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THE PRINCIPLE OF THE OPEN DOOR IN CHINA AND MANCHOUKUO

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December, 1937

The Foreign Affairs Association of Japan

Printed in Japan

At the Kenkyusha Press

THE PRINCIPLE OF THE OPEN DOOR IN CHINA AND MANCHOUKUO

I

It is generally understood that the Open Door principle is synonymous with that of equal opportunity in commerce and industry. It is true that the former principle may always be said to represent one form of the latter principle. [1] But it must be noticed that there are some cases to which the latter principle may be said to apply, which have yet nothing to do with the former principle. Clauses in treaties of commerce which assure to the nationals of the respective contracting Powers treatment equal to that which the contracting Powers give to their own nationals in certain designated matters, may be said to embody the principle of equal opportunity, but they have no direct connection with the Open Door principle. Most-favoured-nation clauses in several treaties of commerce may also be taken as one form of the embodiment of the principle of equal opportunity, without being classed as a form of the principle of the Open Door. Indeed, this principle saw the light, only as a result of the inability of China, by reason of the existence of many spheres of foreign influence in that country, to give practical effect to most-favoured-nation clauses which China had contracted with foreign States. It is true that in Article 1, paragraph 1,

of the Nine Power Treaty of Washington we read that certain obligations are laid upon the contracting Powers other than China "with a view to applying more effectually the principle of the Open Door or equality of opportunity in China for the trade and industry of *all nations*" (*writer's italics*). But if China and her nationals are to be regarded as directly concerned in the principle of the 'Open Door,' the term 'all nations' must be taken to include China and her nationals, so that the rights and privileges accorded to Chinese people must be extended to the nationals of all other Powers. However, this interpretation is against the precedents as well as contrary to the common opinion concerning the Open Door principle in China. So we must conclude that the Open Door in China, differing from many similar policies in other parts of the world, concerns the equal treatment of foreigners in China to the exclusion of the Chinese people.

Viewed from the standpoint of China as against other States, it might be said that there exists no equality of opportunity in the application of the Open Door in its present development; for, according to the Nine Power Treaty, China is, in a one-sided way, deprived of her liberty of action in international commercial policy. By Article III, paragraph 3 of the Nine Power Treaty, a new

obligation was imposed upon China that she should be guided by the Open Door principle in dealing with foreign applications for economic rights and privileges. China was thereby deprived of her liberty of action to give special benefits to the nationals of some States, in matters of commerce and industry, in consideration of corresponding special benefits, which she would acquire from such States. [2]

The above-stated distinction between the Open Door

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principle and that of equal opportunity carries with it some practical consequences which are not unimportant. Let me give one remarkable instance. Article V of the Nine Power Treaty provides that "there shall be no discrimination whatever, direct or indirect, in respect of charges or of facilities on the ground of the nationalities of passengers" or on other grounds specified in that Article. Though the provisions in question are found side by side with those for the Open Door principle in the same Nine Power Treaty, it does not concern the last-named principle, in which States or nationals, other than China and the Chinese, are alone to be directly concerned, as we shall see later on. [3] In the case of the Article in question, China is directly concerned. Article V having nothing to do with the Open Door principle, there is no reason to restrict the meaning of the Article so as to make it read as if there were express provisions to the effect that the privileges given to the Chinese people were excepted from the operation of the Article. We notice in this respect a remarkable difference between Article III, which concerns the Open Door policy, and Article V which, though it concerns the principle of equal opportunity, has nothing to do with that of the genuine principle.

II

The Open Door in China had its origin in the existence of several spheres of influence or interest [4] in China. In the Hay

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Notes of 1899, which marked the starting point of the consecration of that policy by international practice, the purport of that policy was to secure equality of treatment among nationals other than the Chinese in commercial matters within the Chinese districts forming part of the spheres of influence or interest of some major Powers. At the beginning, what might perhaps have been interpreted as constituting international commitments [5] was restricted to refraining from

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interfering with the treaty ports, vested interests, Chinese conventional tariffs and the Chinese customs houses and from applying discriminatory railway rates and harbour dues. Though some

treaties of more or less ample content in the line of the Open Door policy had been concluded between certain major Powers, it was not until the time of the Conference of the Nine Power Treaty of 1922 concerning China, that the said policy was established as a legally binding principle of general application, having all parts of China for its virtual fields of operation. It is true that the American Government, on July 3, 1900, at the time of the Boxer uprising, declared, among other things, its intention of seeking to safeguard the principle of equal and impartial trade with all parts of the Chinese Empire; [6] but that declaration was nothing more than a one-sided one on the part of the American Government and is not held to have created any international legal commitments. We cannot agree with Mr. Hughes regarding his contention, insisted upon

at the time of the Washington Conference, that the Resolution on the Open Door principle, in its first Article (which has later been incorporated in the Nine Power Treaty as its

Article III) stated a principle which had been operative all through the period he had named (that is since 1899) and had been binding upon the Governments concerned, or when he insisted, at the same Conference, that the statement of the principles recorded in the said Resolution (that is the principle of the Open Door or of equality of opportunity in

China for trade and industry) was not a new statement but was to be regarded as a more definite and precise statement of the principle that had long been admitted and to which the Powers concerned had given their unqualified adherence

for twenty years. [7]

III

At its initiation, the Open Door policy in China was deemed to prevail within the limits of certain foreign spheres of influence or interest. According to the expression found in one of the Hay Notes, that policy was taken to consist in securing "to the commerce and navigation of all nations equality of treatment within *such spheres* " (*writer's italics*). [8]

Thus the Open Door policy originally presupposed the existence of spheres of influence or interest and regarded such spheres as the special fields of action of the principle. This was but natural. The Open Door policy had its origin, as I have already remarked, in the establishment of several spheres of influence or interest in China. The most-favoured-nation clause in a treaty with China being rendered virtually ineffective in those parts of Chinese territory where such spheres were mapped out, by dint of the practical inability of the Chinese Government to give effect to the obligations imposed by the said clause, it was, in the main, for the purpose of avoiding the exclusion of English or American commerce from the markets of Chinese districts forming

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part of the spheres of foreign influence or interest, that the English or American Government insisted strongly on the adoption of the said policy. Thus, the policy of the Open Door, as it was originally concerned, presupposed the existence of the spheres of influence or interest and was far from being incompatible with the existence of such spheres. In several treaties between two or more Powers concerning the Open Door, [9] concluded prior to the Nine Power Treaty, the phraseology pointed apparently rather to the application of the principle to all parts of China, yet the virtual limits of their application were restricted to those parts of China where the influence of one or more of the contracting Parties was prevalent. [10] On the conclusion of the Nine Power Treaty, the virtual fields of application of the principle, considered now as one legally established and common to all Powers concerned, came to be taken as extending to all parts of China. Moreover as the existence of spheres of influence or, interest became conceived of as incompatible with the principle, [11] the main virtual fields of application of the principle were taken as being those parts of China where

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the powers of the Chinese Government are effectually exercised and where there exists no particular predominance of foreign influence. Such a change in the fields of application of the principle was necessarily accompanied by that in the quality of the principal obligations arising from the principle as we shall see later on. [12]

IV

As we have already noticed, the original purport of the principle of the Open Door was the equality of treatment of all nations, to the exclusion of the Chinese, in matters of commerce, within the limits of foreign spheres of influence or interest in China. The existence of such spheres was one of the prerequisite conditions of the formation of the principle. But in the recent development of the principle effected chiefly by the insistence of the United States and Great Britain, the Open Door policy came to be considered as incompatible in principle with the existence of the spheres of influence or interest. At the Washington Conference, Mr. Hughes, in explaining the differences between clause (a) and clause (b) in the Resolution (incorporated later into the Nine

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Power Treaty as its Article III), stated that the clause (a) had the purpose of obviating the efforts by which, in a designated region, one Power, or the nationals of that Power, might have a superior position, broadly speaking, with respect to enterprises and that it had direct reference to what were known as spheres of interest, which, according to him, might be described as spheres of exclusion of other interests. These explanations given by Mr. Hughes, Chairman of the Commission on Pacific and Far Eastern Questions and mover of the Resolution, show that the Open Door policy as provided for

in the Nine Power Treaty was, at least according to the American interpretation, considered to be incompatible in principle with the existence of spheres of influence or interest. [13] Referring to the earlier part of the Resolution (which became later Article III, paragraph I, clause (a), of the Nine Power Treaty), Lord Balfour said that the British Government had, in the most formal manner, publicly announced that they regarded the old practice of 'spheres of influence' as utterly inappropriate to the situation existing at the time of the Washington Conference and that they thought the phraseology used in the said part of the Resolution admirably expressed the view that that system had not only gone but had gone forever, and was now explicitly condemned. He remarked that the words "general superiority of rights with respect to commercial or economic development in any designated region of China" (words incorporated later in Article III, paragraph I, clause (a), of the Nine Power Treaty) were words happily designed, as he thought, to describe the system of spheres of influence and that the repudiation of that system was as clear and unmistakable as could possibly be desired. [14] Mr. Hughes quite appreciated what Lord Balfour had said regarding

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the attitude of the British Government and added that nothing could be more gratifying than the assumption that all Powers represented on the Commission were clearly of view that the said practice was entirely abandoned, thou he pointed out that the Resolution only dealt with that phase of the matter which had relation to the Open Door and equality of the opportunity. [15] It is also to be noted that in Article IV of the Nine Power Treaty, it is provided the contracting Powers agree not to support any agreement by their respective nationals with each other designed create spheres of influence or to provide for the enjoyment of mutually exclusive opportunities in designated parts of Chinese territory. The question put by Baron Shidehara, at the time of the Washington Conference, as to whether subject matter of the Resolution concerning the last-mentioned provision was not already covered by the Open Door Resolution (which was later incorporated into the Nine Power Treaty to form its Article III) elicited no satisfactory answer. [16] But the close relationship between the two Resolutions became evident when these two Resolutions were placed in a group before the Fifth Plenary Session of the Washington Conference to be considered and acted upon. [17]

The fact that the principle, which had the existence foreign spheres of influence or interest as one of the prerequisite conditions of its formation, came to be considered as incompatible in spirit with that existence, inevitably points to the remarkable changes in the content of the principle since its original formation.

V

Examining the developments of the obligations arising from the principle, we notice that they assumed, broadly

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speaking, a remarkable change in their characteristics. At the origin, the principal obligations arising from the principle were of active or positive quality, being the obligations imposed on the Powers having spheres of influence or interest in China to give to all nations other than the Chinese equality of treatment in those spheres. [18] On the contrary, in the later stage of the development of the principle, obligations, passive in character, began to rule; that is to say, the obligations of not seeking or of not supporting their respective nationals in seeking any arrangement or any monopoly or preference which would frustrate the practical application of the principle of equal opportunity. [19] This change in obligations was inevitable, as the policy which had originally been applied to foreign spheres of influence or interest had undergone a remarkable change so as to be applied to all parts of China and, as moreover the policy, as I had already stated, came to be conceived of as incompatible, at least in principle, with the existence of the spheres of influence or interest. [20] Contrary to the original idea, the main fields of application of the principle were now conceived of as being those parts of China where the powers of the Chinese Government are effectually exercised and where there exists no particular

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predominance of any foreign influence. So the obligations arising from the principle of which the relations purport to exist principally among the respective Powers and not between China on the one hand and the Powers on the other, [21] acquired necessarily a passive quality, as no Powers other than China are now supposed to be, as a rule, in a position to exercise influence in the areas where the principle is essentially to be applied, and thus to be able to give at their choice equal or unequal treatment to foreigners. We have already noticed that there exist several treaties between two or more Powers, concerning the Open Door principle, concluded prior to the Nine Power Treaty, with their phraseology pointing apparently rather to the application of the principle to all parts of China, but with their virtual limits of application restricted to those parts of China where the influence of one or more of the contracting Parties was prevalent. [22] In these treaties the principal obligations arising from the principle must be necessarily of active or positive quality. In a treaty between a major Power having its sphere or spheres of influence and another Power not having any such spheres, it is conceivable that the obligations, passive in character, similar to those provided for in Article III of the Nine Power Treaty, fall especially upon the latter Power, but the principal obligation arising from the accord must be held to be that of the former Power to give equal treatment to all nations, other than the Chinese; hence to be that of active or positive quality. Since the time of the conclusion of the Nine Power Treaty, circumstances have brought it about that the principal obligations of the Powers other than China have changed into those of passive quality, as is evidenced by Article III of the Treaty.

It is true that the Nine Power Treaty provides, in Article 1,

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clause (3), for the obligation to use the influence of the contracting Powers, other than China, for the purpose of effectually establishing and maintaining the principle of equal opportunity for the

commerce and industry of all nations throughout the territory of China. Yet it seems that that active obligation concerns the use of the influence of the contracting Parties for the purpose of effectually establishing and maintaining the principle, but that it does not concern the principal obligations following from the principle itself upon the Powers other than China with respect to all parts of China.

The Open Door policy originally aimed at the equality of treatment of nationals of various countries in point of commerce. [23] But gradually it was applied to industry as well. Then the words 'commerce' and 'industry' in connection with the policy were used in a broader sense. The American Government especially upheld the wider interpretation against the opposing claims of other major Powers. [24] The protection of the principle was now insisted upon for interests in public enterprises such as railways, telegraphs, telephones, radiographs and mines, in the financing of such enterprises, or the employment of experts, teachers, etc. It was in the Washington Nine Power Treaty that the American interpretation of the principle was in the main consecrated in a multilateral treaty. We see that the Open Door principle as it was provided for in the Nine Power Treaty differs widely from the same principle in its original acceptation.

VI

The principal relations concerning the Open Door principle are between the Powers among themselves and not China, upon the one side and the Powers upon the other. In the words of Mr. Wellington Koo, Chinese delegate to the Washington Conference, the principle of the Open Door or of equal opportunity exists "between foreign Power in China." [25] As this principle in its original acceptation purported to require the Powers having spheres of influence or interest in China to give equality of treatment in matters of commerce to the nationals of all States, to the exclusion of China, it was but natural that, at its initiation, the relations concerning the principle should only exist among the Powers. Although the fields of application of the principle were extended to the whole of the Chinese territory by the Nine Power Treaty, the principal relations concerning the principle are still to be conceived to exist among the Powers, to the exclusion of China. We have already noticed that the words “all nations " in Article 1, paragraph I, of the Nine Power Treaty are to be interpreted as meaning ‘all nations to the exclusion of the Chinese.' So the principle is still considered to have reference preeminently to relations among the Power other than China, even under the Nine Power Treaty. It is true that China now cannot hold a wholly indifferent attitude towards the principle, as it is now deemed to be applied to all parts of China and especially to those parts of China where the powers of the Chinese Government prevail. Hence we have Article III, paragraph 3, of the said Treaty by which China undertakes to be guided by the principle of the Open Door or equality of

opportunity for the trade and industry of all nations, other than the Chinese, in dealing with applications for economic rights and privileges from Governments and nationals of all foreign countries. Still

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China is not deemed to be one of the principal parties to the principle and China's obligations towards it are considered to consist merely in being guided by, and keeping pace with, the principle in dealing with new foreign applications. [26]

VII

The retro-activity of the stipulations in the Nine Power Treaty, in the sense that they would either effect the nullification of previous arrangements, privileges and concessions which are contrary to them or invite alterations of such arrangements, privileges and concessions so as to make them harmonize with the principle laid down in the Treaty, was sometimes urged.

At the time of the Washington Conference, Mr. Hughes, on the assumption that the principle, which was given, according to him, a more definite and precise statement by the Nine Power Treaty, had long been admitted and that the Powers concerned had given their unqualified adherence for twenty years, [27] argued for the virtual retroactivity of the stipulations of the Nine Power Treaty. [28] But, as we have seen before, the Open Door principle as provided for in the Nine Power Treaty differs in many aspects from that principle in its original acceptation. Thus, the grounds for Mr. Hughes' arguments on the virtual retro-activity of the provisions of the above-mentioned Treaty in connection with previous arrangements, privileges and concessions utterly fail. Besides, it must be noted that Mr. Root stated, in answer to an enquiry from Admiral Baron Kato, that the phrase "administrative integrity " in Article 1, clause (I), of the Nine Power Treaty "certainly did not affect any privileges accorded by valid or effective grants." [29] The

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same conclusion must be true with regard to the provisions concerning the Open Door in the same Treaty. We have therefore, to reject the retro-activity theory sponsored by Mr. Hughes.

We must now consider another sort of retro-activity theory concerning the Open Door in the Nine Power Treaty. It was at times insisted, with the support of some writers, [30] that as Article I clause (3), made it an obligation of the Contracting Powers, other than China, to use their influence for the purpose of effectually establishing and maintaining the Open Door principle, they were therefore under obligations to alter previous arrangements so as to make the harmonize with the Open Door principle of

the Nine Power Treaty, and that whenever cases should occur of insistence by a foreign Power or her nationals on rights or privilege apparently incompatible with the Open Door principle China or other contracting Powers could raise the question of the invalidity of such rights or privileges on the strength of the said stipulation. But this contention cannot be sustained. Article I, clause (3), of the Nine Power Treaty might be interpreted as tacitly recognizing that the Open Door principle as laid down in the Treaty was not yet effectually established at the time of the conclusion of the Treaty. Acording to that paragraph, the contracting Powers, other than China, promised each other to use their influence for the purpose of effectually establishing and maintaining the principle. This can hardly be taken to mean that the rights or privileges provided for in previous arrangement deemed by China or by some other Power or Powers not to be in harmony with that principle, are to be held ineffective, either as a matter of course, or as a result of some process of reclamation on the part of China or any other Power concerned. Besides, as China is not to be considered

as a direct party in the relations concerning the Open Door principle,[31] it would be out of the question for China herself to insist on the invalidity of rights or privileges provided for in previous arrangements between herself and some Powers, on the strength of stipulations concerning that principle. It is also to be noted that the only provision in the Nine Power Treaty which places China in contact with the principle is Article III, paragraph 3, of the Treaty which prescribes that China is to be guided by the principle in contact with the principle is Article III, paragraph 3, of the Treaty which prescribes that China is to be guided by the principles in dealing with new applications for economic rights and privileges.

VIII

With respect to the application of Article III, paragraph 1, clause (b), of the Nine Power Treaty, which provides that the contracting Powers, other than China, will not seek, nor support their respective nationals in seeking, any such monopoly or preference which by reason of its scope, duration or geographical extent is calculated to frustrate the practical application of the principle of equal opportunity, the question might be raised as to whether particular enterprises can be construed as frustrating the practical application of the Open Door principle or not. In this connection it is useful to note a remark made by Lord Balfour at the Washington Conference to the effect that, even if no difficulty arose in connection with most industrial enterprises, it was

otherwise when the kind of enterprise which inevitably involved a monopolistic flavour, -- for instance, a railway enterprise -- was concerned. Lord Balfour justly remarked that "nobody is going to give money to build a railway, if another railway is going to be built parallel to it at five miles' distance. Here, therefore, there must be a monopoly,

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no doubt of a very limited kind, but still a monopoly. [32] He made similar remarks with respect to telephone and telegraph systems. It is often very difficult to say whether these or similar enterprises, more or less monopolistic in character, are to be classed as of a nature to frustrate the practical applications of the Open Door principle and, in consequence, whether to seek to engage in them can be looked upon as contrary to the Nine Power Treaty. Lord Balfour expressed doubt whether the words at the end of the Resolution concerned [33] (which words have later been incorporated in Article III, paragraph 2, of the Nine Power Treaty) did deal with enterprises involving a monopolistic flavour in such manner as to prevent international disputes. [34] Even Mr. Hughes, Chairman of the Commission and mover of the Open Door Resolution, which has since passed into the Nine Power Treaty, was forced to allow that there would be cases, perhaps many cases, which were not so clear. He went so far as to admit that it would be impossible to define them in advance. [35] Thus in the Nine Power Treaty, certain

important points of the content of the principle were left knowingly without being given precise definition and thus are subject to uncertainty in its practical application. In case of an accord of that sort, the contracting Parties will not feel bound by the interpretation given either by another State or by other States or by some international organisation in the absence of express stipulations to the contrary, regarding

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the points in the accord which were left knowingly without precise definition. The question of constituting a Board of Reference to which practical problems concerning the application of the Open Door provisions in the Treaty should be referred for investigation and report was raised at the Washington Conference. Though it was resolved at the Conference that such Board of Reference should be established and that the Special Conference concerning the Chinese Customs should formulate a detailed plan for the constitution of that institution, the Board never came into being. Even if that Board were constituted, it having been understood that there should be no compulsion upon the parties to refer to the Board the question of the execution of the Open Door provisions and that the result of the investigation and report of the Board should bind no one, [36] the points left without precise definition in the accord could not be legally settled by the Board.

IX

When the Open Door policy came to be taken as incompatible in principle with the institution and maintenance of the spheres of influence or interest, it took on a close relation with the policy of territorial and administrative integrity. In recognizing this relationship, some writers [37] went to the length of holding the Open Door principle to include that of territorial integrity, as well as that of equal opportunity. It is true that these two principles are generally associated nowadays, but there is a clear distinction between them. The Open Door principle has been taken, from the origin, as a principle, economic in character. In the Hay Notes

of September 22, 1899, to the British Government, the Open Door policy was described as aiming at securing "to the *commerce and navigation* of all nations equality of treatment" within the spheres of influence or of interest. In Article I, clause (3), of the Nine Power Treaty, the Open Door principle was designated by the name of the principle of equal opportunity for the *commerce and industry of all nations* throughout the territory of China." In Article III, paragraph I, it is especially provided that the stipulation concerned is laid down with a view to applying more effectually the principle of equal opportunity in China *for the trade and industry* of all nations. In Article III, paragraph 3, concerning the obligations of China, it is clearly indicated that they concern the application for *economic* rights and privileges from Governments and nationals of all foreign countries. Thus, even under the Nine Power Treaty, the Open Door principle is recognized to be an economic principle, and it is not thought to comprise a purely political principle such as that of territorial or administrative integrity.

Some of the writers who hold that the Open Door principle consists of two elements -- the one economic and the other political -- are apt to use that argument for the purpose of discrediting political spheres of influence and of contributing to undermine it in the name of the Open Door.

X

When the Japanese Government first acquiesced in the application of the Open Door principle in 1899, claims concerning special interests in certain regions in China were not necessarily considered as incompatible with the principle. At that time the principle presupposed the existence of spheres of

influence or interest and the foreign interests directly protected by international commitment connected with the principle were limited to certain specified matters. The principle itself had only the foreign spheres of influence or

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interest in view as its fields of operation and the purely commercial or industrial interests as those under its protection. The extension of the range of the principle in point of its fields of application, as well as in point of the interests to be protected by it, was adopted by the Nine Power Treaty. The protection to be given by the principle seems to have been made to cover any foreign interests of some economic value, though not necessarily of a purely commercial or industrial character. The interests pertaining to the operation of, or participation in, public enterprises, or to the financing of such enterprises, or to the appointments of experts, teachers or other officials, came to be considered as appropriate subjects for protection by the principle. The character of the principal obligations arising from the principle was changed from an active to a passive one. The principle itself came to be taken as incompatible in spirit with the existence of influence or interest, which was originally one of the prerequisite conditions for the formation of the principle. We have already seen that the principle was first raised to a general international commitment of extended purport by the Nine Power Treaty. In view of all this, we must deny the accuracy of the pronouncement of Mr. Hughes made at the Washington Conference, to the effect that the Open Door Resolution in its first Article (which has since passed into the Nine Power Treaty, to form its Article III) stated a principle which had been operative all through the period he had named (that is ever since the time of the Hay Notes of 1899) and had been binding upon the Governments concerned, and that what was stated in the Resolution was nothing but "a reaffirmation of that principle --a statement of it with increased definiteness." [38]

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XI

Many points discussed by Mr. Johnson Long, a distinguished Chinese scholar, in his book *La Mandchourie et la Doctrine de la Porte ouverte*, are worthy of notice.

Mr. Long holds that the principle of the Open Door consists of two principles; --the one being the principle of equal opportunity and the other being that of the respect of sovereignty, independence and territorial and administrative integrity (p. 63). He thinks that the principle of equal opportunity in China is nothing but a wider application of the principle of the most-favoured-nation clause and that the former principle had its origin in the most-favoured-nation clauses which China had contracted with other Powers (pp. 6365). He states that the fields of application are more extensive in the case of the principle of equal opportunity than in the case of the said clauses, but that the absence of reciprocity in the case of the said principle is to the detriment of China (p. 63). According to Mr.

Long, China is prevented, by dint of the principle of equal opportunity, from making any discrimination in her treatment of various nations in matters of commerce and industry and as this obligation on the part of China is not reciprocated by similar obligation on the part of other Powers, the so-called principle of equal opportunity is far from giving a true equality of opportunity; since inequality exists between China as a whole on the one hand and the Powers on the other (pp. 98, 99). The principle being, in the opinion of Mr. Long, a lion's share theory which aims at sacrificing China to the interests of other Powers, it runs counter to international justice and thus it must be condemned by the Law of Nations (p. 98). He holds that the close examination of the principle convinces us that the principle of equal opportunity is nothing but the application to the domains of economy, of the famous principle of balance of power, which is a political system

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and not a principle of law (p. 98).

He recognizes that the principle of equal opportunity not a Chinese doctrine (p.79). He considers that that principle exists among the Powers other than China and not between China and the Powers (p. 93). As the principle was at first applied only to leased territories or to the so-called 'spheres of influence or interest,' China had to accept: (p. 72). But when the principle came to be applied to all parts of China, it rather fettered Chinese sovereignty (p. 72). Without the counterpart of the principle concerning one respect of the sovereignty, of the independence and of the territorial and administrative integrity of China, he thinks that the principle of equal opportunity should be condemned by reason and justice (p. 111).

He urges that the principle of the Open Door does not aim at opening China. His contention goes to the length of holding that China, since ancient times, has never been an Empire with closed doors (p. 67). When John Hay proclaimed his famous doctrine of the Open Door to the world, it did not, according to Mr. Long, concern the opening of the door of China, for China was then already wide open (puisqu'elle setait deja grande ouverte). According to Mr. long, it was intended simply and precisely to open the door of leased territories or of the so-called 'spheres of interest,' which the Powers had, or pretended to have, in China (pp. 68, 106). He laid stress on the fact that the principle only applied to the territories occupied by Powers (p. 68, 75, 106).

Mr. Long noted that, at the origin, the principle aimed simply at equality of opportunity in commerce. According to him, in 1908, when China began to feel the need of capital for railway construction, the competition of the Powers for obtaining the opportunity of placing their capital in China commenced. Then followed the American claims for the equality of opportunity, not only for financing public enterprises

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but also for furnishing materials and experts and for other benefits. He holds that the resulting extension of the principle of equal opportunity from the domain of commerce to that of industry and

finance forms a flagrant abuse of the right of free trade (p. 111).

The mistake of taking the Open Door principle to comprise two kinds of principle has already been pointed out. [39] Even in its later extended form, the principle of the Open Door is restricted to economic fields and does not embody in it any purely political principle. Mr. Long, in holding the principle to be derived from the most-favoured-nation clauses falls into another error, because the principle came into existence through the virtual ineffectiveness of the most-favoured-nation clauses which China had contracted with other Powers. [40] He fails to explain clearly the origin of the principle, which is chiefly to be ascribed to the special conditions in which China then found herself.

His contention that the principle fails in reciprocity, when the relations between China as a whole on the one hand and other Powers on the other are considered, stands on solid ground. His ensuing conclusion to the effect that it is against reason and justice will not be found palatable to the taste of many zealots for the principle.

His opinions that the principle of equal opportunity had, at its origin, limited its fields of operation to the foreign spheres of interests in China, that it had also restricted its protection to the interests of simple commerce and that the recent development had effected a considerable change in the content of the principle, in extending its application in point of its fields of operation as well as in point of the interests to be protected by it, are entirely shared by the present writer.

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As Mr. S. de Lapradelle suggested in the preface of Mr. Long's book, the latter gentleman proves himself to be a Chinese permeated with national sentiment and seeks to defend the cause of China in all its aspects. With respect to some of his contentions, I cannot, in reason, agree with him. But we have seen that there are some points concerning the Open Door, about which I am in full accord with him.

XII

The principle of the Open Door in China is in the main a result of the existence of special circumstances prevailing in that country. Its value must be estimated after taking into full consideration various elements constituting that principle and consecutive phases in its development, as well as different interests concerning it. Some zealots for the principle consider that it is in harmony with justice, for the reason that it aims at securing equality of treatment. But we have already noticed that there is another side to the shield and that certain authors, Mr. Long among others, [41] hold with some truth that the principle of equal opportunity itself is against reason and justice, considering that, viewed from the angle of relationship between China as a whole on the one hand and other Powers on the other, it represents a one-sided burden on the shoulders of that country. It is true that the principle of the Open Door represents that of equal opportunity for all nations; but it is

accompanied by many special characteristics arising from the special circumstances attendant on its development. The failure in reciprocity in the above sense forms one of those special characteristics. We have to take those various characteristics into careful consideration before we venture on an estimate of the true value of the principle. The pretended inconsistency

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of the principle with the existence of spheres of influence or interest does not necessarily form a virtue of the principle. Some persons may think that the principle is to be held in harmony with justice for the reason that it is regarded as being inconsistent with the existence of spheres of influence or interest and that consequently it is considered to be against the restrictions of sovereignty and thus to be favourable for the maintenance of administrative integrity, and, in the long run, of territorial integrity. But the spheres of influence or interest in China are often based on historical necessity or manifest destiny, their *raison d'etre* lying in the inevitable needs of the security or paramount economic interests of the State exercising influence in those regions. If the Open Door policy is to be interpreted in a broader and retrospective sense, as was the case in the opinions of Mr. Hughes or of Lord Balfour on the occasion of the Washington Conference, [42] and if it is to be strictly applied in that sense throughout the territory of China as the phrase runs in the Nine Power Treaty, the very existence of the leased territories, of the railway-zones and of other kind of spheres of influence, as well as of certain concessions actually existing in China, will be endangered by their pretended inconsistency in principle with the policy. Of course we believe that the previous rights and privileges are not touched by the Nine Power Treaty, [43] but our belief in that interpretation cannot prevent the recrudescence of the pretensions of retro-activity after the fashion of Mr. Hughes. [44]

Concerning the questions which might arise about the inconsistency of the Open Door principle with certain concessions, let us take one instance, and not the least important, by way of explanation. On the occasion of the Sino-Japanese Conference after the RussoJapanese War, an arrangement

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dated December 22, 1905, was inserted in the minutes by which the Chinese Government agreed not to construct, prior to the recovery by them of the Manchuria Railway, any main line in the neighbourhood of and parallel to that railway or any branch line which might be prejudicial to the interests of the above-mentioned railway. Although it might be argued with some force that this arrangement does not run counter to the principle of the Open Door, since it was entered into for the sole purpose of giving necessary protection to a particular enterprise, [45] i. e., the South Manchuria Railway, we must remember that contrary opinions re sometimes urged to the effect that the said arrangement created a monopoly which would exclude the nationals of other Powers from legitimate opportunity and which thus would be incompatible with the stipulations of Article III, paragraph I, clause (b), of the Nine Power Treaty. [46] Indeed, even if that arrangement were incompatible in principle with the Open Door policy, it might be said that the rights or privileges accruing from the arrangement would not become ineffective *ipso facto*, as I have already remarked. [47] But even on this latter point some dissenting opinions have been advanced. [48] The results of all these

circumstances were that the wider interpretation of the Open Door principle, coupled with the Chinese endeavour to oust and ruin the Japanese enterprise which touched the vital interests of Japan, affecting her security as well as her national economy, created a situation which endangered our special interests and which, in

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the long run, tended to undermine the position of the Japanese in Manchuria.

Thus, we see that the Open Door principle in its wider interpretation as embodied in the Nine Power Treaty formed one of the elements which created, with the anti-Japanese movements of the Chinese authorities, a state of insecurity and unrest, affecting the vital Japanese interests in Manchuria, by no means inferior in importance to the American interests in territories and islands bordering on the Caribbean Sea and in districts in the propinquity of the Panama Canal, and thence affecting the general situation in Eastern Asia.

The content of the provisions in the Nine Power Treaty, concerning the Open Door, was discussed and decided at the Washington Conference of 1922, under false impressions received from the authoritative pronouncements of Mr. Hughes, Chairman of the Commission and mover of the Open Door Resolution, whose contention to the effect that the Open Door principle in his Resolution (which has since been incorporated in the Nine Power Treaty) was the same thing as that in the Hay Notes of 1899 and had been operative since that time, I have attempted to refute in the present essay. [49] In some important points, the provisions on the Open Door in the Nine Power Treaty fail in precision. I have already pointed out that the latter part of Article 111, paragraph I, clause (b), was left knowingly without giving a precise definition. [50] Moreover, if the retro-activity theory of Mr. Hughes or that of others [51] were to be adopted, the rights and duties acquired prior to the Treaty will be doubly endangered; that is to say, they will be menaced, first by the retro-activity itself of the Treaty and then by the want of precision in the provisions to be applied retro-actively.

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Many defects in the provisions of the Nine Power Treaty convince us that there are not wanting purely legal reasons for insisting on the revision of that Treaty, in case that some Power or Powers would desire it.

XIII

As Japan has already recognized the independence of Manchoukuo, the Open Door principle of the Nine Power Treaty, which is only to be applied to various parts of China, is regarded by us to have ceased to apply to Manchoukuo as a matter of course. The commitments of China with respect to that principle in the above Treaty were to deal with future applications for economic rights and privileges

from Governments and nationals of foreign countries, and to reject such applications as could be deemed not to be in accord with the principle (Article III, paragraph 3, of the Nine Power Treaty). This engagement entered into by China is not deemed to have been taken over by Manchoukuo, for in the case of a secession, the new State does not succeed to the treaty obligations of the State from which it separates itself, except, at most, those closely related to land and waters as the object of international dominium or ownership. [52]

The Manchoukuo Government, on making the declaration of independence, notified several Powers of their determination to respect the Open Door principle, with regard to the economic activities of all foreigners in that country. This promise of Manchoukuo to respect the Open Door principle, being a one-sided and voluntary act, does not legally bind that State. It is considered necessary that

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there exists a two-sided element, analogous to the offer and assent of a private contract, for the formation of an international treaty. There is no occasion for a simple one-sided declaration of a State to give rise to international legal obligations of any sort. Thus, the declaration of Manchoukuo that she would respect the Open Door policy can be revoked at any time by her Government without infringing international law or international engagements.

While she chooses to pursue the Open Door policy, Manchoukuo must give equal treatment to all foreigners in matters of a purely commercial or industrial character and must make no discriminations among nationals of various foreign countries. The Open Door proclaimed by Manchoukuo is not considered to be of the same content as the Open Door of the Nine Power Treaty, which does not concern Manchoukuo and which is the outcome of peculiar development based on particular circumstances affecting China. The Open Door in Manchoukuo may be construed in a sense analogous to that of the original Open Door in China, in that it only concerns the equal treatment of foreigners [53] in matters of a purely *commercial* character, [54] or at most in matters of a purely *commercial* or *industrial* character, in the strict sense of the words. The Japanese Government, when it approved of the declaration of Manchoukuo concerning the Open Door policy, must have interpreted that policy in the sense given by Manchoukuo herself. The Open Door in Manchouk-uo, aiming at the equality of treatment among foreigners in matters of a purely commercial character is not deemed to conflict with national enterprises based on national needs such as the petroleum monopoly

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system now in operation in Manchoukuo.

Thus, the petroleum monopoly system in Manchoukuo as a whole does not conflict with the Open Door principle as proclaimed by that State. Even if the shares of the Manchurian Petroleum Company were actually held exclusively by Manchurians and Japanese, it is not deemed to run counter to the Open Door policy. We have already remarked that the Open Door policy, so far as it concerns Manchoukuo, can be construed as relating to interests of a purely commercial character or at most to

interests of a purely commercial or industrial character, in the strict sense of the words. Moreover, the Company in question is not, in law, the only one to be granted the refinement or manufacture of petroleum or of its substitutes or their purchase and sale. The Manchoukuo Government is legally free to bestow the grant either of the manufacture or of the purchase and sale of petroleum on any other companies or firms as well. [55]

In the decision of the Permanent Court of International Justice concerning the Oscar Chinn Affair in 1934, it was

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held that some special connections of enterprises with the State, such as being under governmental supervision or being entrusted with the conduct of public services, enable the private companies partaking in the enterprises to obtain the benefit of special advantages and governmental support, without occasioning any infringement on the promised equality of treatment. [56] It is to be noted that, in the case of the Congo Basin in question, the equality of treatment was secured, by the Convention of Saint-Germain of September 10, 1919, [57] to the nationals of all States concerned, without excepting the nationals of the State to which the region of the operation of the principle belonged [58] and that a monopoly of any kind in matters of trade might be considered to be prohibited in the name of the principle of freedom of trade. [59]

In the case of the Open Door in Manchoukuo, the equality of treatment among foreigners is envisaged, the authorities or nationals of Manchoukuo having nothing to do with the relations of equal treatment, and there exists no international

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commitment amounting to a prohibition of a monopoly in matters of trade. The Open Door in Manchoukuo, which aims at securing the equality of treatment among foreigners, is not supposed to form a barrier to the execution of a State enterprise for public ends -- such as the petroleum monopoly in Manchoukuo. In the above referred-to case of Oscar Chinn, the stipulations of the St. Germain Convention of 1919, providing for the principle of a complete, commercial equality between the respective nationals of the signatory Powers and those of States, Members of the League of Nations (Article I), and also providing for the treatment in all respects on a footing of perfect equality of craft of every kind belonging to the nationals of the said Powers and States (Article V), were not held to have been violated, so long as the form of discrimination was not based upon nationality and did not involve different treatment by reason of their nationality as between persons belonging to different national groups. [60] Following this precedent, similar, though not quite equal principle of the Open Door in Manchoukuo might be said not to be violated by the institution of the Manchurian Petroleum Company, whose shares are now practically held by some Manchurians and Japanese, in consideration of the fact that there exist no legal nationality qualifications for the shareholders. Besides, as we have already noticed, the company in question is not, in law, the only one to be granted the refinement or manufacture of petroleum or of its substitutes or their purchase and sale.

NOTES

1) The phraseology of the Nine Power Treaty should be examined in this connection. In Article I, clause (3), the phrase 'The principle of equal opportunity' seems to be used to designate the Open Door principle. But in Article III, paragraph I the words ‘the principles of the Open Door or equality of opportunity' occur. We notice that the two principles are here treated as similar, but they are separately named and the plural form ‘principles' is used throughout Article III. A case of the principle of equal opportunity, though not a case of the application of the genuine Open Door principle in the writer's opinion, is provided for in Article V, without expressly naming the principle.

2) *Vide* Johnson Long, *La Mandchourie et la Doctrine de la Porte ouverte*, pp. 98, 99, 111.

3) *Vide* VII *infra*.

4) The words 'spheres of influence' are generally used in international law to designate the geographical area recognized by a treaty to be under the predominant influence of a certain State. Originally the term was exclusively applied to an unoccupied area destined for the influence and future occupation of a certain State by a treaty concluded between that State and other State or States having actual or supposed interests in the area in question. Then it came to be applied also to a district of predominant foreign influence in the territory of a special State, delimited by a treaty between the major Power to whose predominant influence the district is destined and the other major Power or Powers. In the latter case, the term, sphere of interest' is sometimes preferred. Again, the term 'sphere of influence' has been used to describe areas under the foreign influence of a major Power, the special status of which areas is recognized in a treaty between the State in whose territory the area is situated and that major Power, such as leased territories (for instance, Port Arthur today or Kiautchau in the past), territories under foreign occupation and administration (for instance, Bosnia or Cyprus in the past), certain railway zones (for instance, the South Manchuria Railway Zone), etc. The words 'spheres of influence' or 'spheres of interest' are now often used in a wider sense to designate regions which are under foreign exclusive political influence or within which the interests of a particular foreign Power are predominant, without regard to whether or not they are made the object of a treaty. The socalled 'spheres of influence' or 'spheres of interest' in the Hay Notes of 1899 and in the Nine Power Treaty are to be interpreted in the wider sense. In these documents, the term is used either by itself or associated with the term 'leased territory or 'railway zone.' When it stands by, itself, without being associated with other terms, it is usually construed as comprising in it 'leased territories' as well as 'railway zones.'

At the time of the Washington Conference, Mr. Hughes, explaining the purport of the clauses of the draft concerning the Open Door policy, used the words 'spheres of interest' in connection with a designated region which would give general superiority of opportunity to a certain Power or her nationals with respect to economic development, and not the words 'spheres of influence' (*Conference on the limitation of Armament*, Washington, 1922, p.1230.). But Lord Balfour used the

expression ‘spheres of influence' to designate the same regions (*Ibid*., p. 1220). Besides, by Article IV of the Nine Power Treaty, the Contracting Parties agreed not to support any agreements by their respective nationals with each other designed to create 'spheres of influence' or to provide for the enjoyment of mutually exclusive opportunities in designated parts of Chinese territory. When we see that the so-called ‘spheres of influence' are thus deemed to be created by agreements among individuals, and that the creation of such 'spheres of influence' is associated with the enjoyment of mutually exclusive opportunities among individuals, there would seem to be no occasion to adopt the narrower interpretation of 'spheres of influence' as designating exclusively areas in which foreign political influence would be exclusive or predominant, in contradistinction to 'spheres of interest' conceived as of exclusively economic character. It would be safer not to attempt any narrow differentiation between ‘spheres of influence ' and 'spheres of interest,' at least in so far as the afore-mentioned documents are concerned.

5) Doubt might be entertained as to whether the pronouncement of the American Government without the consent of the Senate by two-thirds' vote can constitutionally and internationally bind the United States and, in consequence, whether the said exchange of notes can be said to amount to any true international legal commitment.

6) *Vide United States Foreign Relations*, 1900, p. 299.

7) *Vide Conference on the Limitation of Armament, Washington*, 1922, pp. 1258, 1260.

At the time of the Washington Conference, Baron Shidehara pointed out that the principle had undergone considerable changes in its application since it had originally been initiated by Secretary Hay in 1898, that the principles formulated in the draft Resolution were of an entirely different scope from the policy of the Open Door as conceived in 1898-99, and that, therefore, it seemed natural that the new definition should not have any retro-active force. But Mr. Hughes denied the accuracy of Baron Shidehara's observations in the strong terms cited in the text.

8) In the communication of Mr. Choate, Ambassador to the Court of St. James, to Lord Salisbury, September 22,1899, we find the following words:

"Her Majesty's Government, while conceding by formal agreements with Germany and Russia the possession of ‘spheres of influence or interest' in China, in which they are to enjoy especial rights and privileges, particularly in respect to railroads and mining enterprises, has at the same time sought to maintain what is commonly called the 'open door' policy, to secure to the *commerce and navigation* of all nations equality of treatment *within such 'spheres*.'

9) For instance, Article I of the Anglo-German Agreement of October 16, 1900, the preamble of the Anglo-Japanese Alliance Agreement of 1902, Article II of the Peace Treaty of Portsmouth in 1905, Articles I and II of the Russo-Japanese Convention of 1907, the Franco-Japanese Arrangement of 1907, the Takahira-Root Understanding in 1908, the Ishii-Lanshing Understanding in 1917.

10) For instance, in Article I of the Anglo-German Agreement of October 16, 1900, it was stipulated as follows: --

"It is a matter of joint and permanent international interest that the ports on the rivers and littoral of China should remain free and open to trade and to every other legitimate form of activity for the nationals of all countries without distinction, and the two Governments agree on their part to uphold the same for all Chinese territory *as far as they can exercise influence* " (*writer's italics*).

11) Mr. Hughes, giving explanations about what became later Article III paragraph 1, clause (a) of the Nine Power Treaty concerning China, said that it was not limited to the question of a particular concession or enterprise, but it had the purpose of precluding the efforts by which, in a designated region, one Power, or the nationals of that Power, might have a superior position, broadly speaking, with respect to enterprises. It had, continued Hughes, direct relation to what had been known in the past as spheres of interest, which might be stated to be spheres of exclusion of other interests, (*Conference on the limitation of Armaments, Washington*, 1922, p. 1230).

In reference to the same clause, Lord Balfour said that the British Empire Delegation understood that there was no representative of any Power around the table who thought that the old practice of *spheres of influence* was either advocated by any Government or would be tolerable to the Washington Conference. So far as the British Government were concerned, continued Lord Balfour, they had in the most formal manner publicly announced that they regarded this practice as utterly inappropriate to the existing situation and they thought that the phraseology used in the earlier part of this Resolution (corresponding to Article III, paragraph 1, clause (a) of the Treaty) admirably expressed the view that that system had not only gone but had gone forever, and was now explicitly condemned. According to him, the words 'general superiority' of rights with respect to commercial or economic development in any designated region (in clause (a)) were words happily designed, as he thought, to describe the system of *spheres of influence*; and the repudiation of the system was as clear and unmistakable as could possibly be desired. (*Conference of Limitation of Armament, Washington*, 1922, P. 1220)

12) *Vide* V *infra*.

13) Vide Note 2, p.3.

14) *Vide Conference on the Limitation of Armament*, Washington, 1922, p. 1220.

15) *Ibid*., p. 1222.

16) *Ibid*., pp. 1360, 1364

17) *Ibid*., pp. 186, 188, 190.

18) In a letter of Mr. A.E. Buck, Minister of the United States, to Viscount Aoki, Japanese Minister for Foreign Affairs, dated July 30, 1900 it was expressly stated, under special instructions and authorization of the Government of the United States, as follows: --

"The Government of the United States did not seek to obtain replies from the various Powers approached on this subject couched in identical terms; all that it desired was written declarations of intention, -- statements of the policy they proposed to pursue in China *as regards foreign trade*, confirming the oft-repeated oral assurances made to this Government. The replies received embody, one and all, satisfactory assurances of the various Governments that their intention, their settled policy, is to *maintain, so far as concerns them and so long as all other Powers act in the same manner, liberty of trade and equality of treatment for all the world within the territory China over which they exercise control or influence.* This was the main object of the proposals of the United States."

19) *Vide* Article III of the Nine Power Treaty.

20) *Vide* IV *supra*, and especially Note 3, p.7.

21) *Vide* VII *infra*.

22) *Vide* III *supra*, and especially Note 2, p. 6.

23) *Vide* Note 2, p. 6. *Vide* Johnson Long, La *Mandchourie et la Doctrine de la Porte ouverte* p. 111.

24) *Vide* Professor Paul Hilbert Clyde, "Railway Politics and the Open Door in China, 1916-1917," *American Journal of International Law*, Oct., 1931, pp. 642-657.

25) *Vide Conference on Limitation of Armament*, Washington, 1922, p. 1526.

26) *Vide* Article III, paragraph 3, of the Nine Power Treaty.

27) *Vide Conference on Limitation of Armament*, Washington, 1922, pp. 1258, 1260.

28) *Ibid*., pp. I230-I26o.

29) *Ibid*., p. 892.

30) *Vide* Willoughby, *Foreign Rights and Interests in China*, pp. 123-124.

31) *Vide* VII *supra*.

32) *Vide Conference on Limitation of Armament*, Washington, 1922, pp. 1220, 1222.

33) He perhaps referred to the following words at the end of the Resolution as it was proposed in the eighteenth meeting of the Commission: --

"... it being understood that this Agreement is not to be so construed as to prohibit the acquisition of such properties or rights as may be necessary to the conduct of a particular commercial or industrial undertaking." (*Conference on Limitation of Armament,* Washington, p. 1214.)

34) *Vide Conference on Limitation of Armament*, Washington, 1922, p. 1222.

35) *Ibid*, p. 1234.

36) *Vide Conference on Limitation of Armament*, Washington, 1922, pp. 1238, 1240

37) *Vide* Willoughby, *Foreign Rights and Interests in China*, 1927, p. 65. Morse and MacNair, *Far Eastern International Relations*, p. 128. Johnson Long, *La Mandechourie et la Doctrine de la Porte ouverte*, 1933, p. 63

38) *Vide Conference on Limitation of Armament*, Washington, 1922, pp. 1258, 1260.

39) *Vide* X. *supra*.

40) *Vide* I. *supra*.

41) *Vide* Johnson Long, *La Mandchourie et la Doctrine de la Porte ouverte*, pp. 98, 99, 111.

42) *Vide* III, IV, VI and VIII *supra*.

43) *Vide* VIII *supra*.

44) *Vide* VIII *supra*.

45) In this connection, the provision in the Nine Power Treaty (Article III, paragraph 2) to the effect that the stipulations of Article III of the Treaty concerning the Open Door are not to be so construed as to prohibit the acquisition of such porperties or rights as may be necessary to the conduct of a particular commercial, industrial or financial undertaking, is to be noted.

46) For instance, *vide* Willoughby, *Foreign Rights and Interests in China*, p. 87.

Hornbeek, *Contemporary Politics in the Far East*, p. 250

47) *Vide* VIII *supra*.

48) For instance *vide* Willoughby, *Foreign Rights and Interests in China*, pp. 123-124.

49) *Vide* especially XI *supra*.

50) *Vide* IX *supra*.

51) *Vide* VIII *supra*.

52) Opinions differ as to the rights and duties to be taken over by the new State in cases of secession. Some authors entirely deny the succession or transmission of treaty rights and obligations in such cases. In general, modem authorities do not recognize the succession of such rights and duties beyond those closely connected with the territorial rights, considered as the dominium (or ownership) in the Law of Nations.

53) In the Notes of Manchoukuo giving notice of the independence of that State to foreign Powers, it was announced that the Manchoukuo Government will respect the principle of the Open Door in connection with the economic activities of foreigners in Manchoukuo.

54) *Vide* Note 2., p. 6 and Note 1, p. 11.

55) By an Imperial Ordinance of the Manchoukuo Government dated 1934 petroleum of certain kinds was made the object of governmental monopoly. The manufacture, import and export of those kinds of petroleum and mineral oils other than petroleum were allowed only to persons obtaining licence from the Government. The petroleum manufactured or imported under the licence of the Government is to be bought by the Government. The sale of petroleum was to be effected by the sellers named by the Government. By an edict entitled Manchurian Petroleum Joint-Stock Company Act, a joint-stock company with the mining, refinement, purchase and sale of petroleum for the object of the enterprise was instituted. The capital of the enterprise amounted to five million yen, of which one million are to be advanced by the Government. The shares are to be name-shares and the face value of a share is to be fifty yen. It is forbidden to transmit shares to other persons, without the consent of the company. The Manchurian Petroleum Joint-Stock Company has for its object the mining, refinement, purchase and sale of petroleum in Manchoukuo. But the Manchoukuo

Government can give licence of manufacture, import, export or purchase and sale of petroleum to other persons than the said Company. In a supplementary regulation to the said ordinance, it is provided that persons who were engaged in manufacturing petroleum, or mineral oil other than petroleum, at the time of the publication of the Monopoly Ordinance and who had reported themselves to the Government within the first one month of the enforcement of the Monopoly Ordinance will be assimilated to persons who are licenced under that Ordinance.

56) *Vide Permanent Court of International Justice Series* A./B., *Fascicule* No. 63, The Oscar Chinn Case, pp. 86-87

57) *Vide* I *supra*.

58) *Vide* Articles I and V of the Convention of Saint-Germain of 1919.

59) "The idea of freedom of trade has not disappeared from the Convention of Saint Germain " (*Vide Permanent Court of International Justice Series* A./B, *Fascicule* No. 63, The Oscar Chinn Case, pp. 83-84). "Freedom of trade, as established by the Convention, consists in the right -- in principle unrestricted -- to engage in any commercial activity, whether it be concerned with trading properly so-called, that is the purchase and sale of goods, or whether it be concerned with industry, and in particular the transport business; or, finally, whether it is carried on inside the country or, by the exchange of imports and exports, with other countries." (*Ibid*. p. 84). "A concentration of business of this kind (i.e. the alleged concentration of transport business in the hands of 'Unatra' -- Union nationale des Transports fluviaux) will only infringe freedom of commerce if commerce is prohibited by the concession of a right precluding the exercise of the same right by others in other words, if a 'monopoly' is established which others are bound to respect" (*Ibid*. p. 85). Thus monopolies were found to be against the principle of freedom of trade, as applied to the Congo Basin. It is to be noted that though a monopoly might thus be contrary to the principle of freedom of trade, it should not be deemed to be necessarily contrary to the principle of the simple equal treatment of foreigners, as applied to Manchoukuo.

60) *Vide Permanent Court of International Justice Series* A./B., Fascicule No. 63, The Oscar Chinn Case, pp. 86-87.