> 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.

French Minister of Foreign Affairs, the Secretary of State emphasized that "the Government of the United States welcomes every opportunity for joining with the other Governments of the world in condemning war and pledging anew its faith in arbitration." [2] The expression of this sentiment has become so conventional that a popular impression prevails that it accords with the actual policy of the United States.

The expiration of a number of the arbitration treaties entered into by the United States before the war,[3] now furnishes an occasion for a concrete application of the American Government's attitude toward arbitration; and the treaty with France, signed on February 6, 1928, indicates the lines which will probably be followed for some time to come. An analysis of this treaty may furnish a basis for an appraisal of our present policy, and its comparison with other arbitration treaties may show how far we have kept abreast of the progress made by other countries.

The new treaty with France is very inept in its drafting. The texts in English and in French have "equal force," but only the English text was transmitted to the Senate.[4] The text was so drafted as to make it doubtful how far the new treaty would leave in force all the provisions of the conciliation treaty of September 15, 1914—the so-called Bryan treaty—and the Secretary of State has exchanged notes with the French Ambassador to clear up this doubt.[5] Article 1 of the new treaty is chiefly a re-declaration of a part of Article 1 of the Bryan treaty; but Article 3 would restrict the application of the re-declared provision by setting up certain categories of disputes in respect of which it is not to be invoked, whereas no such exceptions were made in 1914.

The provision for arbitration in Article 2 of the new treaty, is a re-draft of the provision in the treaty of February 10, 1908.[6] The earlier treaty envisaged the arbitration of differences "of a legal nature, or relating to the interpretation of treaties"; the later treaty envisages the arbitration of 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 are justiciable in their nature by reason of being susceptible of decision by the application of the principles of law or equity." The new language seems to mark little advance on the old, for it indicates no broadening of the scope of the treaty. The earlier treaty covered differences "which it may not have been possible to settle by diplomacy," while the later treaty covers differences "which it has not been

[2] Department of State press release, January 3, 1927.

[3] The Root treaty with France expired on February 27, 1928; that with Great Britain will expire on June 4, 1928; with Norway on June 24, 1928; with Japan on August 24, 1928; with Portugal on November 14, 1928; and with the Netherlands on March 25, 1929.

[4] See Senate Document, 70th Cong., 1st Sess., Executive D.

[5] Supplement to this JOURNAL, p. 39.

[6] This treaty was extended by an agreement signed on July 19, 1923, which expired on February 27, 1928. See U. S. Treaty Series, No. 679.

possible to adjust by diplomacy" and "which have not been adjusted" by conciliation. The old provision was that differences should be "referred to the Permanent Court of Arbitration"; the new provision is that they shall be "submitted to the Permanent Court of Arbitration . . . or to some other competent tribunal, as shall be decided in each case by special agreement." Any tribunal would be "competent," for submission to which a special agreement provides. This seems to keep a door open for reference to the Permanent Court of International Justice, but it also keeps a door open for any special tribunal upon which the parties may agree.[7] Under the later treaty, the special agreement is to provide for the organization of the tribunal if necessary, define its powers, state the question or questions at issue, and settle the terms of reference. No permanent machinery need be used. "Reference" and "submission" seem to be employed as equivalent, though this is not wholly clear.

It is in the exclusions that the two treaties differ chiefly. The treaty of 1908 excluded from the obligation to arbitrate, differences which "affect the vital interests, the independence, or the honor of the two contracting states," and differences which "concern the interest of third parties." Article 3 of the new treaty stipulates that the provisions of this treaty shall not be invoked in respect of four kinds of disputes. It is not clear why two words "disputes" and "differences" were used in the treaty, but perhaps they are to be taken as equivalent. The exclusions of the new treaty relate to disputes of which the subject matter

> (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.

Of these, (a), (c), and (d) are new. Certainly the dropping of the exclusion of disputes affecting "the vital interests, the independence, or the honor of the state" is to be welcomed. But does the new language go much further? Under the new treaty, not only must a difference relate "to an international matter" but it must not be "within the domestic jurisdiction" of either state. This language is borrowed from the Covenant of the League of Nations which, in Article 15, provides that disputes submitted to the Council of the

[7] When the Root treaty with France was extended on July 19, 1923, it was agreed that if the Senate should give its consent to the adhesion by the United States to the Protocol of Signature of December 16, 1920, the two governments would consider a modification of the treaty providing for the reference of disputes mentioned in the treaty to the Permanent Court of International Justice. U. S. Treaty Series, No. 679. With the signature of the treaty of February 6, 1928, that possibility ceases to be envisaged.

League of Nations "found by the Council to arise out of a matter which, by international law, is solely within the domestic jurisdiction" of a party, shall not be the subject of a recommendation by the Council. Under the Covenant, there is to be an international determination of what is within domestic jurisdiction, but under the treaty of February 6, 1928, each party is left free to make its own determination of this point. Moreover, the expression "domestic jurisdiction" is of uncertain content. It was recently said by the Permanent Court of International Justice: [8] "The question whether a certain matter is or is not solely within the jurisdiction of a state is an essentially relative question; it depends upon the development of international relations. Thus, in the present state of international law, questions of nationality are, in the opinion of the Court, in principle within this reserved domain." The expression "domestic jurisdiction," as used in the new treaty, may be made to serve practically the same office of exclusion as would have been served by the expression "the vital interests, the independence, or the honor" in the previous treaty. It is a common process in human affairs to throw away an expression which has acquired an unpleasant "psychic fringe," and to substitute a new expression of similar content. This process seems to have been followed in drafting the new treaty. The phrase "domestic jurisdiction" represents little advance, therefore, unless, as in the Covenant of the League of Nations, there is a power conferred to determine its application.

The exclusion of disputes of which the subject matter "depends upon or involves the maintenance of the traditional attitude of the United States concerning American questions, commonly described as the Monroe Doctrine," seems to be an innovation in arbitration treaties of the United States. It is questionable whether this exclusion adds anything of legal significance, for it seems most improbable that a difference based on a claim of right, which would be susceptible of decision by the application of the principles of law or equity, would depend upon or involve the maintenance of the Monroe Doctrine.[9] The language of the new arbitration treaty is broader than Article 21 of the Covenant of the League of Nations, which provided merely that nothing in the Covenant should be deemed to affect the "validity" of the Monroe Doctrine.

The treaty of 1908 provided that the special agreement for submitting to arbitration, should 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, and this language is repeated in Article 2 of the new treaty. The President has a power, which was exercised in the Pious Fund arbitration, to agree to certain arbitrations without the advice and consent of the Senate. In the future, certain arbitrations with France might be agreed to by the President of the

[8] In Advisory Opinion, No. 4. Publications of the Court, Series B, No. 4, p. 24.

[9] On the meaning of "equity" in international law, see Fred K. Nielsen, Report on American and British Claims Arbitration, pp. 277 ff.

United States alone, but the obligation to arbitrate does not necessitate the exercise of this power by the President.

On the whole, the twenty years which have elapsed since the signing of the treaty of 1908, seem to have brought no advance in the arbitration policy of the United States. The new treaty is so full of conditions and leaves so many loopholes for contention, that it is in no real sense a provision for obligatory arbitration. Before the obligation to arbitrate could ever become effective under the new treaty, at least seven conditions would have to be met, and a special agreement to arbitrate would have to be made and would have to receive the advice and consent of the American Senate. The treaty, therefore, realizes little of the purposes so expansively expressed in its preamble. It may even be doubted whether much purpose is to be served by treaties of this character, although they may afford some basis for insistence on peaceful settlement.

The United States and France declare, in the preamble, that they are "eager by their example . . . to demonstrate their condemnation of war as an instrument of national policy" and to hasten the time when the possibility of war shall have been "eliminated forever." To determine how far their example may be persuasive to other countries, it is necessary to examine the content of other arbitration treaties.

The relations between France and Germany are such as to make it far more probable that acute differences may arise between those two countries than between France and the United States; with the United States, France has had more than a century of unbroken peace; with Germany she has had two wars during the last sixty years. Yet in the treaty first initialled at Locarno, France and Germany agreed[10] to submit for decision "either to an arbitral tribunal or to the Permanent Court of International Justice," all "disputes of every kind" with regard to which "the Parties are in conflict as to their respective rights." Provision is made that if the parties fail to agree on a *compromis*, either may take the dispute before the Permanent Court of International Justice. Moreover, questions not covered by that provision are to be submitted to a conciliation commission, and if as a result no agreement is reached, the question is to be brought before the Council of the League of Nations under Article 15 of the Covenant. This goes far beyond the Franco-American treaty of February 6, 1928. Other Locarno treaties of the same extent were made by Belgium and Germany,[11] by Czechoslovakia and Germany,[12] and by Poland and Germany.[13]

If American thought would give a special place to the Locarno treaties, then the treaty between Italy and Switzerland of September 20, 1924,[14] may seem more illustrative of the progress made in these later years. Under this treaty, all disputes of any character whatsoever are to be submitted to a

[10] See 54 League of Nations Treaty Series, p. 315.
[11] See 54 *Ibid.*, p. 303.
[12] 54 *Ibid.*, p. 341.
[13] 54 *Ibid.*, p. 327.
[14] 33 *Ibid.*, p. 92.

permanent conciliation commission, and failing a settlement by that means either party may bring the dispute before the Permanent Court of International Justice, which may deal with non-legal disputes *ex aequo et bono*. Moreover, a dispute as to the interpretation of the conciliation and arbitration treaty itself may be carried before the Permanent Court of International Justice by either party. A treaty between Belgium and Denmark,[15] signed on March 3, 1927, goes almost as far, providing for the submission of all questions not otherwise settled to the Permanent Court of International Justice. Other treaties which go much beyond the scope of the Franco-American treaty are the following: France-Switzerland, April 6, 1925; Greece-Switzerland, September 21, 1925; Norway-Sweden, November 25, 1925;[16] Denmark-Sweden, January 14, 1926;[17] Denmark-Norway, January 15, 1926;[18] Finland-Sweden, January 29, 1926;[19] Denmark-Finland, January 30, 1926; Roumania-Switzerland, February 3, 1926;[20] Austria-Czechoslovakia, March 5, 1926;[21] Denmark-Poland, April 23, 1926;[22] Italy-Spain, August 7, 1926; Germany-Italy, December 29, 1926; Belgium-Switzerland, February 5, 1927.

The foregoing analysis and comparison seems to the writer to justify the conclusion that the United States has lost her share of the leadership in the movement for international arbitration, and that she is today lagging far behind other countries in the development of this means of peaceful settlement of disputes. One of the chief reasons for this situation is the fact that the United States has no part in maintaining and developing the permanent machinery of the League of Nations and the Permanent Court of International Justice, and is therefore precluded from a full utilization of such machinery in its arbitration treaties. At any rate, the preamble to the new treaty contains several statements which can only be read in other countries as irony.

MANLEY O. HUDSON.

THE SETTLEMENT OF WAR CLAIMS ACT OF 1928

On March 10, 1928, the President signed the Settlement of War Claims Act of 1928. It embraces subjects of great importance to international law and to American foreign policy.[1]

The Act provides in its main divisions for three distinct matters: (1) the payment of the American claims against Germany, Austria and Hungary; (2) the return of the property of nationals of Germany, Austria and Hungary,

[15] League of Nations Treaty Registration, No. 4542. [16] *Ibid.* [17] *Ibid.*, No. 1417.
[18] 51 League of Nations Treaty Series, 251.
[19] League of Nations Treaty Registration, No 1418.
[20] 49 League of Nations Treaty Series, 367. [21] 55 *Ibid.*, 91. [22] 51 *Ibid.*, 349.

[1] The full text of the Act will be found in the Supplement to this JOURNAL, p. 40.