaint that the enforcement of the Act of June 15, 1917, and the regulations thereunder, against them invaded their rights under the treaty, their complaint was not a matter for judicial cognizance. Since, therefore, the courts had no authority to give an effect to the treaty contrary to the provisions of the statute, the Swedish shipowners had no remedy for the violation of the treaty provisions. They were by no principle of law or justice obliged to institute judicial proceedings in which their rights could not be enforced and where the only possible outcome of the litigation must have been adverse to them.

For the same reason the case of *Hendricks* v. *Gonzalez*, reported in 67 Federal Reporter, page 351, appears to be no authority for the assertion that the Swedish shipowners had an adequate remedy in the courts. That case decides only that when a collector of customs denies clearance in violation of American municipal law, the person injured may recover damages against him. It does not hold that such damages may be recovered when clearance is denied under the authority of American law although in violation of a prior treaty. As pointed out above it could not be authority for such a proposition because the courts have no authority to enforce a treaty when its provisions are opposed by subsequent legislation.

Local remedies which should be exhausted prior to diplomatic presentation of a claim, exist only when the local courts are empowered to give legal effect to the right alleged to have been infringed. No such remedy existed in the present case. The right asserted in the present case was, and is, that notwithstanding the Act of June 15, 1917, the two Swedish ships, under the circumstances here involved, had the right under treaty provisions to depart from the United States without complying with the conditions demanded of them by the

American Government in accordance with that Act. No court of the United States had authority to give effect to that right because all such courts were bound to enforce the statute, and the question was, therefore, not susceptible of judicial determination.

Turning to the *fifth and last conclusion*—that the American Government cannot agree that the treaty provisions referred to in my note of June 16, 1927, confers upon Swedish subjects the rights asserted—I note that Your Excellency states but does not discuss it. In asserting these rights of free navigation my Government claim no more than the American Government successfully claimed under the similar provisions of the treaty with Spain,[15] as stated in my prior note. Indeed it claims less, for the American Government claimed immunity from export restrictions for tobacco produced in Cuba and the property of American citizens, while my Government claim only that the Swedish ships which had entered American waters and desired only to depart in ballast without drawing upon the resources of the United States had the treaty right to depart freely and unconditionally. It is impossible for my Government to believe that so simple and elemental prerequisite to freedom of navigation clearly within the plain terms and purport of the treaty can by any process of legal reasoning be placed beyond its scope. I venture to hope, therefore, that Your Excellency will reexamine this conclusion and that, if any doubts remain in your mind that this right is not guaranteed, you will communicate them to me so that I may have the opportunity to remove them.

I also note Your Excellency's statement that it is a matter of vital concern to the Government of the United States whether the remedies established by the laws of the United States are to be employed or ignored, and I am happy to be able to point out to you that no such question is involved in the present claim. So far as administrative remedies are concerned, as stated above, the present controversy was not merely appealed to a single officer of the Government but was twice appealed to the Government of the United States, itself, by which the questions involved were, as stated in the notes of November 24, 1917, and June 26, 1918, given "the careful and considerate attention which it merits at the hands of this Government". Here obviously there was no failure—but, on the contrary, the most earnest effort—to obtain all possible administrative relief. Since the matter in controversy was essentially an issue which was not, as the Supreme Court has said, a matter of judicial cognizance, no judicial remedy existed and none was ignored. So far as I am aware, the only issue on this subject which has been raised by officials of the Department of State is not whether remedies established by the laws of the United

[15] Treaty of October 27, 1795, Miller, *Treaties*, vol. 2, p. 318. See Moore, *Digest*, vol. VI, par. 1035, particularly pp. 910–912.

States are to be ignored but whether the laws of the United States have established any remedy available in the present case. This question obviously is not of the character mentioned by Your Excellency.

In conclusion I beg to express the hope that you will reexamine the claim in the light of the observations here made and will reach a favourable conclusion in regard to it. Should that happy conclusion not result, I am instructed by my Government to request that the Government of the United States join with my Government in submitting the present controversy between them to arbitration.

My Government feel confident that in view of Your Excellency's great service to the world in advocating so conspicuously and ably the process of the disposition of international differences by arbitration that this disposition of the matter in accordance with the treaty of March 18, 1925,[16] will meet with your approval. I am further assured in this view by the fact that in the cases of *Sheldon Lewis*, reported in Moore's International Arbitrations, page 3019, and in that of the Dutch vessel *Zeelandia*, (now in the Court of Claims of the United States, Docket No. H 252) the Government of the United States referred similar differences with the British Government and the Dutch Government, respectively, to such disposition. In both of these cases the shipowners, believing that their asserted rights were not the subject of judicial cognizance, did not resort to the Courts of the United States, which was justly regarded by the Government of the United States as no bar to the presentation of the claims through diplomatic channels. In the latter case the detention was by virtue of the same statute invoked by the Government of the United States in the present case.

With renewed assurances [etc.] W. BOSTRÖM

411.58J63/24

The Swedish Minister (Boström) to the Secretary of State

WASHINGTON, June 14, 1929.

MY DEAR MR. SECRETARY: I had the honour to call upon you on June 13, in regard to the claim of my Government (which was filed June 15 [*16*], 1927) on account of the detention in 1917–1918 of two ships belonging to the Rederiaktiebolaget Nordstjernan, the *Kronprins Gustaf Adolf* and the *Pacific*. Unhappily, I found that you had been called to New York. Since I was not able to see you

[16] Arbitration convention between the United States and Sweden signed at Washington, June 24, 1924, and proclaimed on March 18, 1925; *Foreign Relations*, 1924, vol. II, p. 702.

personally, I am taking the liberty of writing in this letter a short review of the case.

In June, 1917, the *Kronprins Gustaf Adolf*, and in July, 1917, the *Pacific* entered American harbors. The *Gustaf Adolf* came in in ballast expecting to take a cargo to Finland. The *Pacific* came in with a cargo of nitrates bound from South America to Sweden. Both vessels on entering American waters had in their bunkers sufficient fuel oil to go from the United States to Sweden. After some discussion, the cargo of nitrates was unloaded and no question has been raised with reference to that cargo. The questions involved concern simply the detention of the vessels contrary to treaty provisions.

When the vessels sought to leave the United States in ballast for Sweden, they were informed by the War Trade Board that they could not obtain clearance without an export license for the fuel oil which they had in their bunkers. And the War Trade Board made it a condition precedent to the granting of licenses that the owner should agree to surrender its right to the free use of these vessels and others which it owned, guaranteed by Articles 7, 12 and 17, of the treaty between the United States and Sweden of April 3, 1783, revised by the treaty of July 4, 1827.

Your Excellency will not fail to observe that these two vessels were not permitted to leave United States waters, although they proposed to take out no cargo and no fuel except what they had entered with.

Upon the owner refusing the conditions, licenses were refused and the vessels were not permitted to depart until June, 1918, when the owner accepted the required conditions, somewhat modified.

My government immediately presented the matter to Mr. Lansing, then Secretary of State, by note of November 24, 1917, drawing his attention to the treaty provisions and requesting that the vessels be permitted to depart. Mr. Lansing, after some intermediate correspondence, replied on June 26, 1918, that the law under which the export licenses were required, applied to the fuel oil and that the treaty provisions in question did not prevent the requiring of such licenses as a condition of departing from the United States. Within a few days of the receipt of this note, the owner in order to obtain the use of its vessels, yielded to the War Trade Board, and secured the release of the vessels.

I feel confident that so distinguished a jurist as Mr. Lansing would not have found that the treaty provisions were inapplicable had it not escaped his attention that the agreement demanded by the War Trade Board, as the condition of granting the licenses, was the surrender of rights guaranteed by the treaty. The principle applicable has been often stated by the Supreme Court of the United

States but never more concisely than in *Barron* v. *Burnside*, 121 U. S. 186:

"As the . . . statute makes the rights to a permit dependent upon the surrender by the foreign corporation of a privilege secured to it by the Constitution and laws of the United States, the statute requiring the permit must be held to be void."

I can not, therefore, escape the conclusion that the treaty guaranteed the privilege of complete freedom of navigation to nationals of the two contracting parties, and that the action of the War Trade Board in conditioning the granting of export licenses upon the surrender of treaty rights was an infraction of the treaty. It is especially gratifying to me that this view accords with the interpretation placed by the Department of State upon the similar provisions of Article VII of the treaty between the United States and Spain of 1795, which was subsequently accepted by the Spanish Government. (Moore, Int. Arb. 1033–35)

After the release of the vessels the matter of compensation for the loss sustained by the detention was discussed informally from time to time with officials of the Department of State by representatives of the owner. But the matter of preparing and presenting a formal claim was delayed and greatly hampered by the sudden death of Mr. Eckstrom, the New York representative of the owner. Since presentation of the claim in 1927, I have conferred with the Solicitor of the Department of State regarding it.

The Solicitor has suggested that the owner should have brought either a petition for a writ of mandamus or an action at law for damages in the United States District Court against the Collectors of the ports of New York and Norfolk for their failure to grant clearance. But neither of these proceedings could have secured for the owner his treaty rights or compensation for their denial. As Mr. Lansing pointed out in his note of June 15, 1927 [*June 26, 1918*], Title VII "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 entered the territorial waters of this country". The Collector, therefore, was not only under no legal obligation to grant clearance, in the absence of an export license, but was actually under a legal duty to refuse clearance. The fact that this law conflicted with a prior treaty did not, under well recognized rules of law laid down by the Supreme Court, make it any less binding upon courts of the United States.

There was no obligation upon the owner to do a futile thing in order to preserve its right, through my Government, to appeal to Your Excellency that just compensation be made possible for the loss

sustained. I am the more convinced that this will be the view taken by Your Excellency since it has already prevailed in the case arising from the claim of the Royal Holland Lloyd out of the refusal of the Federal authorities to grant clearance to the Dutch vessel, *Zeelandia*, from October, 1917, to March, 1918, under the same authority invoked in the present case. In that case, no suits were filed by the owner in American courts, but the case was considered through diplomatic channels and procedure developed for its disposition upon its merits.

In addition to conferences with the Solicitor of your Department, I had several talks with your distinguished predecessor, Honorable Frank B. Kellogg, and he indicated to me that he recognized that my Government has a just claim, and that the United States Government ought to make amends in some form or other, but before the negotiations could be brought to a conclusion, his term of office ended.

I am aware of the immense load of responsibility you have undertaken and the many matters pressing for your attention, and I have been reluctant to urge the matter of my Government's claim upon your attention. And I hope you will not think me insistent in writing this letter; rather my thought is that it may summarize the situation for you, and therefore, to some extent, facilitate your study of the case. I would be much obliged if Your Excellency could find time to peruse all our notes and memoranda, in which, I believe, all the contentions made by the Solicitor have been conclusively answered. It is my hope that the soundness of the claim will be recognized and that it might be possible to reach an agreement as to the exact damages suffered, thus avoiding the lengthy and costly proceedings of arbitration.

I beg you to inform me when it will be convenient for Your Excellency to discuss the matter with me orally, and remain, my dear Mr. Secretary,

Yours very sincerely, W. BOSTRÖM

411.58J63/27

The Under Secretary of State (Cotton) to the Swedish Minister (Boström)

WASHINGTON, July 1, 1930.

MY DEAR MR. MINISTER: You will recall that on Friday last in my office you and I talked, in the presence of Mr. Castle, on the possible submission to a neutral tribunal of the claim of your Government against the United States for ship detention damages during the last war. I said to you that I was willing to try to agree to a convention to that end, provided we could agree on terms of sub-

mission and personnel of the tribunal. I said *inter alia* (*a*) that I thought such a tribunal should clearly sit in Washington (where all the evidence is and those familiar with the matter are), (*b*) that there should be a study by both of us to see if any other question between the two countries should go before the same tribunal (as it would be preferable to clear the slate), (*c*) that I thought it best to have a tribunal composed of a single judge who should not be a national of Sweden or the United States (although I am not clear as to this point about the number), (*d*) that I was making a similar proposal for a convention relating to claims of a different character to at least one other European country and would hope that the same person (who would have to be a person generally familiar with American law though not a citizen of the United States) would be selected who could sit on both tribunals—obviously that would minimize our time wasted in the matter.

I threw out the suggestion that if we found difficulty in agreeing on a tribunal, we both might trust our mutual friend, Mr. Massey,[17] or someone like him to do it or to select a panel from which a tribunal might be chosen.

To all these suggestions you said nothing but that you would consider the matter, and I think that is the best way to leave it. Neither of us is in the least bound to any such scheme, but we will consider it as a proposal open between us with the idea that when you come back in the autumn you will have talked to your Government concerning its position in regard to such a proposal.

Very sincerely yours, J. P. COTTON

411.58J63/52

The Swedish Minister (Boström) to the Under Secretary of State (Cotton)

WASHINGTON, October 17, 1930.

MY DEAR MR. COTTON: With reference to your letter of July 1st last, concerning submission to a neutral tribunal of the claim of my Government against the United States for ship-detention damages during the war, and to my preliminary answer of July 2nd,[18] I have the honour to inform you that I have discussed the matter with my Government and that I am ready to discuss with you the terms of submission and the personnel of the tribunal.

I beg to transmit herewith a draft of the main points of a compromise, drawn up by our Foreign Office, and will be glad to discuss the whole matter with you orally.

Very sincerely yours, W. BOSTRÖM

[17] Vincent Massey, Canadian Minister to the United States.
[18] Not printed.

[Enclosure]

Swedish Draft of the Main Points of a Compromise

Whereas the Swedish Motor ships *Kronprins Gustaf Adolf* and *Pacific*, which had entered American ports on June 23rd, 1917 and July 1st, 1917, respectively, were prevented to leave American territory until July 12th, 1918 and July 19, 1918, respectively, as a con sequence of the refusal of the American Government to allow, unconditionally, the exportation of the bunker oil carried by these ships at their arrival to American territory,

His Majesty the King of Sweden and the President of the United States of America agree to submit to arbitration the following ques tions:

1) Do the facts stated above constitute a contravention of the Swedish-American Treaties of April 3rd, 1783 and July 4th, 1827?

2) Should the reply be in the affirmative, what pecuniary reparation is due to the Government of Sweden on behalf of the owner of the ships above-mentioned?

411.58J63/50

The Under Secretary of State (Cotton) to the Swedish Minister (Boström)

WASHINGTON, November 14, 1930.

MY DEAR MR. MINISTER: The Solicitor's Office has prepared, after consideration of your memorandum, a proposed draft convention of which I now enclose a copy.[19]

As to the questions to be submitted to arbitration, the first differs from your memorandum and the second and third, I think, are in substance the same. Article II I understand to be in general in line with what we have previously said.

Articles III, IV, V, VI, VII, VIII, and IX are, according to our Solicitor, in the usual form excepting the part about being in English and being in Washington, to which I understood you did not object.

I am not wedded to this particular form of procedure but some procedure requirements should be clear. It would be our intention, in case we reach agreement, to submit this convention to the Senate for its approval.

Sincerely yours, J. P. COTTON

[19] Not printed; this draft was accepted by the Swedish Government and, except for several typographical changes, is identical with the definitive treaty printed *infra*.

Treaty Series No. 841

Special Agreement Between the United States of America and Sweden for the Arbitration of Claims Growing out of the Alleged Detention of the Motorships "Kronprins Gustaf Adolf" and "Pacific," Signed at Washington, December 17, 1930 [20]

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 motorship *Kronprins Gustaf Adolf* and the motorship *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 motorships, 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,[21] and the Arbitration Convention between the United States of America and Sweden, signed at Washington, October 27, 1928,[22] the following questions:

First, Whether the Government of the United States of America detained the Swedish motorship *Kronprins Gustaf Adolf* between June 23, 1917 and July 12, 1918, and the Swedish motorship *Pacific*

[20] Ratification advised by the Senate, February 14 (legislative day of January 26), 1931; ratified by the President, April 17, 1931; ratifications exchanged at Washington, October 1, 1931; proclaimed by the President, October 2, 1931.

[21] *Foreign Relations*, 1907, pt. 2, p. 1181.

[22] *Ibid.*, 1928, vol. III, p. 883.

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 motorships 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 motorships 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 defense 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]

[In his decision of July 18, 1932, the arbitrator, Eugène Borel, Honorary Professor of International Law at the University of Geneva, decided: "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."—Department of State Arbitration Series No. 5 (6), p. 100.]

ARRANGEMENT BETWEEN THE UNITED STATES AND SWEDEN REGARDING RECIPROCAL EXEMPTION OF PLEASURE YACHTS FROM ALL NAVIGATION DUES

858.843/7

The Secretary of State to the Chargé in Sweden (Crocker)

No. 127 WASHINGTON, December 12, 1929.

SIR: There are enclosed for your consideration copies of the following correspondence concerning apparently discriminatory charges assessed against American yachts calling at Swedish ports, particularly in the case of the yacht *Cyprus* which arrived at Stockholm on July 3, 1929:—despatch from the American Consul General, Stockholm, September 5, 1929; letters from Department of Commerce, September 27 and November 21, 1929, and letter to Department of Commerce, October 31, 1929.[23]

[23] None printed.

You are accordingly authorized to invite the attention of the Swedish authorities to the charges assessed against the *Cyprus*, and to state that, pending ratification of the proposed treaty of friendship, commerce and consular rights between the United States and Sweden, this Government would appreciate an agreement on the part of the Swedish Government to accord to American yachts in Swedish ports treatment in the matter of the payment of various port charges reciprocal to that which is now enjoyed by Swedish vessels calling at ports of the United States. If deemed advisable in this connection, the provisions of the statutes of the United States for the collection of tonnage and light dues, (U. S. Code, Title 46, Secs. 121 and 128), as well as for the suspension of these charges in behalf of vessels of foreign countries which accord national treatment to vessels of the United States, may be cited for the information of the Swedish authorities.

I am [etc.] For the Secretary of State:
WILBUR J. CARR

858.843/12

The Chargé in Sweden (Crocker) to the Secretary of State

No. 155 STOCKHOLM, October 29, 1930.
[Received November 12.]

SIR: In compliance with the Department's instruction No. 127, dated December 12, 1929, enclosing correspondence concerning apparently discriminatory charges assessed against American yachts calling at Swedish ports, particularly in the case of the yacht *Cyprus* which arrived at Stockholm on July 3, 1929, and instructing me to invite the attention of the Swedish authorities to the charges assessed against the *Cyprus* and to state that, pending ratification of the proposed treaty of friendship, commerce and consular rights between the United States and Sweden, the Government of the United States would appreciate an agreement on the part of the Swedish Government to accord to American yachts in Swedish ports treatment in the matter of the payment of various port charges reciprocal to that which is now enjoyed by Swedish vessels calling at ports of the United States, I have the honor to report that on January 3, 1930, I addressed a communication to the Minister for Foreign Affairs, in the sense of the Department's instruction under reference, a copy of which, without its accompanying enclosures, is enclosed. On October 22, 1930, the Legation received a reply thereto from the Minister for Foreign Affairs, a copy and translation of which are enclosed herewith, informing me that, according to the provisions of Section 126 of the Swedish Customs Regulations and of the Royal Decree dated October 7, 1927, yachts belonging to yacht clubs of countries where the same facilities are

accorded to Swedish yachts are exempted in Swedish ports from all navigation dues—except dues of pilotage when they have actually a pilot on board—provided that they be furnished with a certificate delivered by the authorities of the country and on the understanding that they are not equipped for commercial purposes. A copy and translation are enclosed of Section 126 of the Swedish Customs Regulations and of Royal Decree dated October 7, 1927.

The Minister for Foreign Affairs states in conclusion that "if your Government consents to grant upon a basis of reciprocity the same facilities to pleasure yachts belonging to Swedish yacht clubs, I permit myself to propose that the present note and the reply which you may make thereto will serve as an agreement reached between our two countries".

In view of the form of the agreement proposed by the Minister for Foreign Affairs and in the absence of specific instruction from the Department authorizing me to conclude such an agreement, I have the honor to report that, in order to avoid unnecessary delay, I addressed a reply to the note of the Minister for Foreign Affairs under reference, dated October 29, 1930, a copy of which is enclosed herewith, in which I stated that, inasmuch as the provisions of the Statutes of the United States for the collection of tonnage and light dues (U. S. Code, Title 46, Sections 121 and 128) permitted the suspension of those charges in behalf of vessels of foreign countries which accorded national treatment to vessels of the United States, I was accordingly gratified that there appeared to be no further obstacle to the enjoyment by the pleasure yachts of each country of treatment reciprocal to that enjoyed in the ports of the other.

For the Department's confidential information, I may state that, in my opinion, upon the conclusion of the reciprocal agreement, there will be no difficulty in obtaining the refund of the discriminatory charges assessed in the past against American yachts calling at Swedish ports and which have been protested.

Respectfully yours, EDWARD SAVAGE CROCKER

[Enclosure 1]

The American Chargé (Crocker) to the Swedish Minister for Foreign Affairs (Trygger)

No. 211 STOCKHOLM, January 3, 1930.

EXCELLENCY: Acting under instructions from my Government, I have the honor to invite the attention of Your Excellency to the apparently discriminatory charges assessed against American yachts calling at Swedish ports, and particularly to the charges assessed against the yacht *Cyprus* which arrived at Stockholm on July 3, 1929. A memorandum of these charges as contained in a report by the Master

of the *Cyprus*, dated August 1, 1929, is appended hereto.[24] I am further instructed to state that, pending ratification of the proposed treaty of friendship, commerce and consular rights between the United States and Sweden, my Government would appreciate an agreement on the part of the Swedish Government to accord to American yachts in Swedish ports treatment in the matter of the payment of various port charges reciprocal to that which is now enjoyed by Swedish vessels calling at ports of the United States.

In this connection I venture to cite for the information of Your Excellency the provisions of the Statutes of the United States for the collection of tonnage and light dues (U. S. Code, Title 46, Secs. 121 and 128), as well as the suspension of those charges in behalf of vessels of foreign countries which accord national treatment to vessels of the United States.

I avail myself [etc.] EDWARD SAVAGE CROCKER

[Enclosure 2—Translation]

The Swedish Minister for Foreign Affairs (Ramel) to the American Chargé (Crocker)

STOCKHOLM, October 22, 1930.

MR. CHARGÉ D'AFFAIRES: By a letter dated January 3, 1930, you kindly informed my predecessor that the United States Government is disposed to conclude an arrangement with the Swedish Government with a view to exempting on a basis of reciprocity the pleasure yachts of the two countries from all navigation dues in their ports.

Referring to this letter, I have the honor to inform you that, according to the provisions of Section 126 of the Swedish Customs Regulations and of the Royal Decree dated October 7, 1927, yachts belonging to yacht clubs of countries where the same facilities are accorded to Swedish yachts are exempted in Swedish ports from all navigation dues—except dues of pilotage when they have actually a pilot on board—provided that they be furnished with a certificate delivered by the authorities of the country and on the understanding that they are not equipped for commercial purposes.

If your Government consents to grant upon a basis of reciprocity the same facilities to pleasure yachts belonging to Swedish yacht clubs, I permit myself to propose that the present note and the reply which you may make thereto will serve as an agreement reached between our two countries.

Please accept [etc.] RAMEL

[24] Not printed.

[Enclosure 3—Translation]

Section 126 of the Swedish Customs Regulations

A master of a vessel belonging to a public yacht club or other similar association and which is not equipped for commercial purposes (pleasure yachts) shall, when the vessel arrives or departs from a port in the customs territory without being used for conveying goods other than foodstuffs and articles necessary for the vessel during the journey, be exempt from the duty to submit to the customs authorities a written report regarding the vessel and from obtaining a permit for it from the customs authorities.

When arriving from a port outside of the customs territory, the master may not visit any other port with the vessel than a customs port or a place where coast-guards are stationed. When arriving from and departing to a place outside of the customs territory, it is the duty of a master to report personally to the nearest customs office or coast-guard station and to submit a certificate, issued by a public authority or the board of the association, showing the name of the vessel, number and tonnage, the name of the owner of the vessel and domicile, as well as the name of the association to which the vessel belongs.

If the owner or master of a pleasure yacht has here in the country been found guilty of illegal import or export of articles, the provisions granted in this section shall not apply to any of the vessels belonging to the association as long as he owns or commands the vessel. However, the advantages shall be discontinued not earlier than fifteen days after the General Customs Board has informed the board of the association of the misdemeanor committed.

The provisions of this section shall not apply to vessels belonging to an association in Sweden, provided His Majesty has not granted the association similar rights for its vessels, and shall not either apply to vessels belonging to a foreign association, unless Swedish pleasure yachts enjoy the same advantages in the respective country.

[Enclosure 4—Translation]

Royal Decree of the Swedish Government

No. 394

ROYAL DECREE

REGARDING EXEMPTION IN CERTAIN CASES FOR SALVAGE VESSELS AND PLEASURE YACHTS FROM PAYMENT OF MARITIME DUES

Given at the Palace of Stockholm, October 7, 1927

His Royal Majesty has deemed fit to decree that salvage vessels and pleasure yachts referred to in Sections 124 and 126 of the Customs Regulations, under the conditions mentioned in these sections,

shall in Swedish ports be exempt from all those fees which are generally assessed for vessels in such ports, with the exception of pilotage fees where a pilot is employed.

This decree shall enter into force on May 1, 1928, on and from which day the regulations in the letter to the Board of Trade of April 24, 1863, (No. 23), relating to the exemption from certain fees in Swedish ports accorded vessels intended for diving and salvage activities, shall cease to be effective.

Let all concerned duly comply herewith. In faith whereof, We have signed this with Our own hand and have caused it to be confirmed by Our Royal Seal. The Palace of Stockholm, October 7, 1927.

GUSTAF
(L. S.)

(Department of Commerce) FELIX HAMRIN

[Enclosure 5]

The American Chargé (Crocker) to the Swedish Minister for Foreign Affairs (Ramel)

No. 56 STOCKHOLM, October 29, 1930

EXCELLENCY: I have the honor to acknowledge the receipt of Your Excellency's note dated October 22, 1930, in reply to my note dated January 3, 1930, addressed to Your Excellency's predecessor, relating to the desire of my Government to obtain an agreement on the part of the Swedish Government to accord to American yachts in Swedish ports treatment in the matter of the payment of various port charges reciprocal to that which is now enjoyed by Swedish vessels calling at ports of the United States.

Your Excellency is so good as to inform me that, according to the terms of Section 126 of the Swedish Customs Regulations and of the Royal Decree dated October 7, 1927, yachts belonging to yacht clubs of countries where the same facilities are accorded to Swedish yachts are exempted in Swedish ports from all navigation dues—except dues of pilotage when they have actually a pilot on board—provided that they be furnished with a certificate delivered by the authorities of the country and on the understanding that they are not equipped for commercial purposes.

In conclusion Your Excellency states that, if my Government consents to grant upon a basis of reciprocity the same facilities to pleasure yachts belonging to Swedish yacht clubs, Your Excellency proposes that the note under reference and the reply which I may make thereto will serve as an agreement reached between our two countries.

In reply I have the honor to state that, inasmuch as the provisions of the Statutes of the United States for the collection of tonnage and light dues (U. S. Code, Title 46, Sections 121 and 128) permit the suspension of those charges in behalf of vessels of foreign countries which accord national treatment to vessels of the United States, I am accordingly gratified that there appears to be no further obstacle to the enjoyment by the pleasure yachts of each country of treatment reciprocal to that enjoyed in the ports of the other.

I avail myself [etc.]

EDWARD SAVAGE CROCKER