presenting projects of their own. The American delegation acted as a unit on every occasion, without a difference of opinion on any subject, and the American delegation was its chairman, Charles Evans Hughes.

JAMES BROWN SCOTT.

THE NEW ARBITRATION TREATY WITH FRANCE

The Senate has given its advice and consent to the ratification of the new arbitration treaty between the United States and France, which was signed on February 6, 1928, on the understanding, however, that it does not impose any limitation on the so-called Bryan Peace Treaties, and notes to that effect were exchanged between the two governments before ratifications were exchanged.[1]

This treaty is put forward as a model which the Government of the United States desires to adopt in substitution for the so-called Root Arbitration Treaties, not only with France, but with a number of other Powers with which the Root Treaties have either expired, or are about to expire, by reason of the time limitation imposed by their own terms.

The preamble of the new treaty recites:

> Desirous of reaffirming their adherence to the policy of submitting to impartial decision all justiciable controversies that may arise between them;
>
> Eager by their example not only to demonstrate their condemnation of war as an instrument of national policy in their mutual relations, but also to hasten the time when the perfection of international arrangements for the pacific settlement of international disputes shall have eliminated forever the possibility of war among any of the Powers of the world;

The two governments have accordingly concluded this "new treaty of arbitration enlarging the scope of the arbitration convention signed at Washington on February 10, 1908, which expires by limitation on February 27, 1928, and promoting the cause of arbitration."

Unfortunately, and perhaps inevitably in the circumstances, this new treaty of arbitration does not seem entirely adequate for the accomplishment of the ambitious program set out in the preamble.

In considering the question of how far this new treaty makes any useful or important additions to our previous arbitration and conciliation treaties with other Powers requiring compulsory investigation, or arbitration of pending, or future questions, it is necessary to review briefly its antecedents and historical background and then to compare its terms with those of our other treaties for the pacific settlement of international disputes.

Disregarding arbitration treaty projects signed on the part of the United States but not ratified, the most noteworthy of which are the project adopted

[1] For the text of the treaty and exchange of notes, see Supplement to this JOURNAL, pp. 37 and 39.

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by the Inter-American Conference of 1890[2] and the Olney-Pauncefote Treaty of 1897,[3] the first general arbitration treaty entered into and ratified by the United States was the Hague Convention of 1899 for the Pacific Settlement of International Disputes. This convention has since been superseded by the Hague Convention of 1907, having the same title, which later convention is still in force.

This convention provides for recourse to the good offices or mediation of friendly Powers before an appeal to arms, and the parties agree "to use their best efforts to insure the pacific settlement of international differences" with a view to avoiding recourse to force. Provision is also made for international commissions of inquiry "in disputes of an international nature involving neither honor nor vital interests, and arising from a difference of opinion on points of fact," to facilitate a solution "by elucidating the facts."

This convention recites that "in questions of a legal nature, and especially in the interpretation or application of international conventions, arbitration is recognized by the contracting Powers as the most effective and, at the same time, the most equitable means of settling disputes which diplomacy has failed to settle." The convention accordingly provides for a Permanent Court of Arbitration, under which special arbitral tribunals are to be constituted by special agreement in each case, but it leaves undisturbed general or private treaties making arbitration obligatory on the contracting Powers, and they reserve to themselves "the right of concluding new agreements, general or particular, with a view of extending compulsory arbitration to all cases which they may consider it possible to submit to it."

The Final Act of the 1907 Hague Conference recites that

> It is unanimous—
> 1. In admitting the principle of compulsory arbitration.
> 2. In declaring that certain disputes, in particular those relating to the interpretation and application of the provisions of international agreements, may be submitted to compulsory arbitration without any restriction.

This Hague Convention of 1907 was followed by the so-called Root Arbitration Treaties, which are identical in form with the unratified arbitration treaties negotiated by Secretary Hay, except that in the Root Treaties is incorporated the provision, which was imposed by the Senate as a condition for the ratification of the Hay Treaties, providing that the special agreement, which was required in each case as a preliminary to arbitration proceedings, could be made on the part of the United States only by and with the advice and consent of the Senate.

As above stated, the new treaty now under consideration is intended to replace the Root Treaty of 1908 with France, which, after four renewals of five

[2] Moore's International Law Digest, Vol. 7, p. 70.
[3] *Ibid.*, p. 76; also in Supplement to this JOURNAL, Vol. 5 (1911), p. 88.

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years each, expired on February 27, 1928.[4] The Root Treaties all adopted the arbitration organization established by the Hague Convention of 1899 for the Pacific Settlement of International Disputes, subject to the proviso, however, that the questions to be arbitrated "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."

In chronological order, the next treaty of importance as a model treaty is the treaty of 1909 with Great Britain, concerning the boundary waters between the United States and Canada, which treaty was also negotiated by Secretary Root.[5] This treaty also follows the lead of the above mentioned Hague Conventions of 1899 and 1907 and establishes a Joint Commission of Inquiry, which plan was further developed and given wider application in the unratified Taft Treaty of 1911 with Great Britain[6] and again in the Bryan Peace Treaties of 1914, which are now in force and will be considered below.

The Canadian Boundary Waters Treaty concerns only the United States and Canada, and provides for the reference to a joint commission of inquiry thereby established of any questions or matters of difference "involving the rights, obligations or interests of either in relation to the other or to the inhabitants of the other along the common frontier between the United States and the Dominion of Canada." In accordance with the well recognized necessity for limiting the authority of commissions of inquiry, this treaty provides that the reports of the commission "shall not be regarded as decisions of the questions or matters so submitted either on the facts or the law, and shall in no way have the character of an arbitral award."

The commission of inquiry provisions of the Taft Treaty with Great Britain required that at the request of either party all differences arising between them, which it had not been possible to settle by diplomacy, should be referred either at once or, in some cases, after the expiration of a year from the date of the request, to a Joint High Commission of Inquiry, to be constituted as therein provided, "for impartial and conscientious investigation." The commission was authorized to report on the questions referred to it "for the purpose of facilitating the solution of disputes by elucidating the facts, and to define the issues presented by such questions, and also to include in its report such recommendations and conclusions as may be appropriate." The usual proviso was added that "the reports of the commission shall not be regarded as decisions of the questions or matters so submitted either on the facts or on the law and shall in no way have the character of an arbitral award."

Although the Taft Treaty was not ratified, its provisions relating to commissions of inquiry were approved without change by the Senate, and closely

[4] Printed in Supplement to this JOURNAL, Vol. 2 (1908), p. 296.
[5] *Ibid.*, Vol. 4 (1910), p. 239.
[6] *Ibid.*, Vol. 5 (1911), p. 253.

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resemble the Bryan Peace Treaties[7] later entered into by the United States with some twenty other nations, pursuant to the advice and consent of the Senate.

The chief difference between the commission of inquiry provisions in the Taft Treaty and in the Bryan Treaties was that in the latter the commission is to be a permanent organization appointed and maintained without waiting until occasion for its services should arise, and that the commission may by unanimous agreement volunteer its services to investigate and report about any dispute which the parties have failed to adjust by diplomatic methods, and also that the parties agree "not to declare war or begin hostilities during such investigation and before the report is submitted."

The new model treaty with France incorporates by reference, in Article I, the provisions of the Bryan Treaties. One of the notable features of the Bryan Treaties is that they provide that any disputes, of whatsoever nature they may be, and without any exceptions, arising between the parties to the treaty, shall, when ordinary diplomatic proceedings have failed and the parties have not had recourse to arbitration, be submitted for investigation and report. This provision of the Bryan Treaties is reproduced almost word for word in Article I of the new treaty, but Article III of this treaty was construed by the Senate Foreign Relations Committee as imposing exceptions and reservations as to disputes involving certain questions not excepted in the Bryan Treaties. The following is the text of Article III:

> The provisions of this treaty shall not be invoked in respect of any dispute the subject matter of which
>
> "(a) is within the domestic jurisdiction of either of the high contracting parties,
>
> "(b) involves the interests of third parties,
>
> "(c) depends upon or involves the maintenance of the traditional attitude of the United States concerning American questions, commonly described as the Monroe Doctrine,
>
> "(d) depends upon or involves the observance of the obligations of France in accordance with the Covenant of the League of Nations."

On a strict construction of the terms of Article III these exceptions apply to all the provisions of the treaty, including Article I, which has reference to the commissions of inquiry under the Bryan Treaty. It now appears, however, that it was not intended that these exceptions should apply to the Bryan Treaty commissions of inquiry, which would be distinctly a step backward in our policy for the pacific settlement of international disputes. In order to remove all possible doubt on this subject, Secretary Kellogg had, as stated above, committed the two governments to this understanding by an exchange of notes before the treaty was ratified.[8]

Another question which suggests itself as to the effect of this treaty on the

[7] The treaty with France is printed in Supplement to this JOURNAL, Vol. 10 (1916), p. 278.
[8] Supplement to this JOURNAL, p. 39.

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Bryan Treaty with France is whether that treaty can be terminated while this treaty remains in force.

Article II of the new treaty corresponds almost word for word with Article I of the Taft Treaty, and reads as follows:

> All differences relating to international matters in which the high contracting parties are concerned by virtue of a claim of right made by one against the other under treaty or otherwise, which it has not been possible to adjust by diplomacy, which have not been adjusted as a result of reference to the above mentioned Permanent International Commission and which are justiciable in their nature by reason of being susceptible of decision by the application of the principles of law or equity, shall be submitted to the Permanent Court of Arbitration established at The Hague by the Convention of October 18, 1907, or to some other competent tribunal, as shall be decided in each case by special agreement, which special agreement shall provide for the organization of such tribunal if necessary, define its powers, state the question or questions at issue and settle the terms of reference.
>
> The special agreement in each case shall be made on the part of the United States of America by and with the advice and consent of the Senate thereof, and on the part of France in accordance with the constitutional laws of France.

The Senate decided, in considering the corresponding provisions of Article I of the Taft Treaty, that these provisions covered too wide a field and that certain subjects should be expressly excluded from the scope of the proposed plan of arbitration. The Senate accordingly imposed as a condition for its assent to the ratification of the Taft Treaty a reservation that:

> The treaty does not authorize the submission to arbitration of any question which affects the admission of aliens in 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.

Presumably the exceptions in Article III, above quoted, of the new treaty are intended to have the effect of excluding from arbitration all of the questions thus excluded by the Senate resolution. Any dispute involving the maintenance of the American attitude concerning the Monroe Doctrine is expressly excluded, and the new treaty goes even beyond the Senate reservations made to the Taft Treaty by excluding any questions involving the interests of third parties and the obligations of France in accordance with the Covenant of the League of Nations.

The remaining exception in the new treaty, which excludes "any dispute the subject matter of which (a) is within the domestic jurisdiction of either of the high contracting parties," is doubtless intended to exclude all the other

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questions excluded in the Senate reservations relating to the Taft Treaty. This exception certainly accomplishes that purpose, but its terms may be interpreted as having a much more extensive meaning than perhaps was intended. A reservation from arbitration of every dispute, the subject matter of which is within the domestic jurisdiction of a nation, if literally interpreted, means that no question is to be arbitrated which involves the exercise of the domestic authority of a government in either its legislative, executive or judicial capacity within its constitutional jurisdiction, even if it involves a question of right under international law. Such interpretation would exclude from arbitration practically every dispute which did not arise either from the action of a government in the exercise of some unconstitutional authority, or as the result of some governmental action outside of the territorial jurisdiction of the government.

It has come to be recognized in recent years that while purely domestic questions are not proper subjects for compulsory arbitration, this exception comprises only questions which are *exclusively* within the national jurisdiction, such as immigration, taxation, governmental policies, etc., many of which are expressly enumerated in the above-quoted Senate reservation to the Taft Treaty. To go beyond these minimum exceptions, which are now generally considered "indispensable to safeguard the independence and the sovereignty of the States, as well as its exercise in matters within their domestic jurisdiction" (resolution adopted by the recent Pan American Conference at Havana), and to exclude every subject within the domestic jurisdiction of either party, is to take a retrogressive step not in harmony with the purposes announced in the preamble of this treaty.

So far as our relations with France are concerned, the question is, perhaps, of no real importance, but our national interests might be seriously compromised if this new model treaty should be adopted with Mexico, and by virtue of the exceptions under consideration that government be thereby given the right to exclude from arbitration with us any dispute the subject-matter of which is within the domestic jurisdiction of Mexico, irrespective of whether or not such dispute involved a question of our rights under international law.

Another point which calls for passing consideration is found in the use of the phrase "by the application of the principles of law or equity" in the definition of justiciable questions in Article II of this treaty. This phrase, as above stated, was used in the same way in Article I of the Taft Treaty, and the majority report of the Senate with reference to that treaty objected to the use of the word "equity" in this phrase, as a test of the justiciable nature of a controversy, on the ground that:

> In England and the United States, and wherever the principles of the common law obtain, the words "law or equity" have an exact and technical significance, but that legal system exists nowhere else and does not exist in France, with which country one of these treaties is made. We

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> are obliged, therefore, to construe the word "equity" in its broad and universal acceptance as that which is "equally right or just to all concerned; as the application of the dictates of good conscience to the settlement of controversies." It will be seen, therefore, that there is little or no limit to the questions which might be brought within this article, provided the two contracting parties consider them justiciable.

Inasmuch as the Taft Treaty was between the United States and Great Britain, this particular objection did not lead to a reservation by the Senate with reference to that treaty, but it was clearly foreshadowed that this objection would be made to this use of the word "equity" in a treaty between the United States and France or other countries not having the same common understanding which Great Britain and the United States have as to its meaning. Inasmuch as this new model treaty is with France it is significant of a change in the views of the Senate that it has not required any definition of the word "equity" as used in this treaty.

It may be said that these criticisms are negligible, even if well founded, because this treaty contains the usual proviso requiring, as a preliminary to arbitration in any case, the adoption of a special agreement between the parties, which on the part of the United States can be entered into only by and with the advice and consent of the Senate, so that in that way the questions to be arbitrated and the terms of submission are always subject to its final control. A treaty which goes no further than that, however, can hardly be said to serve as a model for the purposes set out in the preamble of this treaty.

In conclusion, this new treaty is on the whole disappointing in that it fails to coördinate and consolidate the progress heretofore made in the field of general arbitration and, on the contrary, in the respects above pointed out, it abandons some of the gains made in previous treaties; also it makes no specific provision for facilitating the arbitration of pecuniary claims, and it does not furnish a model in form suitable for use generally with all nations.

CHANDLER P. ANDERSON.

THE NEW ARBITRATION TREATY WITH FRANCE

The Government of the United States seldom loses an opportunity to profess its loyalty to international arbitration in the abstract. At a meeting of the Preparatory Commission for the Disarmament Conference, held in Geneva on November 30, 1927, the American representative stated that "the United States has always championed the idea of international arbitration and conciliation, both in principle and in practice," and "welcomes the extension of the practice"; but at the same time he announced the refusal of the United States to participate in the work of an international committee on arbitration and security.[1] On December 28, 1927, in a communication to the

[1] League of Nations Document, C. 667, M. 225, 1927, IX.

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