LETTER OF THE PRESIDENT TO THE FOREIGN RELATIONS COMMITTEE CONCERNING PARTICIPATION BY THE UNITED STATES IN THE PERMANENT COURT OF INTERNATIONAL JUSTICE[1]

THE WHITE HOUSE,
Washington, March 2, 1923.

HON. HENRY CABOT LODGE,
United States Senate, Washington, D. C.

MY DEAR SENATOR LODGE: On Wednesday you sent me the request of the Foreign Relations Committee for information relative to the proposal that we adhere to the protocol establishing an International Court of Justice at The Hague. I immediately submitted the inquiries of your committee to the Secretary of State for detailed reply. I am pleased to transmit to you herewith a letter from the Secretary of State covering the various questions raised in the committee resolution of inquiry. I need not add that the reply of the Secretary of State has my most hearty approval.

Very truly yours,

WARREN G. HARDING.

[Enclosure]

DEPARTMENT OF STATE,
Washington, March 1, 1923.

MY DEAR MR. PRESIDENT: I have received your letter of February 28, inclosing a request handed to you by Senator Lodge, chairman of the Senate Committee on Foreign Relations, for certain information desired by the committee in order to reach a decision relative to advising and consenting to our adhesion to the protocol establishing the permanent court of international justice. I beg leave to submit the following statement upon the points raised:

First, the inquiry is this:

> That the President be requested to advise the committee whether he favors an agreement obligating all Powers or governments who are signers of the protocol creating the Court to submit all questions about which there is a dispute, and which cannot be settled by diplomatic efforts, relative to: (a) The interpretation of treaties; (b) any question of international law; (c) the existence of any fact which, if established, would constitute a breach of an international obligation; (d) the nature or extent of reparation to be made for the breach of an international obligation; (e) the interpretation of a sentence passed by the court.

I understand that the question is not intended to elicit your purely personal opinion, or whether you would look with an approving eye upon an agreement of this sort made effective by the action of all Powers, but whether you, as President, in the exercise of your constitutional authority to

[1] *Congressional Record*, March 2, 1923, Vol. 64, No. 80, p. 5135.

negotiate treaties, favor the undertaking to negotiate a treaty on the part of the United States with other Powers creating such an obligatory jurisdiction.

So understood, I think that the question must be answered in the negative. This is for the reason that the Senate has so clearly defined its attitude in opposition to such an agreement that until there is ground for believing that this attitude has been changed it would be entirely futile for the Executive to negotiate any treaty of the sort described.

I may briefly refer to earlier efforts in this direction.

In the latter part of the Cleveland administration a very strong public sentiment was expressed in favor of a general arbitration treaty between the United States and Great Britain, this being regarded as a step toward a plan for all civilized nations. In January, 1897, the Olney-Pauncefote treaty was signed, with provisions for compulsory arbitration having a wide scope. This treaty was supported not only by the Cleveland administration but President McKinley indorsed it in the strongest terms in his annual message of December 6, 1897, urging "the early action of the Senate thereon not merely as a matter of policy but as a duty to mankind". But despite the safeguards established by the treaty the provisions for compulsory arbitration met with disfavor in the Senate, and the treaty failed.[2]

A series of arbitration treaties was concluded in 1904 by Secretary Hay with about twelve states. Warned by the fate of the Olney-Pauncefote treaty, Secretary Hay limited the provision for obligatory arbitration in these treaties to "differences which may arise of a legal nature or relating to the interpretation of treaties existing bewteen the two contracting parties, and which it may not have been possible to settle by diplomacy". Even with this limitation, there was added the further proviso: "Provided, nevertheless, that they (the differences) do not affect the vital interests, the independence, or the honor of the two contracting states, and do not concern the interests of third parties."

It was also provided that the parties should conclude a "special agreement" in each individual case, "defining clearly the matter in dispute, the scope of the powers of the arbitrators, and the periods to be fixed for the formation of the arbitral tribunal and the several stages of the procedure."

Notwithstanding the limited scope of these treaties for compulsory arbitration, the Senate amended them by substituting the phrase "special treaty" for "special agreement", so that in every individual case of arbitration a special treaty would have to be made with the advice and consent of the Senate.[3] In view of this change, Secretary Hay announced that the President would not submit the amendment to the other governments.

It should also be observed that the Hague conventions of 1899 and 1907, to which the United States is a party, relating to the general arbitration of

[2] Moore's *International Law Digest*, Vol. VII, pp. 76–78.

[3] *Ibid.*, pp. 102–103.

certain classes of international differences, do not make recourse to the tribunal compulsory.

In 1908 a series of arbitration treaties was negotiated by the United States. The provisions of these treaties were limited to "differences which may exist of a legal nature or relating to the interpretation of treaties existing between the two contracting parties and which it may not have been possible to settle by diplomacy," with the proviso "that they do not affect the vital interests, the independence, or the honor of the two contracting states, and do not concern the interests of third parties". Secretary Root also provided, taking account of the failure of the Hay treaties, that "in each individual case" the contracting parties before appealing to the arbitral tribunal should conclude a "special agreement" defining the matter in dispute, the scope and powers of the arbitrator, and so forth, and it was further explicitly stipulated in these treaties that such "special agreement" on the part of the United States should be made by the President "by and with the advice and consent of the Senate." These treaties, with these limiting provisions, made in deference to the opinion of the Senate as to the permissible scope of such agreements, received the Senate's approval.

In 1911 the Taft administration submitted to the Senate general arbitration conventions with Great Britain and with France which were of broad scope. There were numerous objections on the part of the Senate. There was a provision in Article 3 that, in case of a controversy as to whether a particular difference was justiciable, the issue should be settled by a proposed joint high commission. Objection was made that such an arrangement was an unconstitutional delegation of power, and the provision was struck out by the Senate. Again the Senate conditioned its approval on numerous other reservations, withholding from the operation of the treaty any question "which affects the admission of aliens into the United States, or the admission of aliens to the educational institutions of the several States, or the territorial integrity of the several States or of the United States, or concerning the question of the alleged indebtedness or moneyed obligation of any State of the United States, or any question which depends upon or involves the maintenance of the traditional attitude of the United States concerning American questions, commonly described as the Monroe Doctrine, or other purely governmental policy."

In the amended form the treaties were not acceptable to the administration and remain unratified.

In the light of this record it would seem to be entirely clear that until the Senate changes its attitude it would be a waste of effort for the President to attempt to negotiate treaties with the other powers providing for an obligatory jurisdiction of the scope stated in the committee's first inquiry quoted above.

If the Senate, or even the Committee on Foreign Relations, would indi-

cate that a different point of view is now entertained, you might properly consider the advisability of negotiating such agreements.

Second. The second inquiry is as follows:

> Secondly, if the President favors such an agreement, does he deem it advisable to communicate with the other Powers to ascertain whether they are willing to obligate themselves as aforesaid?
>
> In other words, are those who are signers of the protocol creating the Court willing to obligate themselves by agreement to submit such questions as aforesaid, or are they to insist that such questions shall only be submitted in case both, or all, parties interested agree to the submission after the controversy arises?
>
> The purpose being to give the Court obligatory jurisdiction over all purely justiciable questions relating to the interpretation of treaties, questions of international law, to the existence of facts constituting a breach of international obligation, to reparation for the breach of international obligation, to the interpretation of the sentences passed by the court, to the end that these matters may be finally determined in a court of justice.

What has been said above is believed to be a sufficient answer to this question. It may, however, be added that the statute establishing the Permanent Court of International Justice, as I stated in my previous letter, has a provision—Article 36—by which compulsory jurisdiction can be accepted, if desired, in any or all of the classes of legal disputes concerning (a) the interpretation of a treaty, (b) any question of international law, (c) the existence of any fact which, if established, would constitute a breach of an international obligation, and (d) the nature or extent of the reparation to be made for the breach of an international obligation. Accordingly, attached to the protocol of signature for the establishment of the Permanent Court of International Justice is an "optional clause" by which the signatory may accept this compulsory jurisdiction.

I understand that of the forty-six states which have signed the protocol for the establishment of the Court about fifteen have ratified this optional clause for compulsory jurisdiction, but among the states which have not as yet assented to the optional clause are to be found, I believe, Great Britain, France, Italy, and Japan. The result is that aside from the objections to which I have referred in answering the first inquiry there is the additional one resulting from the attitude of these Powers.

It was for all the reasons above stated that in my previous letter I recommended that if this course met with your approval you should request the Senate to give its advice and consent to the adhesion on the part of the United States to the protocol accepting, upon the conditions stated, the adjoined statute of the Permanent Court of International Justice, but not the optional clause for compulsory jurisdiction.

Third. The next inquiry is:

> The committee would also like to ascertain whether it is the purpose of the administration to have this country recognize part XIII

(Labor) of the Treaty of Versailles as a binding obligation. See Article 26 of the statute of League establishing the Court.

I submit that the answer should be in the negative.

Part XIII of the treaty of Versailles, relating to labor, is not one of the parts under which rights were reserved to the United States by our treaty with Germany. On the contrary, it was distinctly stated in that treaty that the United States assumes no obligations under Part XIII. It is not now contemplated that the United States should assume any obligations of that sort. Article 26 of the statute of the Court, to which the committee refers in its inquiry, relates to the manner in which labor cases referred to in Part XIII of the treaty of Versailles shall be heard and determined. But this provision would in no way involve the United States in Part XIII. The purpose of the Court is to provide a judicial tribunal of the greatest ability and distinction to deal with questions arising under treaties. The fact that the United States gave its adhesion to the protocol and accepted the statute of the Court would not make the United States a party to treaties to which it was otherwise not a party or a participant in disputes in which it would otherwise not be a participant. The function of the Court, of course, is to determine questions which arise under treaties, although only two of all the Powers concerned in maintaining the Court may be parties to the particular treaty or the particular dispute.

Undoubtedly there are a host of treaties to which the United States is not a party, as well as Part XIII of the Treaty of Versailles, which would give rise to questions which such a Permanent Court of International Justice should hear and determine. None of the signatory Powers by cooperating in the establishment and maintenance of the Court make themselves parties to treaties or assume obligations under treaties between other Powers. It is to the interest of the United States, however, that controversies which arise under treaties to which it is not a party should be the subject of peaceful settlements, so far as it is practicable to obtain them, and to this end that there should be an instrumentality, equipped as a Permanent Court, through which impartial justice among the nations may be administered according to judicial standards.

Fourth. Finally the committee states that "they would also like to be informed as to what reservations, if any, have been made by those countries who have adhered to the protocol."

I am not advised that any other state has made reservations on signing or adhering to the protocol.

I am, my dear Mr. President.

Faithfully yours,

CHARLES E. HUGHES.