Powers to the agreement, and negotiations with Spain, by reason of its peculiar interests, may require much time; but given European conditions and the willingness of the great Powers, as evidenced by their history, to sacrifice the independence of a country in which they are not specially interested, it appears probable that their approval will be obtained without serious difficulty.

It may seem strange that two of the most advanced and most highly civilized Powers of the world, ancient or modern, should enter into an agreement affecting a third country (Morocco), which was not a party to the negotiations, for there is no evidence in the treaty that Morocco has agreed in advance to its terms. It will, it is believed, be persuaded or forced to yield: *voluntas principis facit jus.*

THE PENDING TREATY OF ARBITRATION BETWEEN THE UNITED STATES AND GREAT BRITAIN *

On the 3d day of August, 1911, the pending treaty of arbitration between the United States and Great Britain [1] was signed by Secretary Knox on behalf of the United States, and by Ambassador Bryce on behalf of Great Britain, and the following day it was sent to the Senate for its advice and consent to its ratification. There has been comparatively little difference of opinion as to the advisability of negotiating treaties of arbitration which will bind the respective nations to submit their differences broadly and generally to this peaceful method of settling international disputes, and it may be said that public opinion in each of the countries is prepared for the widest possible extension and application of the principle of arbitration to any differences which may unfortunately arise between them and which the ordinary channels of diplomacy shall have failed to adjust.

While the general principle is thus admitted by the respective governments and their peoples, details of a domestic nature have given rise to much discussion and prevented prompt approval of certain provisions of the treaty. It is thought advisable to point out in this place the general purposes of the treaty, the means by which they are sought to be made effective, and to mention the points of controversy impartially by argu-

* In this comment the pending treaty between the United States and Great Britain is considered without reference to the French treaty, which is, however, identical in terms.

[1] Printed in the October, 1911, SUPPLEMENT, p. 253.

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ments drawn, on the one hand, from the opponents of their ratification in the form as submitted to the Senate, and, on the other hand, from the partisans of their ratification in that form, leaving to signed articles expressions of individual assent to, or of dissent from, some of the terms of the treaties. For this purpose notice will be taken of the majority report of the Foreign Relations Committee of the Senate objecting to certain provisions of the treaties, of the minority report of the same body advocating their approval with or without an interpretation of their terms, and of the authoritative interpretation of the treaties made by Secretary of State Knox, in an elaborate and carefully prepared address before the American Society for Judicial Settlement of International Disputes. A few words may properly be said about the genesis of the treaties before quoting their terms and passing to the arguments of opponent or partisan.

At a meeting of the American Society for the Judicial Settlement of International Disputes, held at Washington on December 17, 1910, President Taft said:

> What teaches nations and peoples the possibility of permanent peace is the actual settlement of controversies by courts of arbitration. The settlement of the Alabama controversy by the Geneva arbitration, the settlement of the seals controversy by the Paris Tribunal, and the settlement of the Newfoundland Fisheries controversy by the Hague Tribunal are three great substantial steps toward permanent peace, three facts accomplished that have done more for the cause than anything else in history.

With reference to the submission of controversies to courts of arbitration, in order that disputes between nations might be settled by judicial means, he said:

> If now we can negotiate and put through a positive agreement with some great nation to abide the adjudication of an international arbitral court in every issue which can not be settled by negotiation, no matter what it involves, whether honor, territory or money, we shall have made a long step forward by demonstrating that it is possible for two nations at least to establish as between them the same system of due process of law that exists between individuals under a government.

Great Britain thereupon proposed that a general treaty of arbitration calculated to give effect to this very important announcement of the President, be negotiated between the United States and Great Britain, and as a consequence of prolonged consideration and mature reflection, the pending treaty was concluded.

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Arbitration treaties were concluded in 1908 between the United States, Great Britain and France, but they reserved from the scope of arbitration questions of independence, vital interests and honor, and the preamble to to the present treaty was negotiated in order to extend the scope and obligations of those treaties "so as to exclude certain expressions" contained therein. The high contracting parties therefore agree in the first article of the pending treaty that

all differences hereafter arising between the high contracting parties, which it has not been possible to adjust by diplomacy, 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, 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 arbitral tribunal, as shall be decided in each case by special agreement, which special agreement shall provide for the organization of such tribunal if necessary, to define the scope of the powers of the arbitrators, the question or questions at issue, and settle the terms of reference and the procedure thereunder.

The concluding paragraph of this article contemplated a special agreement in each case "to be made on the part of the United States by the President of the United States, by and with the advice and consent of the Senate thereof," and that "such agreement shall be binding when confirmed by the two governments by an exchange of notes." The treaty further provided for

a joint high commission of inquiry to which, upon the request of either party, shall be referred for impartial and conscientious investigation, any controversy between the parties within the scope of Article I, before such controversy has been submitted to arbitration, and also any other controversy hereafter arising between them even if they are not agreed that it falls within the scope of Article I; provided, however, that such reference may be postponed until the expiration of one year after the date of the formal request therefor, in order to afford an opportunity for diplomatic discussion and adjustment of the questions in controversy, if either party desires such postponement.

The commission thus referred to is to be constituted in the following manner:

Each of the high contracting parties shall designate three of its nationals to act as members of the commission of inquiry for the purposes of such reference; or the commission may be otherwise constituted in any particular case by the terms of reference, the membership of the commission, and the terms of reference to be determined in each case by an exchange of notes.

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Article III, which has given rise to serious controversy, is as follows:

The joint high commission of inquiry, instituted in each case as provided for in Article II, is authorized to examine into and report upon the particular questions or matters 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 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.

It is further agreed, however, that in cases in which the parties disagree as to whether or not a difference is subject to arbitration under Article I of this treaty, that question shall be submitted to the joint high commission of inquiry; and if all or all but one of the members of the commission agree and report that such difference is within the scope of Article I, it shall be referred to arbitration in accordance with the provisions of this treaty.

An examination of the essential terms of these three articles discloses the fact that all questions "justiciable in their nature by reason of being susceptible of decision by the application of the principles of law or equity," shall be arbitrated, and that if a dispute of a justiciable nature arises between the countries it shall be referred to the commission of inquiry "for an impartial and conscientious investigation," before it shall be submitted to arbitration, in the hope that such impartial and conscientious investigation may settle the question without a resort to arbitration, which is, at present, a costly and time-consuming procedure. In like manner, any other controversy, although it be not justiciable and therefore falls outside the scope of Article I, shall be submitted to the commission in the belief that an impartial and conscientious investigation will suggest a peaceful settlement of the controversy. It is, however, expressly stipulated, as appears from Article III, which has been quoted, that "the reports of the commission shall not be regarded as decisions of the questions or matters submitted, either on the facts or on the law, and shall in no way have the character of an arbitral award." The negotiators were evidently of the opinion "that an impartial and conscientious investigation" of justiciable and other questions might, in many cases, avoid the resort to arbitration. It may, however, happen that one country may maintain that a question falls within the obligation of Article I, that is to say, that it is justiciable, whereas the other country may insist that it is not justiciable. To break the deadlock the concluding paragraph of Article III vests the commission with the power

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of deciding whether or not the question is arbitrable under the treaty, and provides that if all but one of the members of the commission agree and report that such difference is within the scope of Article I it shall be referred to arbitration. If, therefore, the six commissioners agree, or five of them agree, that the difference is within the scope of Article I, it is justiciable and shall be referred to arbitration, but the arbitration in this case requires, by express terms of Article I, a special agreement, and the special agreement can only be concluded by "the President of the United States, by and with the advice and consent of the Senate," and the special agreement shall only become binding after the approval by the Senate, which approval is to be confirmed by an exchange of notes between the two governments.

The majority report of the Senate committee accepts apparently the principle of arbitration, and the committee is equally desirous, with the President, to enlarge its scope. Thus:

The Senate of the United States is as earnestly and heartily in favor of peace and of the promotion of universal peace by arbitration as any body of men, official or unofficial, anywhere in the world, or as anyone concerned in the negotiation of arbitration treaties. The Senate today is heartily in favor, in the opinion of the committee, of enlarging to the utmost practicable limit the scope of general arbitration treaties. The committee itself, and in the opinion of the committee, the Senate also, has no desire to contract the ample boundaries set to arbitration in the first article.

After this general statement, the majority report, recommending the treaties with the omission of the last paragraph of the third article, and the softening of the obligation of the first article by the use of the word "may" for "shall," objects to the use in the first article of the expression "law or equity," as a test of the justiciable nature of the controversy:

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 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.

The chief objection of the Senate, however, is the power vested in the commission to decide whether or not the question is justiciable, and it

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declares that the acceptance of the treaty with this clause would constitute a delegation of its treaty-making power:

The last clause of Article III, therefore, the Committee on Foreign Relations advises the Senate to strike from the treaty and recommends an amendment to that effect. This recommendation is made because there can be no question that through the machinery of the joint commission, as provided in Articles II and III, and with the last clause of Article III included, the Senate is deprived of its constitutional power to pass upon all questions involved in any treaty submitted to it in accordance with the Constitution. The committee believes that it would be a violation of the Constitution of the United States to confer upon an outside commission powers which, under the Constitution, devolve upon the Senate. It seems to the committee that the Senate has no more right to delegate its share of the treaty-making power than Congress has to delegate the legislative power. The Constitution provides that before a treaty can be ratified and become the supreme law of the land it shall receive the consent of two-thirds of the Senators present. This necessarily means that each and every part of the treaty must receive the consent of two-thirds of the Senate. It can not possibly mean that only a part of the provisions shall receive the consent of the Senate. To take away from the Senate the determination of the most important question in a proposed treaty of arbitration is necessarily in violation of the treaty provisions of the Constitution. The most vital question in every proposed arbitration is whether the difference is arbitrable. For instance, if another nation should do something to which we object under the Monroe Doctrine and the validity of our objection should be challenged and an arbitration should be demanded by that other nation, the vital point would be whether our right to insist upon the Monroe Doctrine was subject to arbitration, and if the third clause of Article III remains in the treaty the Senate could be debarred from passing upon that question.

One of the first sovereign rights is the power to determine who shall come into the country and under what conditions. No nation which is not either tributary or subject, would permit any other nation to compel it to receive the citizens or subjects of that other nation. If our right to exclude certain classes of immigrants were challenged, the question could be forced before a joint commission, and if that commission decided that the question was arbitrable the Senate would have no power to reject the special agreement for the arbitration of that subject on the ground that it was not a question for arbitration within the contemplation of Article I. In the same way our territorial integrity, the rights of each State, and of the United States to their territory might be forced before a joint commission, and under Article III, in certain contingencies, we should have no power to prevent our title to the land we inhabit from being tried before a court of arbitration. To-day no nation on earth would think of raising these questions with the United States, and the same is true of other questions, which will readily occur to everybody. But if we accept this treaty with the third clause of Article III included we invite other nations to raise these very questions and to endeavor to enforce them before an arbitral tribunal. Such an invitation would be a breeder of war and not of peace, and would

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rouse a series of disputes, now happily and entirely at rest, into malign and dangerous activity. To issue such an invitation is not, in the opinion of the committee, the way to promote that universal peace which we all most earnestly desire.

With the substitution of "may" for "shall" in the first article, and with the omission of the last paragraph of Article III, the majority report recommends the approval of the treaties.

The minority report, presented by Senator Root, in which Senators Cullom and Burton joined, thus answers the objection raised to the preliminary determination of the justiciable nature of the question:

The pending treaties also provide that, if the parties disagree as to whether any particular case comes within the description of the class which we have agreed to arbitrate, the question whether that case is one of the cases described shall be submitted to the arbitral decision of a joint commission.

We see no obstacle to the submission of such a question to decision, just as any other question of fact, of mixed fact and law, may be submitted to decision. Such a submission is not delegating to a commission power to say what shall be arbitrated; it is merely empowering the commission to find whether the particular case is one that the President and Senate have said shall be arbitrated.

Provisions of this kind are very common in our statutes. For example when Congress provides that a duty shall be imposed upon imports of one kind and not upon imports of another kind some officer has to decide whether goods which are imported come within the dutiable class or not. No one claims that the power to make such a decision involves a delegation to collectors of customs of legislative power to say what goods shall be dutiable.

Replying to the argument that questions of national policy and conduct might be submitted to arbitration by the treaty as worded, the minority report says:

It is true that there are some questions of national policy and conduct which no nation can submit to the decision of anyone else, just as there are some questions of personal conduct which every man must decide for himself. The undoubted purpose of the first article of these treaties is to exclude such questions from arbitration as nonjusticiable.

If there is danger of misunderstanding as to whether such questions are indeed effectively excluded by the terms of the first article, such a danger, of course, should be prevented. No one questions the importance of having the line of demarcation between what is and what is not to be arbitrated clearly understood and free from misunderstanding; for nothing could be worse than to make a treaty for arbitration and then to have either party charged by the other party with violating it.

The real objection to the clause which commits to the proposed joint commission questions whether particular controversies are arbitrable is not that the

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commission will determine whether the particular case comes within a known line, but that the commission, under the general language of the first article, may draw the line to suit themselves instead of observing a line drawn by the treaty-making power. If we thought this could not be avoided without amending the treaty, we would vote for the amendment to strike out the last clause of Article III, for it is clearly the duty of the treaty-making power, including the Senate, as well as the President, to draw that line, and that duty can not be delegated to a commission.

We do not think, however, that any such result is necessary. It certainly is not intended by the treaty; and it seems that it can be effectively prevented, without amending the treaty by following a practice for which there is abundant precedent, and making the construction of the treaty certain by a clause in the resolution of consent to ratification. Such a clause being included in the formal ratification will advise the other party of our construction, and being accepted will remain of record as the true construction.

Such a clause may well be, in substance, as follows:

The Senate advises and consents to the ratification of the said treaty with the understanding, to be made a part of such ratification, that the treaty does not authorize the submission to arbitration of any question which depends upon or involves the maintenance of the traditional attitude of the United States concerning American questions, or other purely governmental policy.

The minority report proposed to advise consent to the ratification of the treaties without amending them, but by adding to the resolution of advice and consent the following clause:

Resolved further, That the Senate advises and consents to the ratification of the said treaty with the understanding, to be made a part of such ratification, that the treaty does not authorize the submission to arbitration of any question which depends upon or involves the maintenance of the traditional attitude of the United States concerning American questions, or other purely governmental policy.

Senator Burton, who concurred in the minority report, made a supplemental statement of his views regarding the intentions of the minority report, and expressed himself in favor of the ratification of the treaties as submitted.

Senator Bacon proposed to amend Mr. Root's resolution to read as follows:

Resolved further, That the Senate advises and consents to the ratification of the said treaty with the understanding, to be made a part of such ratification, that the treaty does not authorize the submission to arbitration of 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 ques-

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tion 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.

He also proposed the following additional resolution to define and state clearly the power which, in his opinion, the Senate constitutionally possesses:

Resolved further, That the Senate advises and consents to the ratification of the treaty with the understanding, to be made a part of such ratification, that the treaty does not purport or intend that there shall in any case be denied to the Senate of the United States the full exercise of all the powers and duties conferred upon it by the Constitution of the United States in advising and consenting to the making of treaties and as to each and every part of the same and as to each and every question entering therein; and that nothing in said treaty shall be construed to impose any obligation, legal or moral, upon the Senate to waive its constitutional authority and duty to consider and determine each and every question entering into treaties proposed or submitted in pursuance thereof, including the question whether the matters in difference are arbitrable.

Secretary Knox's address before the Society for the Judicial Settlement of International Disputes, delivered at Cincinnati, on November 8, 1911, may be taken as the clearest and most authoritative statement of the views of the administration. He calls attention to the fact that the Senate and the Executive are in favor of arbitration and passes to a consideration of the differences which have unfortunately arisen between these two branches of the treaty-making power. He assumes that the treaty-making power "may constitutionally enter into a treaty to arbitrate all differences" and that the agreement to arbitrate the question as to whether the specified differences are arbitrable within the terms of such treaty is a less comprehensive exercise of the treaty-making power than would be the agreement to arbitrate all differences. He thus states the point of difference between the Senate and the Executive:

The question, therefore, is one of expediency and not of power, and, stated in its simplest form and in the sense and to the extent that it is now involved, is this: Is it wise as a matter of expediency to provide that in case the executive branches of two governments fail to agree as to whether a specific difference is within the terms of Article I, that question should be referred to a commission for decision, so that if it is decided to be within the terms of the treaty, the special agreement to arbitrate should be prepared and sent to the Senate for its approval, as it would have been if no question as to its arbitrability had arisen?

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He then says:

> Every agreement to arbitrate must go to the Senate for its approval. There can be no arbitration without its approval. An agreement to arbitrate goes to the Senate for its approval either because the executive branches of the two countries concerned in the difference agree that the difference is one for arbitration or because, failing so to agree, the commission of inquiry report that it is such a difference.
>
> How can the Senate's power over the agreement be less if it goes to the Senate after the commission's report that it presents an arbitrable question than if it had gone there because of the opinion of the executive branches of both governments to the same effect?
>
> If the two governments agree that the difference is arbitrable they make an agreement to arbitrate it and it is sent to the Senate for its approval. If the two governments can not agree that the difference is arbitrable that ends the matter until the commission reports, and if its report is that the difference is arbitrable an agreement is made to arbitrate it and the agreement is sent to the Senate for approval just as if no such question had been raised, and the Senate deals with it with unimpaired powers.

In order to allay any fear that the members of the commission may not possess the full confidence of the Senate, Secretary Knox states that:

> The President is willing, and always has been willing, and the Senate may so provide, that they shall be nominated by the President and confirmed by the Senate.

Mr. Knox then takes up *seriatim* certain questions of policy, as distinct from questions of law, which could not properly be arbitrated under the terms of the treaty, namely, questions concerning the Monroe Doctrine, the right to exclude immigrants, the question of territorial integrity, and states that:

> If you examine them and apply the test of the first article of the treaties to each, it will demonstrate their non-inclusion in the class of questions it is proposed to arbitrate. They are matters of such universally conceded domestic concern that it is difficult to imagine other nations claiming rights in respect to them or to find danger to them in treaties which provide for arbitration only where international rights are involved.

The Secretary then states that one of the great advantages of the treaties "is the substitution of a carefully defined jurisdiction for the vague and indefinite terms of existing treaties, a jurisdiction under which our honor or vital interests can not be imperiled, unless, indeed, we assert them against another nation's rights."

He concludes his address with the following apt quotation from Presi-

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dent McKinley's message advocating the favorable consideration of the Olney-Pauncefote treaty of arbitration, concluded in 1897:

Since this treaty is clearly the result of our own initiative, since it has been recognized as the leading feature of our foreign policy throughout our entire national history — the adjustment of difficulties by judicial methods rather than by force of arms — and since it presents to the world the glorious example of reason and peace, not passion and war, controlling the relations between two of the greatest nations of the world, an example certain to be followed by others, I respectfully urge the early action of the Senate thereon, not merely as a matter of policy, but as a duty to mankind. The importance and moral influence of the ratification of such a treaty can hardly be overestimated in the cause of advancing civilization. It may well engage the best thought of the statesmen and people of every country, and I can not but consider it fortunate that it was reserved to the United States to have the leadership in so grand a work.

No action was taken upon the treaties at the last session of the Senate. During the succeeding months there was much discussion of the questions involved. On January 11th of the present session Senator Lodge, of the Senate committee, proposed the following resolution:

Resolved (two-thirds of the Senators present concurring therein), That the Senate advise and consent to the ratification of a treaty signed by the plenipotentiaries of the United States and Great Britain on August third, nineteen hundred and eleven, extending the scope and obligation of the policy of arbitration adopted in the present arbitration treaty on April fourth, nineteen hundred and eight, between the two countries, so as to exclude certain exceptions contained in that treaty, and to provide means for the peaceful solution of all questions of difference which it shall be found impossible in future to settle by diplomacy.

Resolved, further, That the Senate advise and consent to the ratification of the treaty with the understanding, to be made a part of such ratification, that any joint high commission of inquiry to which shall be referred the question as to whether or not a difference is subject to arbitration under Article I of the treaty, as provided by Article III thereof, the American members of such commission shall be appointed by the President subject to the advice and consent of the Senate, and with the further understanding that the reservation in Article I of the treaty that the special agreement in each case shall be made by the President by and with the advice and consent of the Senate means the concurrence of the Senate in the full exercise of its constitutional powers in respect to every special agreement whether submitted to the Senate as the result of the report of a joint high commission of inquiry under Article III or otherwise.

Thus the matter stands as the JOURNAL goes to press. It is to be hoped that an acceptable solution of this domestic difficulty may be reached so that the cause of arbitration may not seem to be compromised in the minds of the enlightened both at home and abroad.

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