

## The Defects of the Articles of Confederation, Part 5

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**Synopsis:** The fifth in a series regarding the weakness of the Articles of Confederation. In this edition, the problems arising from Congress' inability to regulate commerce with foreign nations is reviewed.

Every successful nation that intends to remain independent requires the ability to regulate commercial activities with foreign nations. Historically, national governments have used the management of foreign trade for several purposes, including: a) generation of domestic revenue through imposition of duties and tariffs; b) restrictions or prohibitions on the exportation of certain items which would give competing nations an equal or superior military advantage (such as the U. S. Munitions List); c) regulation on the quality of articles that can be imported (such as consumer safety); d) as a means of promoting trade and closer relations with certain "favored nations"; e) outright prohibition on the importation of articles deemed dangerous (such as "illegal drugs"); f) restrictions on imports to protect domestic industry or stimulate domestic investment and production; g) management of boycotts of certain enemy nations; and h) indirect means to influence domestic policies in a foreign nation (such as restrictions on goods imported from nations that allow child labor). Nearly all of these have been tried in different times and to different degrees by every nation. While the first four are eminently practical and wise, the last two are useful only for making symbolic political statements. The remaining two are generally well-meaning but ineffective, and may sometimes be dangerous. Regardless of their wisdom or lack thereof, the main point is that every nation has a legitimate power to pass laws regulating foreign commerce as a means to advance or protect its interests. The consequences of an inability to do so can be illustrated by a review of the events in this area while the Articles of Confederation were in effect.

The states were prohibited by Article VI of the Articles of Confederation from contradicting any provision in any subsequent treaty then in negotiations with France and Spain. Also, they retained powers over the most important aspects of commercial treaties.

**Article VI.** No State, without the consent of the United States, in Congress assembled, shall send any embassy to, or receive any embassy from, or enter into any conference, agreement, alliance or treaty with any king, prince or state; nor shall any person holding any office of profit or trust under the United States, or any of them, accept of any present, emolument, office, or title of any kind whatever, from any king, prince or foreign state; nor shall the United States, in Congress assembled, or any of them, grant any title of nobility.

No two or more States shall enter into any treaty, confederation, or alliance whatever between them, without the consent of the United States, in Congress assembled, specifying accurately the purposes for which the same is to be entered into, and how long it shall continue.

No State shall lay any impost or duties, which may interfere with any stipulations in treaties entered into by the United States, in Congress assembled, with any king, prince, or state, in pursuance of any treaties already proposed by Congress to the courts of France and Spain.

**Article IX.** The United States, in Congress assembled, shall have the sole and exclusive right and power of determining on peace and war, except in the cases mentioned in the sixth Article; of sending and receiving ambassadors; entering into treaties and alliances, provided that no treaty of commerce shall be made whereby the legislative power of the respective States shall be restrained from imposing such imposts and duties on foreigners, as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever; of establishing rules for decid-

ing, in all cases, what captures on land or water shall be legal, and in what manner prizes taken by land or naval forces in the service of the United States shall be divided or appropriated; of granting letters of marque and reprisal in times of peace; appointing courts for the trial of piracies and felonies committed on the high seas; and establishing courts for receiving and determining finally appeals in all cases of capture; provided that no member of Congress shall be appointed a judge of any of said courts.

By the ninth Article, the states had the power to regulate commerce by imposts and duties, so long as foreigners were treated equally with Americans, and also retained the power to prohibit exports or imports as they saw fit. During the war, the ability to make meaningful trade regulations in the states was limited. After the war, the states naturally proceeded to enact laws that they believed best advanced their interests. One of the main issues, as detailed in the third essay in this series, was how to respond to Great Britain's Navigation Acts. Recall that these were designed to limit America's ability to conduct trade with British territories; in fact was designed to prevent the Americans from gaining a significant share of the carrying trade in the western Mediterranean. Britain was able to capitalize on the weakness of each state, and the inability of Congress to form a united front in its alleged capacity to negotiate treaties for all thirteen states.

On 26 Apr 1784, Congress passed a resolution stipulating that all treaties were to be represented as an agreement with all thirteen states. But since the Articles of Confederation allowed the states to determine import and export rules as well as the setting of duties, which constituted important provisions in commercial treaties, Congress in effect was not able to force the states to abide by any treaties that were negotiated by the ambassadors. There was therefore little incentive for foreign nations to enter into treaties with the United States. Great Britain chose to adopt a policy of negotiating with each of the states separately; but any state that did so would be in violation of the Articles prohibiting separate treaties by states.

By the end of 1783, Britain's Navigation Acts had ruined much of the commercial activity in the states. The Virginia state legislature had passed a resolution in which they urged all the other states to grant Congress a power to respond to them. On 30 Apr 1784, Congress passed a resolution recommending to the states that it be given power for 15 years to develop and enforce regulations in response to the Navigation Acts. But the states never did agree to grant Congress this power, as there was considerable suspicion among the states that Congress would be unable or unwilling to develop rules that were equally fair to all the states. By Mar 1786, several states had granted some powers to Congress to either regulate trade or impose a revenue duty, but they were inconsistent and could not be used to justify a modification to the Articles. All Congress could do was to issue another request for consideration of the initial resolution.

Meanwhile, a general authority lacking in Congress, the states did as they believed best for themselves. In Jan 1785, New York imposed a two-fold duty on goods arriving in British ships, as retaliation for the Navigation Acts. These were passed onto the residents of New Jersey, since they imported their goods from New York. The residents of New Jersey were thus forced to pay a duty to New York, without any corresponding advantage to their treasury. By the spring of 1785, merchants in Massachusetts organized a boycott of all British-owned businesses in the state. In Jul 1785, Massachusetts prohibited exports carried on British ships, levied a tonnage duty, and imposed high duties on certain foreign goods in order to protect domestic manufacturers. New Hampshire and Rhode Island passed nearly identical laws a week or two later. Connecticut then opened its ports to British ships, and imposed a tax on imports from Massachusetts. In Sep 1785, Pennsylvania passed a law imposing duties on 70 items, especially iron manufactures, and imposed a tonnage duty on the ships of any nation that did not have a commercial treaty with Congress. Pennsylvania also passed laws against trade with Delaware and New Jersey. As states levied duties on imports, the trade was simply carried to ports in other states, negating the alleged benefits of a revenue duty. New York imposed heavy duties on imports from Connecticut and New Jersey,

including a requirement that every shipment, no matter how small, be obliged to clear customs upon entering any port in New York. Connecticut responded with a boycott on commerce with New York. New Jersey retaliated by imposing a large tax on a lighthouse owned by New York, but sitting on an island off the coast of New Jersey. Most of the states violated the most-favored-nation provisions of the treaties with Holland and France. In other words, America was in the midst of a trade war among the states, and in violation of agreements with other nations. Fortunately, the Convention of 1787 occurred before any shooting wars between the states, and the Constitution that resulted resolved the commercial trade issues.

The lack of requisite powers over trade in the Articles of Confederation was so obvious to the delegates at the Convention, that there was little argument over giving them generally to the federal government. Ultimately, the U. S. Constitution as devised at the Convention addressed all these difficulties by four methods. First, in regard to treaties in general, the Executive was given power to negotiate them, but they require ratification by the Senate, as detailed in part 3 of this series (Article 1, Section 10). Second, Congress was given general legislative power over foreign trade not covered by treaty (Article 1, Section 8). Third, Congress was given legislative power to regulate trade between the states and the Indian tribes (Article 1, Section 8) with the caveats per Article 1, Section 9. Fourth, the states are prohibited from imposing import and export levies except for the costs of inspection, and any excess revenue is to be devoted to the United States (Article 1, Section 10). The relevant texts are:

**Article 1, Section 8, First and Third Clauses:**

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

**Article 1, Section 9, Fifth and Sixth Clauses:**

No Tax or Duty shall be laid on Articles exported from any State.

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

**Article 1, Section 10:**

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.

No State shall, without the Consent of Congress, lay any duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.