

TREATY RELATIONS WITH TURKEY

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The treaty of general relations concluded at Lausanne, August 6, 1923, is designed, according to its preamble, to re-establish the consular and commercial relations of the Contracting Parties, and to regulate the conditions of the intercourse and residence of the nationals of each of them on the territory of the other in accordance with principles of international law, and on the basis of reciprocity.

In conformity with the avowed object of the treaty, the Contracting Parties, in Article 2, declare the Capitulations concerning the régime of foreigners in Turkey, together with the economic and financial system resulting from the Capitulations, to be completely abrogated; and in Article 30 they agree that from the coming into force of the new treaty the treaties formerly concluded between the United States and the Ottoman Empire shall absolutely and finally cease to be effective as between the Contracting Parties.

For an understanding of the significance of the new treaty, and for the formation of an opinion as to its adequacy for the protection of American interests under conditions at present existing in Turkey, it is important to consider what rights were accorded to the United States and its nationals under the treaties formerly existent and under the Capitulatory system, and what changes have occurred in the conditions which were formerly deemed to justify or require the extension to Americans and other foreigners in Turkey of privileges which were neither in accordance with international law nor based on principles of reciprocity.

RIGHTS OF THE UNITED STATES UNDER TREATIES WITH THE OTTOMAN EMPIRE

The agreements in force between the United States and the Ottoman Empire before the World War consisted of a Treaty of Commerce and Navigation concluded in 1830, an Extradition Treaty concluded in 1874, and a Protocol concerning the right to hold real estate in Turkey, concluded in 1874.¹

The Extradition Treaty, which contains provisions of the same character as those usually incorporated in American treaties of extradition as well as those included in the new treaty on the

¹ The texts are printed in 2 Malloy, *Treaties, Conventions, International Acts, etc.*, 1318-1348.

same subject concluded at Lausanne, August 6, 1923, does not require detailed consideration or comment.

The provisions of the Treaty of 1830 may be summarized as follows:

Article I. Most favored nation treatment is assured to merchants of each country as regards duties, imposts, privileges, and facilities.

Article II. Each country is given the right to appoint consuls, who are to be accorded suitable distinction and necessary aid and protection.

Article III. American merchants established in Turkey are to receive most favored nation treatment as regards employment of brokers and the general conduct of their affairs, and they are not to be disturbed in their affairs nor treated in any way contrary to established usages.

Article IV. Mixed civil cases between American citizens and Ottoman subjects cannot be decided without the presence of an American dragoman. If the amount involved exceeds five Turkish pounds, decision must be rendered by the Sublime Porte.² Americans accused of penal offenses cannot be arrested by the local authorities but must be tried by an American minister or consul, "following in this respect the usage observed toward other Franks."³

Article V. American merchant vessels flying their own flag are assured safety in coming and going. American diplomatic and consular officers must refrain from protecting Christian subjects of the Sultan.

Article VI. War vessels of the two countries must observe the usual courtesies.

Article VII. American merchant vessels are assured most favored nation treatment as regards passage of the Straits of the Dardanelles.

Article VIII. Merchant vessels of each country are exempt from impressment for military objects.

Article IX. Crews of wrecked merchant vessels of either country must be given appropriate assistance, and the effects saved must be conveyed to the nearest consul.

The Protocol concerning the right to hold real estate gives to American citizens of non-Ottoman origin the right to hold real estate in Turkey subject to the laws and regulations governing Turkish nationals. It provides that the immunities specified by the treaties shall continue to protect the person and the movable property of foreigners who may become owners of real estate. The residence of an American citizen is declared inviolable, and can, in general, be entered by Turkish authorities only in the presence of an American consul or his delegate. In localities more than nine hours' journey from the residence of an American

² The jurisdiction thus given to the Sublime Porte was transferred in 1847 to the newly established Mixed Courts.

³ The nature of the long standing dispute with reference to this provision is indicated below.

consul, Americans may, in civil cases involving not more than ten pounds or in penal cases involving a maximum penalty of five pounds, be tried by native tribunals in the absence of the consul, subject to the right of appeal to a higher tribunal in which the consul is present. Forcible execution of judgments requires the coöperation of the consul or his delegate. The right of defense and publicity of hearings in Turkish tribunals is assured. The provisions of the Protocol, it is stated, are to remain in force "until the revision of the ancient treaties,—a revision which the Sublime Porte reserves to itself the right to bring about hereafter by an understanding between it and the friendly Powers."

THE TREATY OF 1830 AND THE PROTOCOL OF 1874

Of the nine articles of the Treaty of 1830, five (the first, second, sixth, eighth, and ninth) are of a fully reciprocal and not unusual character; one (the fifth) balances the grant of a privilege with the imposition of a restriction upon action which it was evidently apprehended might be taken by American diplomatic or consular officers, following a practice fairly common at the time among representatives of the Powers, with a view to enrolling as protégés large numbers of the Christian subjects of the Porte; and three (the third, fourth, and seventh) accord to American merchants privileges of a non-reciprocal character which suggest the existence of peculiar conditions in the Ottoman Empire.

Taking in the reverse order the three articles just mentioned, we may note first, in connection with the provision in Article VII according most favored nation treatment as regards passage of the Straits by American merchant vessels, that by treaties with various European Powers from 1774 to 1806 Turkey had agreed to the free navigation of the Dardanelles by commercial vessels. No provision was made as regards the passage of men-of-war, but it was the long standing rule of the Ottoman Empire to exclude foreign men-of-war from the Dardanelles and the Bosphorus.⁴ Many years after the conclusion of the Treaty of 1830, however, the American Department of State took the position that the right of the Turkish Government to obstruct the navigation of the Dardanelles even to vessels of war, in time of peace, was open to serious question, and that a proper occasion might some time arise for disputing the applicability of the ancient Turkish rule to American men-of-war.⁵

Article IV of the Treaty of 1830 is of the highest importance, as being the direct source of the admitted right of American citizens to be tried in mixed civil cases (that is, cases involving

⁴ 1 Moore, *Digest of International Law* (1906) 664.

⁵ *Ibid.* at 667.

Americans and Ottoman subjects) only in the presence of an American dragoman, representing the legation or consulate as well as of the disputed right of American citizens to be tried for penal offenses only by an American minister or consul. The first of these rights was never questioned before 1914, because it was identical with the right generally accorded to foreigners in mixed civil cases. The second right was strongly contested by the Sublime Porte upon textual grounds. The terms in which this right was granted were, according to the English translation, accepted by our State Department, as follows:

“Citizens of the United States of America, quietly pursuing their commerce, and not being charged or convicted of any crime or offense, shall not be molested; and even when they may have committed some offense they shall not be arrested and put in prison, by the local authorities, but they shall be tried by their Minister or Consul, and punished according to their offense, following in this respect, the usage observed toward other Franks.”

According to the Turkish contention, the words “they shall not be arrested” and “they shall be tried by their Minister or Consul and punished according to their offense” had no equivalent in the Turkish text of the Treaty, which appears to have been accepted as original and controlling by Commodore Porter, the representative of the United States, for the purpose of exchanging the ratifications of the Treaty. American citizens accused of penal offenses must therefore, they maintained, be treated according to “the usage observed toward other Franks” (that is, other foreigners), who, when the dispute first arose, in 1868, and throughout its continuance, were regularly tried in such cases by Turkish tribunals. The dispute remaining unsettled, Americans accused of penal offenses were, as a rule, not tried at all.⁶

Article III, which provides that American merchants shall not be treated in any way contrary to established usages, was until 1874 the clearest treaty warrant for the extension to American citizens, generally, of the benefit of the régime of the Capitulations. As a matter of fact, as will be seen later, no such warrant was necessary in 1830, since the Capitulatory system was at that time considered to be applicable as a matter of course to all foreigners in Turkey.

The Protocol of 1874 is worthy of note chiefly for its specific extension of the Capitulatory immunities to American citizens, and for its accompanying reservation of the right of the Porte to bring about a revision of the Capitulations by an understanding with the Powers.

⁶ The details of the controversy are given in 2 Moore, *op. cit. supra* note 4, at 668-714.

THE RÉGIME OF THE CAPITULATIONS

The régime of the Capitulations, to the benefit of which the United States was entitled by virtue of the specific provisions in the Protocol of 1874 and by virtue of the general assurances in the Treaty of 1830, was the system, founded on the so-called principle of immiscibility, by which the conditions of the residence of foreigners in Turkey had been regulated for some hundreds of years before the United States became a factor in the situation.

The term "Capitulations" has in relation to the régime of foreigners in Turkey an entirely different meaning from that which it has in military usage. The term as here used is derived from the Latin word *capitula*, which signified the headings of the agreements which the Western Powers made with the Moslem conquerors of Constantinople. The fact that under these agreements foreigners were exempt from the jurisdiction of the Turkish courts and were in other respects treated differently from Turkish subjects was not at the time these agreements were made deemed to be in any way derogatory to the sovereignty and dignity of the Sultans. Sovereignty and jurisdiction were at that time generally regarded, in Europe scarcely less than in the Levant, as personal rather than territorial; and, particularly in view of the Islamic doctrine of the immiscibility of Moslem and Christian communities and the radical divergence between the legal systems of Turkey and the Occident, it was considered to be the most natural and proper arrangement for foreigners in Turkey to be subject exclusively to the laws and jurisdiction of their own sovereign, acting through his minister and consuls. The Capitulatory system was, in fact, so definitely a part of the public law of Turkey that it was applied to all foreigners in the country, even in the absence of treaties extending them the benefit of the system. The Porte, moreover, during many generations, interposed no objections to the gradual development, as part of the Capitulatory system, of usages not sanctioned by specific treaty provisions but deemed to subserve the convenience of the foreign communities in the disposition of matters of primary concern to themselves, or even in their intercourse with Ottoman subjects and the authorities.⁷

⁷ For details regarding the origin, nature, and content of the Capitulations reference may be made to Ravndal, *The Origin of the Capitulations and of the Consular Institutions* (1921) (Senate Document No. 34, 67th Congress, 1st Session); Van Dyck, *Report upon the Capitulations of the Ottoman Empire since the year 1150* (Executive Document No. 3, Special Session of Congress, 1881); Brown, *Foreigners in Turkey*; Hinckley, *American Consular Jurisdiction in the Orient*; Mandelstam, *La Justice Ottomane dans ses Rapports avec les Puissances Etrangères* (1911); and du Rausas, *Le Régime des Capitulations dans l'Empire Ottoman*.

The provisions of the Capitulations were in 1880 summarized as follows in a consular report by Edward A. Van Dyck:⁸

"1st. Permission to foreigners to come upon Moslem territory, to freely navigate the waters and enter the ports of the state, whether for devotion and pilgrimage to the holy places, or for trading in the exportation and importation of every kind of unprohibited goods.

"2d. Freedom to follow, on Moslem ground, one's own habits and customs, and perform the rites and fulfill the duties of one's own religion.

"3d. Exemption from every 'avarie,' tax, impost, or tribute, except duties as agreed upon on goods and merchandise. (In 1914 the customs duties, under agreement with the Capitulatory Powers, were limited to a uniform rate of eleven per cent *ad valorem*).

"4th. Right of foreigners to be judged by the ambassadors and consuls of their respective governments in suits between one another, both civil and criminal, and obligation of the local authorities to render aid to consul in enforcing his decisions and judgment concerning the same, etc.

"5th. In civil causes between natives and foreigners jurisdiction is reserved in many of the capitulations to the local tribunals, but with various guarantees and qualifications, such as, that the suit must be tried in the presence of the consular dragoman, that the Ottoman judge shall not give heed to the native unless he have written proof of his claim, and, lastly, that if the claim exceeded a given sum it shall be referred to the imperial divan. Usage, however, and the provisions of some of the capitulations have widely departed from these stipulations.

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"6th. In crimes and offenses committed by foreigners against natives, jurisdiction is reserved in most of the capitulations to the local judge, but always with the presence or assistance of the consular dragoman or consul, and according to the most recent capitulations, jurisdiction even in such criminal cases is allowed to the consul of the accused. * * * By usage, and by the principle of the most favored nation, all the powers can avail themselves of this provision of the latest capitulation; and this perhaps is one of the chief reasons why the Sublime Porte contested the English text of Article IV of the treaty of the United States with the Ottoman Empire of 1830. * * *

"7th. Inviolability of foreigners' domicile, and, in event of urgent necessity for arresting a delinquent, obligation of government officials not to enter the dwelling place of a foreigner, without having previously notified the ambassador or consul, and unless accompanied by his deputy.

"8th. Full freedom for foreigner to give and bequeath by will, and in case of intestate estate, obligation of local government to allow the consul or the heir, if there be one, to take unhindered charge thereof and administer the same; and in case of absence of both heir and consul, to itself take care of the same, and deliver it to the heirs without any costs.

⁸ *Supra* note 7.

"9th. Prohibition to consuls and ambassadors to give protection to Ottoman subjects and rayas (i. e., Christians who are subject to Ottoman rule), or give the flag of their nation to Ottoman and raya vessels."

A provision of the Capitulatory system not mentioned in Van Dyck's enumeration, although it existed as a matter of usage at the time of his report, was that under which the sanitary administration of Turkey was controlled by a Council of Health composed of eight Ottoman subjects and thirteen representatives of the Powers.⁹

Another provision of the Capitulations, or perhaps more properly an incident of the system, was that under which, pursuant to the Mitylene agreement of 1901, foreign educational, charitable, and philanthropic institutions in Turkey were entitled to official recognition and to exemption from taxes and customs duties.¹⁰

It will doubtless have been noted that certain of the provisions of the Capitulations above indicated are not inconsistent with modern juridical concepts. The first, second, and eighth in the series, relating respectively to freedom of residence and travel, freedom of religion and social customs, and freedom of testation and inheritance, are provisions such as may be found in many treaties between modern States. The ninth provision, moreover, by which consuls and ambassadors were forbidden to give protection to the Christian subjects of the Porte, was obviously a stipulation in favor of Turkey. Each of the remaining provisions, on the other hand, whether relating to arrest and trial of offenders, to search of premises, to sanitary measures, or to taxation, limits the action of the administrative or judicial authorities of Turkey, and establishes in favor of foreigners privileges which could not reasonably have been expected long to survive the development in Turkey of the notion of exclusive territorial sovereignty and the adoption of reforms designed to bring the laws and the administrative and judicial machinery of the country into conformity with Western standards.

TURKISH OPPOSITION TO THE CAPITULATIONS

The incompatibility of the Capitulatory system with modern juridical concepts had been recognized and deplored by the Sublime Porte for some years before 1856, the year of the Treaty of Paris, by the terms of which Turkey was admitted to participation in the political system of Europe. The Turkish spokesmen at the Congress of Paris could point to the facts that certain reforms in the administration of law in the Turkish courts had

⁹ 3 Young, *Corps de Droit Ottoman*, 125.

¹⁰ 2 *Ibid.* at 375; *Foreign Relations of the United States* (1901) 529 et seq.

been made as early as 1839; that Mixed Courts had been established, primarily for commercial cases, in 1847; and that a Commercial Code, based upon a French model, had been promulgated in 1850. The representations of the Turkish spokesmen were, however, not sufficiently convincing to induce the Powers to assent to the revision of the Capitulations in 1856; and the discussion of the question was concluded by an expression in the record of the hope that further discussions might be held later at Constantinople with a view to the revision of the stipulations regarding the commercial relations of the Porte with other Powers, as well as of those determining the conditions of the residence of foreigners in Turkey.¹¹

Later innovations effected by the Turkish reformers up to the beginning of the World War were the Code of Commercial Procedure, promulgated in 1861; the Penal Code, in 1863; the Codes of Civil and Penal Procedure, in 1878 and 1879 respectively; and the laws for the reorganization of the judicial system, in 1913 and 1914. These innovations, in which French models were generally followed, were directly attributable to the growing influence of Western ideas of law and administration.¹²

Immediately after the Young Turk Revolution of 1908 the Turkish leaders, with a new spirit of nationalism and a new sensitiveness to the inequality implied by the Capitulatory régime, began to make intensive efforts to bring about the revision of the Capitulations by agreement with the Powers. They succeeded in obtaining the promises of Austria in 1909, Italy in 1912, and France in the early part of 1914, to accept the eventual abolition of the Capitulations with the consent of the other Powers.¹³ Their progress toward relief from the Capitulatory restrictions was not sufficiently rapid to satisfy them, however, and accordingly, in September, 1914, finding most of the Capitulatory Powers preoccupied with the War, the Sublime Porte announced that it had decided to abrogate the Capitulations as from October 1, 1914. In announcing its decision, the Porte stated that the exceptional privileges accorded to foreigners under the Capitulatory régime had been found to be "in complete opposition to the juridical rules of the century and to the principle of national sovereignty", and "an impediment to the progress and development of the Ottoman Empire."¹⁴

The action of the Porte was immediately protested by all the ambassadors at Constantinople. The American protest contained

¹¹ Compare Ismet Pasha's memorandum of December 2, 1922 (Turkey No. 1—1923—Lausanne Conference on Near Eastern Affairs, Cmd. 1814, page 472).

¹² Compare Scott, *The Law affecting Foreigners in Egypt, etc.*, ch. 9.

¹³ *Foreign Relations* (1914) 1091; Thayer, article on Capitulations (1923) 17 AM. JOUR. INT. LAW, 207.

¹⁴ *Foreign Relations* (1914) 1092.

a declaration that the Government of the United States did not recognize that the Turkish Government had a right to abrogate the Capitulations or that its attempt to do so had any effect upon the rights and privileges enjoyed under them.¹⁵ In response to the declaration the Porte claimed "the right to denounce, at any time, international acts concluded without stipulations of duration." It added:¹⁶

"In effect, no treaty can contain provisions which should perpetuate themselves to eternity, when they deal with matters of commerce, of organization and of judicial procedure or administration, which should evidently be submitted to the evolution of time.

"The Imperial Government has all the more undeniably the right to avail itself of the faculty of denouncing which belongs to it, since the régime of the Capitulations, obsolete and no longer responding to modern needs, even when it is confined within its true contractual limits, threatens its own existence, and renders very difficult the conduct of Ottoman public affairs."

With the entry of Turkey into the World War on the side of the Central Powers at the end of October, 1914, the abrogation of the Capitulatory régime began to be given a practical effect which the Allied Powers were not in a position to prevent. The Turks were, moreover, enabled to advance against the Allies the argument that the clauses of the ancient treaties by which exceptional privileges were accorded to Allied nationals were, if not actually annulled by the outbreak of the War, at least suspended for the period of its duration. As a matter of fact, however, the argument that the Capitulations were suspended or annulled as the result of the War does not appear to have been largely relied upon by the Turks; the emphasis of their attacks upon the Capitulatory system having been consistently laid upon arguments of the character indicated in the preceding paragraph, which could be urged against the United States and other neutrals as well as against the Allies.

The position of the Turkish Government in relation to the exercise of Capitulatory rights by the United States was not altogether clear or consistent between October 1, 1914, the announced date of the abrogation of the Capitulations, and April 20, 1917, the date of the severance of diplomatic relations by action of the Porte. During this period the Turks did not acknowledge the existence of the Capitulations; but on the other hand they did not take the measures which it was in their power to take for the prevention of the functioning of the American consular courts. There is evidence that they deemed it advisable, before the entry of the United States into the War, to avoid raising a sharp issue

¹⁵ *Foreign Relations* (1915) 1301.

¹⁶ *Ibid.* at 1302-1306.

with this country. At any rate, they lost but little time after the declaration of a state of war between the United States and Germany in effecting the severance of relations with this Government and communicating to it the information, somewhat surprising if intended to illustrate a general rule, that the severance of relations entailed the annulment, *ipso facto*, of all treaties between the United States and Turkey.

Shortly after the Armistice concluded at Mudros on October 30, 1918, the Allied Powers and the United States notified the Turkish Government of the reapplication of the Capitulatory privileges as they had been applied before the War. Consular courts were reopened and the fiscal restrictions were restored. The American High Commissioner, Rear-Admiral Bristol, commanding a naval detachment and representing the President of the United States, took occasion to inform the Sublime Porte of his dissent from the view expressed in its announcement of April, 1917, concerning the status of the treaties between the United States and Turkey. The exercise of Capitulatory rights during the post-Armistice period can hardly, under the circumstances, be said to have a bearing upon the question of the status of the Capitulations and of the treaties between the United States and Turkey.

THE ALLIED-TURKISH SETTLEMENT AT LAUSANNE

When the Conference on Near Eastern Affairs opened at Lausanne in November, 1922, following the triumph of the Turkish Nationalist armies over the invading forces of the Greeks, it was fully appreciated by the Allies that the attitude of the Turkish representatives toward the maintenance of the régime of the Capitulations or the establishment of any similar system respecting the conditions of residence of foreigners in Turkey would be governed by the declaration in Article 6 of the National Pact of January 28, 1920, a document which had been one of the important factors in the collapse of the unratified Treaty of Sévres as the basis of restoring peace in the Near East. This Article was in part as follows:¹⁷

“It is a fundamental condition of our life and continued existence that we, like every country, should enjoy complete independence and liberty in the matter of assuring the means of our development, in order that our national and economic development should be rendered possible and that it should be possible to conduct affairs in the form of a more up-to-date regular administration.

“For this reason we are opposed to restrictions inimical to our development in political, judicial, financial and other matters.”

¹⁷ Toynbee, *The Western Question in Greece and Turkey*, 210.

Accordingly, in opening the discussion of the régime to be applied to the residence of foreigners in Turkey, the Italian Chief Delegate, Marquis Garroni, who was the President of the Conference Commission on the Régime of Foreigners, took the initiative in recalling "the fact that the Capitulations were originally granted to foreigners by spontaneous act on the part of the Turkish Government" and in recognizing "that according to present-day ideas of law the Capitulatory régime is regarded as liable to diminish the sovereign powers of an independent State". It was intelligible, he observed, that Turkey should demand the abolition of this régime, which had had its day, and the Allies were disposed in principle to meet the desire of Turkey. On the other hand, he remarked, it must be recognized that foreigners had established themselves in Turkey and built up important enterprises there in reliance on the guarantees offered to them by the treaties; and it would therefore no doubt be agreeable to the Turkish Government to substitute for the Capitulatory régime such guarantees as regards legislation and the administration of justice as would inspire confidence in all those who would be obliged to have recourse thereto.¹⁸

Lord Curzon, the Chief British Delegate, associated himself with the conciliatory language of the President of the Commission, but deemed it appropriate to add that the Capitulations depended upon treaty rights established by mutual consent and that on more than one occasion, notably in 1871, 1878, and 1914, it had been laid down by the Powers that the Capitulations could not be destroyed by either of the Contracting Parties without the consent of the other, and without the substitution of some new system in their place.¹⁹

Mr. Child, the Chief of the American Delegation, indicated the concurrence of the United States in the point of view of the Allied Powers.²⁰

By way of reply to the remarks of the representatives of the Allied Powers and the United States, Ismet Pasha, the Chief Delegate of the Government of the Grand National Assembly of Turkey (now the Government of the Republic of Turkey), read to the Commission a memorandum in which he pointed out "the regrettable results of the application of the Capitulatory régime", cited the opinions of European jurists in proof of the unilateral character of the Capitulations or, alternatively, in proof of the right of Turkey to denounce the Capitulations as incompatible with altered conditions and dangerous for the political and economic existence of the country, and stated that Turkey could "in

¹⁸ Turkey No. 1 (1923), Lausanne Conference on Near Eastern Affairs, Cmd. 1814, pages 466, 467.

¹⁹ *Ibid.* at 468.

²⁰ *Ibid.* at 470.

no wise agree to the re-establishment of the Capitulations, which are in direct conflict with the modern conception of a State and with the principles of public law".²¹

The end of the long argument was reached eight months later, on July 24, 1923, when the Allies and the Turks signed a Treaty of Peace and other instruments the terms of which included the following of special interest to the United States:²²

1. The régime of the Capitulations was formally abrogated and replaced by a system, "based on respect for the independence and sovereignty of States", under which Allied nationals in Turkey are, upon condition of complete reciprocity, to be received and treated, as regards their persons and their property, in accordance with ordinary international law.

2. The non-Moslem nationals of the Allied Powers in Turkey are accorded the right to apply to courts in their own countries for the adjudication pursuant to their own laws, of matters involving their personal status or domestic relations or the succession to and the distribution and liquidation of personal property.

3. In regard to judicial matters other than those above indicated, the nationals of the Allied Powers in Turkey are to be amenable to the Turkish tribunals, but the Turkish Government engages itself to take immediately into its service for not less than five years a number of European legal advisers whose duties will be to participate in the work of legislative commissions; to observe and report to the Minister of Justice on the functioning of the Turkish civil, commercial, and criminal courts, and to receive complaints growing out of the administration of justice, the execution of sentences, the application of the laws, or the effectuation of arrests or domiciliary visits and searches. Moreover, in cases of minor offenses release on bail is always to be ordered unless it entails danger to the public safety or impedes the investigation of the cases; and all arbitral decisions in civil or commercial matters are to be executed upon being signed by the president of a court of first instance, who is not permitted to refuse his signature "unless the decision should be contrary to public order."

4. The system under which the Turkish customs duties were limited to a uniform rate of eleven per cent ad valorem is replaced by a provision that for a period of five years the duties shall be those fixed in the Turkish specific tariff which came into operation, without the consent of the Capitulatory Powers, in 1916.

²¹ *Ibid.* at 471 *et seq.*

²² The enumeration here given follows for the most part the enumeration made in the writer's article, *The American Treaty of Lausanne*, published by the World Peace Foundation as pamphlet No. 10, Volume VII, 1924. Details of the Allied settlement are given in the writer's article in (1924) 18 AM. JOUR. INT. LAW, 696.

5. The sanitary administration of Turkey is left to the control of the Turkish authorities, but Turkey undertakes to appoint for a period of five years three European medical specialists as counsellors of the administration.

6. The principle of "freedom of transit and of navigation, by sea and by air, in time of peace as in time of war" is recognized subject to conformity with certain regulations prescribed in a convention regarding the Straits. The Zone of the Straits, as defined in the convention, is to be demilitarized. An International Straits Commission is to be established at Constantinople under the auspices of the League of Nations. The Contracting Parties assume the obligation to take such action as the Council of the League may decide upon to meet any interference with the freedom of navigation or any attack upon the security of the demilitarized Zone.

7. Turkey undertakes to continue to recognize the existence of such British, French, and Italian religious, scholastic and medical establishments and charitable institutions as had been recognized as existing prior to October 30, 1914, and to examine favorably the situation of establishments and institutions of the same nationalities existing on July 24, 1923, with a view to regularizing their position. These establishments and institutions are to be treated on a footing of equality with similar Turkish establishments and institutions as regards fiscal charges, and, due regard being had to the essential conditions of their operation, are to be subject to Turkish laws, regulations, and administrative arrangements of a public character.

THE SETTLEMENT BETWEEN THE UNITED STATES AND TURKEY

Two weeks after the signature of the Treaty of Peace and the other instruments of the Allied-Turkish settlement at Lausanne, the treaty of general relations now awaiting the action of the United States Senate was signed by representatives of the United States and Turkey. At the same time the Chief of the Turkish Delegation communicated to the American plenipotentiary, Mr. Grew, a letter regarding the recognition and treatment of American establishments and institutions of the character mentioned in the undertaking of Turkey, likewise by letter, indicated in paragraph 7 of the foregoing enumeration of the terms of the Allied-Turkish settlement. Ismet Pasha also communicated to Mr. Grew copies of the declarations in which the Turkish Government had assumed the obligations indicated in paragraphs 3 and 5, above, as regards the administration of justice and of sanitary affairs in Turkey. The principal provisions of the settlement thus effected between the United States and Turkey are the following (arranged, to facilitate comparison, in the same

order as the terms of the Allied-Turkish settlement enumerated above):²³

1. The Contracting Parties join in declaring the Capitulatory régime to be abrogated. The obligations assumed by the parties with respect to the treatment of each other's nationals, in accordance with international law and on the basis of reciprocity, include the following:

(a) The nationals of each of the Contracting Parties, subject to compliance with the local laws and regulations, including those regarding immigration, are to have complete liberty to enter and establish themselves in the territory of the other party; and while in such territory they are to enjoy the most constant protection and security for their property and their persons in accordance with generally recognized international law. They are assured, specifically, upon compliance with the local laws and regulations, complete liberty of conscience and worship; free access to courts of justice; the right to acquire, possess and dispose of movable property; the right, subject to reciprocity, to acquire, possess and dispose of immovable property so far as may be allowed by the local laws to foreigners in general; and the right to engage without hindrance "in every kind of profession, industry or commerce not forbidden by the local laws to all foreigners".

(b) Commercial, industrial and financial concerns organized and maintaining their head offices in either country are to be recognized in the other country and to be accorded the same protection as the nationals of their country.

(c) Domiciliary visits and searches in dwellings and other buildings of citizens and concerns of either of the Contracting Parties may be effected only in accordance with laws, regulations and ordinances equally applicable to nationals of the country in which the buildings are situated.

(d) The nationals of each country in the territory of the other are to be exempt from military service and from contributions in lieu thereof, and both individuals and companies are to be exempt from forced loans or other exceptional levies on property.

(e) With respect to taxes the nationals of each country in the territory of the other are to be accorded the same treatment as natives of the country, and the companies of each country in the territory of the other are to enjoy the same treatment as any similar foreign companies.

(f) The right and duties of consular officers are defined in accordance with international law and with provisions in existing treaties between the United States and other countries.

2. In regard to matters involving their personal status or domestic relations, or the succession to and distribution or liquidation of personal property, the non-Moslem nationals of the United States in Turkey are to be subject to the jurisdiction of American tribunals or other national authorities of the United States sitting outside Turkey and applying American law.

3. The terms of the Turkish declaration regarding the employment of European legal advisers, the grant of release on bail,

²³ This enumeration, like the enumeration of the terms of Allied settlement, is taken largely from the pamphlet mentioned *supra* note 22.

and the enforcement of arbitral decisions are applicable for the benefit of American citizens.

4. American nationals are assured most favored nation treatment in regard to import and export duties (as well as in regard to freedom of commerce and navigation, consumption and excise taxes, transit duties and drawbacks, and the protection of patent and trademark rights).

5. The Turkish declaration regarding the sanitary administration benefits American citizens in a general way.

6. Merchant and war vessels and aircraft of the United States are to enjoy complete liberty of navigation and passage in the Straits on a basis of equality with similar vessels and aircraft of the most favored foreign nation, subject to the rules prescribed in the Allied-Turkish Straits convention.

7. The Turkish letter regarding American establishments and institutions is identical in substance with the letters the contents of which were indicated in paragraph 7 of the enumeration of the Allied-Turkish terms of settlement.

COMMENTS ON THE AMERICAN SETTLEMENT

1. The formula employed with respect to the recognition of the abrogation of the Capitulations is consistent with either the Turkish contention that the abrogation took effect October 1, 1914, or with the American contention that it will not take effect until after the exchange of the ratifications of the new treaty. The question of the jurisdiction over American citizens in civil and criminal cases pending the coming into force of the new treaty is not settled in the treaty but is left to be disposed of or adjourned in each case as it arises. The question of responsibility for arrears of taxes not authorized by the Capitulations is, on the other hand, the subject of a compromise embodied in Article 29 of the treaty (corresponding to Article 69 of the Allied-Turkish Treaty of Peace), which provides that American nationals shall be exempt from the payment, on account of fiscal years prior to the fiscal year 1922-1923, of any impost, tax or surtax to which they were not subject on August 1, 1914. The provision (see paragraph 1 (a) of the foregoing enumeration) that nationals of each country shall have the right to "engage without hindrance in every kind of profession, industry or commerce not forbidden by the local laws to all foreigners" is so worded that American nationals will be entitled to the benefit of the conventions which the Allies reserved the right to conclude later with Turkey regarding the right to engage in "the different forms of commerce, professions and industry".

2. The effectuation of the provision respecting the jurisdiction of American tribunals or other national authorities of the United

States sitting outside Turkey will require the enactment of legislation by Congress, which might appropriately vest the jurisdiction in the Secretary of State and/or in a diplomatic or consular officer of the United States in some country more readily accessible to the interested parties than is the United States. The jurisdiction could of course be exercised by an American representative in a foreign country only with the assent of that country.

3. The Turkish declaration concerning the administration of justice in Turkey is a unilateral instrument, but was regarded at Lausanne as constituting an international commitment. Its formal communication to the American plenipotentiary removed any doubt which might have existed as to its applicability for the benefit of American nationals equally with the nationals of Allied countries.

4. The provisions regarding most favored nation treatment with respect to customs duties and the like contemplate the application of such treatment unconditionally, in accordance with the new policy established in the recent agreements of the United States with Germany and other Powers.

5. The specification of European medical specialists for appointment as counsellors of the sanitary administration of Turkey does not exclude the possibility of the employment of American medical specialists in the same capacity.

6. The United States obtained the assurance of most favored nation treatment as regards navigation and passage of the Straits without adhering to the Allied-Turkish convention regarding the Straits, and without assuming, in the treaty with Turkey, any obligation of a political or military nature with respect to the execution of the convention.

7. Great importance may in practice be attached to the provision, in the letter regarding the recognition and treatment of American establishments and institutions, that in the application of Turkish laws, regulations, and administrative measures, the Turkish Government will take into account the conditions of the operation of such establishments and institutions.

PRESENT STATUS OF AMERICAN RIGHTS IN TURKEY

The diplomatic relations severed on April 20, 1917, have never been formally resumed, although the United States has since shortly after the Armistice of Mudros maintained in Turkey a High Commissioner, not accredited to any Government, as well as a number of diplomatic and consular officers who are not officially recognized by the Turkish Government. The Turkish Foreign Office has apparently not thought fit to pursue with vigor the untenable contention, put forward in 1917, that all treaties between

the United States and Turkey were annulled by the mere fact of the severance of relations. On the other hand, the Foreign Office has remained firm in its insistence that the treaties were lawfully denounced upon the ground that the conditions under which they were concluded had changed in essential respects.

There can be no doubt of the existence of the legal principle invoked by the Turkish Government.²⁴ The only doubt must be upon the question of fact whether the conditions have changed so materially as to warrant the termination of the treaties by the act of one of the Contracting Parties without the prior assent of the other Party. Since the end of the discussions at Lausanne the Turkish settlement with the Allies has gone into effect; and, all the other Capitulatory Powers except the United States having recognized the new position of Turkey and the new basis of her relations with the Occident, it might well be said that the revision contemplated in the Protocol of 1874 has been at last effected "by understanding with the friendly Powers". The change in the relations of Turkey with other Powers, in addition to the considerable changes made in the laws, and the judicial organization of the country within the last two years, has made it much more difficult than it was during the negotiations at Lausanne to maintain that the conditions prevailing at the time of the conclusion of the Treaty of 1830 and the Protocol of 1874 have not changed in essential respects. Moreover, if our Treaty and Protocol could be proved to be still legally in effect, it would be found that, as a result of the termination of the Allied treaties and the ancient usages, our Treaty and Protocol, which drew their substance mainly from those treaties and usages, through the medium of most favored nation provisions, have been reduced to scarcely more than empty shells, far from adequate for the protection of American interests in an Eastern country just emerging into the realm of generally recognized international law and needing in doubtful cases the guidance of definite treaty statements of the law and practice of nations.

Should the new treaty, for any reason, fail to gain the approval of the United States Senate, it would doubtless be necessary for the United States to negotiate some kind of substitute agreement with Turkey before the resumption of formal diplomatic relations. In the meantime, the Turkish Government, acting upon the theory that there are no treaties in force between the United States and Turkey, would presumably apply to American citizens and concerns in Turkey the rules of ordinary international law. It is

²⁴In addition to the authorities cited by Ismet Pasha in his memorandum of December 2, 1922; the following may be consulted: 5 Moore, *op. cit.*, *supra* note 4, at 319-341; 1 Cobbett, *Leading Cases on International Law* (3d ed. 1909) 327; Lawrence, *Principles of International Law* (7th ed. 1923) 303.

scarcely necessary to elaborate upon the elasticity of those rules as they might be applied by Turkish authorities smarting under the impression that their efforts to be conciliatory during recent years had not been understood nor appreciated in the United States. It may be of interest, however, to note that among the consequences of the rejection by the United States of the new basis of relations accepted by all the other Capitulatory Powers might be, and probably would be, (1) the termination of the unofficial functioning of the American High Commissioner and the diplomatic and consular officers of the United States now stationed in Turkey; (2) the discontinuance of most favored nation treatment of American commerce with Turkey; and (3) the closing of the educational, charitable, and philanthropic institutions through which Americans in Turkey have built up, during the last hundred years, an immense fund of goodwill toward the United States and have stimulated ideals of progress which are largely responsible for the awakening of Turkey from the torpor of the East.