borrower retaining in its grasp the asset employed to induce credit. With its close knowledge of the fiscal, political and economic conditions confronting every foreign public applicant for a loan, the Department of State might unhesitatingly inform a prospective lender of the probable effect of certain forms of security upon the stability of the borrower from which they were exacted. Thus it might, for example, in a particular case, question the wisdom of demanding of a borrower constituting an independent State not under the protection of the United States (and not subjected to a régime of extraterritorial jurisdiction) pledges of customs revenues to be relinquished to an alien trustee.[4] Should the borrower be called upon to surrender by way of security or for the purpose of utilizing security, the exercise of privileges locally deemed to be incapable of delegation to a foreign entity, the danger of the transaction, however valid, should be made known. The effect of terms likely to be challenged by enlightened opinion as subversive of the sovereignty of the borrower upon the popular mind throughout its domain should be made clear. Arrangements likely to beget hostility towards the United States and resentfulness in relation to American investors should be pictured in their true colors. In a word, governmental cooperation should serve to emphasize precautions to be taken, risks to be guarded against, forms of security to be avoided, pitfalls to be shunned, as well as safeguards to be demanded. Under scientific and persistent and friendly development, the coordinated labors of the Department of State and American lenders to foreign governments are capable of safeguarding the interests of American investors, enhancing the ultimate success of American loans, and simultaneously of advancing in the best sense the cause of American diplomacy by eliminating obstacles otherwise bound to impede its progress.

CHARLES CHENEY HYDE.

THE CLASSIFICATION OF JUSTICIABLE DISPUTES

There was considerable discussion at the annual session of the Institute of International Law in Rome last October concerning the jurisdiction of the Permanent Court of International Justice provided for by Article XIV of the Covenant of the League of Nations. This discussion centered around the wording of Article 36 of the Statute of the Court adopted by the Assembly of the League of Nations at Geneva on December 13, 1920. The text of this Article reads as follows:

The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in Treaties and Conventions in force.

The Members of the League of Nations and the States mentioned in the Annex of the Covenant may, either when signing or ratifying the protocol

[4] It is not suggested that such terms might not, under entirely different circumstances, be justly exacted as a necessary safeguard for the lender and without jeopardizing the validity or ultimate success of the loan.

to which the present Statute is adjoined, or at a later moment, declare that they recognise as compulsory *ipso facto* and without special agreement, in relation to any other Member or State accepting the same obligation, the jurisdiction of the Court in all or any 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;

(d) The nature or extent of the reparation to be made for the breach of an international obligation.

The declaration referred to above may be unconditionally or on condition of reciprocity on the part of several or certain Members or States, or for a certain time.

In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.

It will be observed that by the first paragraph of Article 36 the jurisdiction of the Court is most comprehensive so far as it concerns disputes which the parties may voluntarily refer to it.

As concerns the compulsory jurisdiction of the Court the attempt made to classify legal disputes can hardly be said to be satisfactory. "Any question of international law" is obviously all-inclusive in scope, as also "the existence of any fact which if established would constitute a breach of international obligation."

It is not at all strange, therefore, that only a few of the smaller powers thus far have accepted the compulsory jurisdiction of the Court. Nations having large interests at stake cannot afford to do so unless there is a very explicit and complete agreement as to what disputes are considered to be legal or justiciable in character. By the very nature of things a true court of justice implies the right to summon the parties subject to its jurisdiction to appear before the Court. The question then of the classification of legal disputes becomes of fundamental importance. It was for these reasons that the Institute of International Law at its last session designated a special Commission for the study of the question of The Classification of International Disputes of a Justiciable Nature.

It should not be forgotten that various attempts have been made to classify justiciable disputes, notably by the Sub-Commission of the Hague Peace Conference of 1907. In fact, very considerable progress was made in this direction and a large majority agreed upon a long list of concrete subjects in which the contracting nations expressly renounced the classic reservation of "honor, independence, vital interests, etc." The unanimity rule, however, prevented the adoption of this list. The jurisdiction of the Permanent Court of Arbitration was consequently left voluntary and included a wide range of disputes.

In view of the failure of the Hague Conference of 1907 to agree upon a classification of justiciable disputes, the Commission of Jurists appointed by

the League of Nations felt constrained to avoid what seemed to be another futile attempt and therefore agreed upon the general and vague phraseology of Article 36 already quoted.

Attention should also be called to the fact that the term "justiciable" was first employed in a formal international document when the United States sought to negotiate in 1911, under the Administration of President Taft, general arbitration treaties with Great Britain and France. These treaties contained a clause accepting arbitration in the case of differences "which are justiciable in their nature by reason of being susceptible of decision by the application of the principles of law and equity." It was unfortunate that the definition of justiciable should have included the term "*equity*." There is no general agreement among nations concerning principles of equity. As employed in English it is either very vague and general in significance or it refers to the system of equity applied in English and American courts of law. In either case it does not serve to clarify the meaning of "justiciable."

Reduced to its simplest terms the word justiciable as employed either in English or in French would seem to apply to all disputes which—to use the definition of the Century Dictionary—"are proper to be brought before a court of justice or to be judicially disposed of." It is therefore to be restricted in its application, and should not for any general purpose be applied to *all* international controversies. Both from the juristic and political standpoints, the utmost precision of definition of those disputes which properly may be brought before a court of justice is desirable.

Certain difficulties in the way of the classification of justiciable disputes must be acknowledged at the outset. The first great difficulty is that of distinguishing between justiciable disputes and those controversies of a political character affecting "independence, vital interests, honor, etc." Experience has shown that there is hardly any international dispute, even though of the most innocent appearance, which may not be deemed at a given moment to involve a political consideration. Among these are matters of an economic character or relating to the general intercourse of nations. As an illustration, an international agreement concerning the exchange or return of freight cars would hardly be a justiciable question at a moment of high tension between the parties concerned when such cars might be required for purposes of mobilization.

Baron Marschall von Bieberstein in the course of the discussions of the Sub-commission above referred to laid great emphasis on this difficulty, which, in his mind, seemed to preclude in large measure any attempt to classify justiciable disputes. Another German, however, Doctor Hans Wehberg, has pointed out the reverse side of the question: namely, that in every political dispute it is possible to extract what he well terms "the legal core." From the purely juristic point of view then the problem becomes, not one as to what categories of disputes certain nations may be unwilling to submit to a court of justice, but one of determining in a dispassionate, scientific

manner what questions may be said to be justiciable in character, that is to say, "proper to be brought before a court of justice or to be judicially disposed of." Once such a legal classification is agreed upon, it is to be hoped that in the process of time all nations may find it compatible with their own national interests as well as those of international justice to submit without any reservation whatever all disputes of a justiciable nature to the Court of International Justice.

A second, and a very serious, difficulty in the way of classification is the fact that in a considerable number of controversies there does not exist a general agreement as to the principles of law to be applied. It cannot be denied that international law is in a relatively backward state of development in certain fields. For example, in disputes concerning the rights of aliens to damages because of the acts of states, or in the case of contracts and concessions, or international loans, it might be difficult for a court of justice to enunciate the principles of law which should apply. There is no international law of torts or of bankruptcy.

Furthermore, it may be seriously questioned either from the point of view of principles or of expediency whether nations would be willing to grant to the Court of International Justice the right to legislate judicially. The law of nations would seem by its very nature and the history of its development to be a system requiring positive assent. It is not a system to be imposed either by a sovereign executive or a court of justice.

For these reasons, therefore, the task of classification of justiciable disputes may be rendered more difficult in certain categories. But in those cases where it might appear possible to obtain a general agreement on the legal principles to be applied, this might be accomplished through international conferences and commissions. This was clearly recognized by the Commission of Jurists in its wise recommendation for conferences on international law. It is greatly to be regretted that the recommendation did not appear to have been appreciated at its full value by the League of Nations. It is certainly of the utmost importance in connection with the problem of classification.

A third difficulty in the way of classification has appeared to some minds to consist in the necessity of creating special courts for the decision of highly technical matters, particularly in regions where local customs and conventions are to be interpreted. This might well be the case in many questions affecting the interests of the nations of the American continent. This would not appear to be a serious difficulty, however, inasmuch as, from the juristic point of view, the task still remains one of determining the list of disputes which may strictly be said to be justiciable in character. As in the case of political disputes, this need of special tribunals for controversies of a special nature is one of method, not one of principle.

A fourth difficulty is that a classification of justiciable disputes would virtually amount to a codification of international law. Unquestionably the

most satisfactory classification should be precise and definite. To attempt to enumerate all of the various rights of action and the remedies provided under international law would certainly be of the nature of codification.

The objection to codification would appear to be based on the assumption that a code must necessarily be *complete*, that is to say, a well-balanced system of law in which provision is made for all reasonable contingencies.

If we view codification, however, not as a complete system, but as an evolution,—an orderly development of law through common consent,—classification would appear to be entirely logical and desirable, if it be made perfectly clear that it is not intended to be *exclusive* in scope. It would necessarily contemplate the progressive enlargement of the list as rapidly as the growth of the law of nations would permit, especially in those fields where it might be possible through international conferences to formulate the principles of law which should apply, as in the case of international torts and bankruptcy.

Viewed in this light, as a "*progressive* codification" of international law, which takes into account the necessity of providing for its deficiencies from time to time, classification would not seem open to serious objection. Even though it be impossible always to be precise in details, the definition of general categories of justiciable disputes would undoubtedly prove a great help in the evolution of justice among nations.

Having considered the various difficulties in the way of the classification of justiciable disputes one is tempted to ask if the better method would not be to attempt to classify *political* disputes as being essentially the *exceptions* in the intercourse of nations. Would it not be more feasible to state as a general principle that the jurisdiction of the Court of International Justice would extend to all questions of a justiciable nature and would exempt only those controversies involving political considerations of such moment as to preclude a judicial decision? Would it not be possible to agree first of all on a limited list of political disputes such as, for example, the interpretation of a treaty of alliance; and secondly, to provide for an impartial determination whether in certain instances international controversies should be referred either to mediation, conciliation or to arbitration?

In the present stage of development of international society, it certainly does not appear that nations have yet achieved that degree of harmony of standards of moral right or of legal principles to warrant their acceptance of any common sovereign executive, legislature, or judiciary. It cannot be too insistently emphasized that the political evolution of international society is through the laborious process of education and of common consent. For these reasons there must necessarily continue to exist many disputes primarily justiciable in character, that is to say, having a "legal core" rendering them proper for decision by a court of justice; but which at the same time unquestionably involve grave political considerations. It is therefore a fair question whether the problem of the classification of international con-

troversies might not more profitably be approached from the political side. Instead of attempting a strictly legal classification which would virtually amount to codification, the task would be in a large measure simplified. It would become one rather of providing the means, the machinery for deciding in a given case whether the political considerations at stake would exclude a purely judicial decision, and demand adjustment either through diplomacy or arbitration.

We face here a fact of the utmost importance concerning the competency as well as the prestige of the Court of International Justice. We should not forget that this Court owes its creation primarily to the need and to the demand for an administration of international justice entirely dissociated from diplomatic jugglery or arbitral compromise. The respect and confidence which this new Court should inspire will depend largely on the manner in which it courageously refuses to become involved in the political disputes of nations. The Court unquestionably will be called on, under the vague general terms of Article 36 defining its competency, to decide whether certain of the disputes submitted are not essentially political in character and hence not "proper to be brought before a court of justice."

The refusal of the Court of International Justice to entertain various disputes involving political considerations would not result in any injury to the nations concerned inasmuch as there already exists the much older institution of the Permanent Court of Arbitration at The Hague, whose function, and in fact, whose *raison d'être* alongside of the new Court of International Justice should be the decision of disputes involving considerations *not* entirely justiciable in their character. Nothing could be more dangerous to the whole cause of justice amongst nations than to attempt to burden the new Court of International Justice with "all cases which the parties refer to it." Nothing would appear to be more favorable to this cause than the existence of courts of arbitration and of other means of adjustment and conciliation to provide for a peaceful decision of those special questions which are outside of the competency of a pure court of justice.

By way of summary, then, this problem of the classification of international disputes of a justiciable nature, while primarily a juristic problem, would appear to be involved essentially in the consideration of the actual status of international society. There would seem to exist serious grounds for doubting whether it would be possible to attempt a classification of a purely scientific character which would not have more of an academic value than a practical significance. May we not be compelled, after all, to approach this task from the political end and try by a process of elimination, that is to say, by dealing with the exceptions rather than with the rule, to finally arrive at the desired goal, namely the free untrammeled administration of international justice?

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