EDITORIAL COMMENT

THE AMERICAN THEORY OF INTERNATIONAL ARBITRATION

The United States has been and is a partisan — we might almost say a violent partisan — of international arbitration. In times past it has submitted individual cases to arbitration and has expressed a willingness, indeed a profound desire, to bind itself to submit all cases susceptible of judicial treatment, and of a nature to be submitted, to international arbitration. Various general treaties of arbitration were negotiated in 1904 and were ratified by the Senate of the United States, with an amendment, however, which required for the establishment of the *compromis* the conclusion of a treaty. This would necessitate, therefore, the negotiation of an individual treaty in order to submit a question to arbitration which the contracting parties had already bound themselves to submit. There would be thus involved the delay incident to the conclusion of the treaty, and the exchange of ratifications would necessarily prolong the delay. Under these circumstances it was deemed inadvisable to submit the treaties as amended to the various powers for their ratification. It is doubtful whether the powers would have been

willing to ratify the amended treaty which carried with it the obligation to conclude a treaty to carry it into effect when the very purpose of the original treaty was to bind the respective countries to submit questions to arbitration without further recourse to the treaty-making power. The theory of the European governments is that the general treaty obligates the contracting parties to submit the questions specified in the treaty to arbitration and that the formulation of the *compromis,* however important it may be, is a question of procedure. The duty created by the general treaty thus obligates the power to submit the individual question to arbitration and the duty created by this treaty becomes a mere question of procedure which the contracting parties may arrange diplomatically without further resort to the treaty-making power, for the general treaty clothes the national organ with the necessary powers to give effect to the international agreement embodied in the general treaty. In the United States, however, the President and the Senate constitute the treaty-making power and the cooperation of both these is necessary to bind the United States internationally. The difficulty with the United States is, therefore, a constitutional difficulty, and a treaty to be operative and binding upon the United States must permit the United States to formulate the agreement according to our laws. The difficulty, therefore, as far as we are concerned, is internal, and it would seem that foreign powers have no more right to object to the particular manner in which the *compromis* is established, provided only it be established, than the United States would have to object to the formulation of the *compromis* in a particular manner by a foreign power. The duty to formulate the *compromis* is, by virtue of the treaty, international; the means by which it is established are internal, and international law stops at the frontier. It would follow from this statement that if the establishment of the *compromis* involved the treaty-making power of the United States we should not, in order to solve our internal difficulties, require a foreign power to resort to the treaty-making power if that foreign power is competent to conclude the *compromis* by simple administrative action. The Senate amendment of 1904 providing that the *compromis* be a special treaty seems, therefore, objectionable; for it compels a foreign power to negotiate a treaty when by the internal organization of the foreign power in question a formal treaty is unnecessary. Therefore, Secretary Root is to be congratulated for devising a simple expedient by which the constitutional difficulties of the United States will be satisfied without requiring a foreign power

to negotiate the special treaty for the submission of the individual case to arbitration.

An objection frequently made to the cooperation of the Senate in the establishment of the *compromis* necessary for the submission of the case is that a foreign power is bound by its general treaty to negotiate the *compromis,* whereas the United States is not bound; for the agreement upon the terms of the *compromis* binds the foreign power, whereas the United States is not bound until the Senate has ratified the special agreement. If this objection were well founded it would indeed be serious, but as the *compromis* is established by diplomatic negotiation it is merely an offer until it is accepted and may be withdrawn at any time before acceptance. If Germany, in accordance with the provisions of a general arbitration treaty, formulates and presents to the United States a *compromis,* this is, in the language of private law, an offer, and if the ratification of the Senate is necessary it does not become binding on Germany until the Senate has ratified it. A treaty may be negotiated between Germany and the United States, and may be signed by Germany, but it would be absurd to suppose that Germany is bound by the treaty unless and until it is ratified by the treaty-making power of the United States. Neither party is bound unless both are. Regarded in this light, the proposed *compromis* is not binding upon Germany until the treaty-making power of the United States has signed and ratified it, and until this has happened Germany is at liberty to withdraw its offer. It may be that it is easier for Germany to formulate the *compromis,* but the ease or difficulty is not the point at issue. The question is that neither party is or can be, in the nature of things, bound until the other is. It may be that the cooperation of the Senate involves delay, but this naturally exists where the agent is forced to consult the principal. If the *compromis,* therefore, be looked upon as a simple case of offer and acceptance, no legal difficulty arises, although delay may be caused by the necessity of consulting a branch of the Government other than that which negotiated the agreement. The convention between the United States and France, signed on the 10th day of February, approved by the Senate on February 19, and ratified by the President on the 27th of February, 1908, may be considered as a model treaty, and it is hoped that it will be the first of a long and increasing series.

Turning to the discussion of the various articles of this convention, it will be seen that the Contracting States have adopted the general formula of international arbitration, in which questions involving vital

interests, independence, or the honor of the two Contracting States, as well as questions affecting the interests of third parties, are excluded from the scope of the treaty. It may be that nations will one day agree to arbitrate questions concerning their vital interests, independence, or honor, but at present they are either unwilling or unable to do so. In the meantime, there is no reason why they should not arbitrate differences of a legal nature or those relating to the interpretation of treaties between the contracting parties which have not been settled by diplomacy. Article 1, which is fully abreast of the enlightened public sentiment of the present day, is a follows:

> **Differences which may arise 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, should be referred to the Permanent Court of Arbitration established at The Hague by the Convention of the 29th July, 1899, provided, nevertheless, 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.**

Article 2 consists of two sentences, the first of which provides that the *compromis* — that is to say, the special agreement — shall be established before an appeal is made to the Permanent Court of Arbitration. The exact wording of this is as follows:

> **In each individual case the High Contracting Parties, before appealing to the Permanent Court of Arbitration, shall conclude a special Agreement 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.**

The second sentence of the article in question provides how the *compromis* shall be made. For example:

> **It is understood that on the part of the United States such special agreements will be made by the President of the United States, by and with the advice and consent of the Senate, and on the part of France they will be subject to the procedure required by the constitutional laws of France.**

An analysis of this simple clause shows that the *compromis* is to be made by the President of the United States by and with the advice and consent of the Senate, but does not state, as in the treaties of 1904, that the special agreement is to be a special treaty. The President negotiates the *compromis* and submits it to the Senate for its advice and consent. The approval of the Senate binds the United States, and the agreement

upon the issue thus determined is ready for submission to the Court of Arbitration. Until the approval of the Senate is obtained the United States is not bound, and in like manner France is not bound until the procedure has been complied with required by the constitutional laws of France. When this procedure has been complied with the *compromis* is established by France. Both parties are thus bound, and until both are neither is. This expedient is as simple as it is wise, because it frees each President from the responsibility of determining whether the vital interests, the independence, or the honor of the Contracting States is involved, and by associating the constitutional organs of each State divides a responsibility which at all times would be grave and which at times might be oppressive.

The third article provides that the convention shall remain in force for a period of five years, so that if the carefully drawn provisions prove unsatisfactory in practice they may be revised in the light of experience.

INTERNATIONAL LAW INVOLVED IN THE SEIZURE OF THE TATSU MARU

The recent seizure (on February 5, 1908) of the *Tatsu Maru,* a Japanese merchant vessel, by Chinese authorities, for the prevention of smuggling of arms, has given rise to grave diplomatic discussion which at one time seemed likely to threaten the peaceful relations of China and Japan. It was alleged that the seizure of the vessel in question, laden with a cargo of arms destined to Macao, a port under Portuguese jurisdiction, which vessel sailed under a Japanese permit, was a justifiable act of the Chinese authorities, whether the vessel was upon the high seas or within the waters technically under the jurisdiction of Portugal, because the delivery of the arms at Macao was colorable, their real destination being to the Chinese interior for illicit purposes. It has been stated and denied that the vessel when seized was within Portuguese jurisdiction, and therefore, for the purposes of this brief note, it may be assumed that the seizure was not within Portuguese waters. If the vessel when seized was within Portuguese waters, the question, already sufficiently complicated, would be more involved, because in seizing the vessel and the cargo consigned to Macao the Portuguese jurisdiction would have been violated in law, however justifiable in morality it may otherwise have been. As, however, Portugal does not seem to advance the contention that the seizure actually took place within its jurisdiction,