EDITORIAL COMMENT

CHINA'S TERMINATION OF UNEQUAL TREATIES

China has for many years sought to modify the treaty restrictions on territorial jurisdiction and custom rights imposed by the Powers. Recently, this aspiration of China has grown almost to the proportion of a national revolt against the so-called "unequal treaties." Something in the nature of a test case has been made of the Sino-Belgian Treaty of November 2, 1865. By this treaty, China granted to Belgium extraterritorial jurisdiction in China and also the privileges of a tariff schedule of imports and exports and certain commercial regulations. This treaty was an aftermath of the coercive war of 1857 and its provisions followed generally the treaties which that war compelled China to accept. Like many treaties of this character and time, this treaty was not limited to a definite period and contained no provision for its termination or modification except in Article 46, which provided as follows (translation):

> Should the Government of His Majesty the King of the Belgians judge it necessary in the future to modify certain clauses of the present treaty, it shall be free to open negotiations to this end after an interval of ten years from the date of the exchange of ratifications; but six months before the expiration of the ten year period, it must officially inform the Government of His Majesty the Emperor of China of its intention to make such modifications and in what they will consist. In the absence of this official announcement the treaty shall remain in force without change for a new term of ten years and so on from ten years to ten years.

This treaty has remained in its original text, Belgium having found no occasion to request a revision under Article 46. Under the pressure of the Nationalist movement in China, the Chinese Government on April 16, 1926, informed the Belgian Government that it desired to have the treaty of 1865 revised. The Chinese note stated:

> The aforesaid treaty, which still regulates the commercial relations between the two countries, was concluded as long as sixty years ago. During the long period which has elapsed since its conclusion so many momentous political, social and commercial changes have taken place in both countries that, taking all circumstances into consideration, it is not only desirable but also essential to the mutual interest of both parties concerned, to have the said treaty revised and replaced by a new one to be mutually agreed upon.
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> As conditions and circumstances in human society are constantly changing, it is manifestly impossible to have any treaty which can indefinitely remain good for all times without modification. International agreements, particularly treaties of commerce and navigation are, as a matter of international practice, always subject to more or less

> frequent revisions, in accordance with the nature and circumstances of each case, even in the absence of any express provision to that effect, so that, necessary readjustments may be effected from time to time, to the best advantage of the contracting parties. With the view just expressed above the Chinese Government is glad to note that the Belgian Government is in full accord, as in its reply of September 4, 1925 to the Chinese note of June 24, 1925, the Belgian Government expressed its readiness to consider China's proposal for the modification of her existing treaties.
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> With reference to the particular treaty now under discussion it is clearly indicated in Article XLVI thereof that the treaty is to run for periods of ten years each, at the end of which revisions may be undertaken. The said treaty was concluded on November 2, 1865 but came into force upon the exchange of ratifications thereof on October 27, 1866. Therefore, on that day of this year, the treaty comes to the end of another decennial period when it could be revised. Accordingly, in pursuance of the provisions of said Article XLVI, the Chinese Government has the honor to inform the Belgian Government that it is the intention of the Chinese Government to have the aforesaid Treaty of Amity, Commerce and Navigation of November 2, 1865 revised and that, therefore, upon the expiration of the present decennial period on October 27 of this year all the provisions thereof, as well as the Tariff Schedule of Imports and Exports, and the Commercial Regulations appended thereto, will thereupon be terminated, and that new agreements will have to be made to take the place of the old ones.

The Chinese Government added the intimation that the proposed treaty should be concluded on the basis of "equality and reciprocity."

The Belgian Minister at Peking immediately replied on April 27, 1926, calling attention to the fact that Article 46 gave "to the Belgian Government alone the right to invoke under certain conditions the revision of the clauses which it judged useful to be modified." The Belgian Government, nevertheless, was in principle disposed to undertake "eventually" a revision of the treaty, but indicated that this should be postponed until the conclusions of the Customs Conference and the Extraterritoriality Commission had been made known.

In the diplomatic exchanges which followed, China declined to agree to a postponement of the negotiations for a new treaty as suggested by Belgium, and expressed a desire that the new treaty be concluded before the close of the decennial period on October 27 next. China added that if a new treaty could not be completed before that date, she would consider the possibility of a provisional *modus vivendi*.

While both parties reserved their original points of view, they undertook to reach an immediate agreement on a *modus vivendi* to take effect on October 27, and continue until a new treaty was negotiated. Without going into the details of the proposals and counter-proposals of the diplomatic correspondence, it may be said that, broadly speaking, China desired the *modus* to place the parties after October 27 on a basis of "equality and reciprocity," while Belgium desired to retain most-favored-nation treatment in China.

China eventually agreed to *reciprocal* most-favored-nation treatment, on condition that a new treaty be negotiated within the next six months to replace the treaty of 1865. Belgium, however, desired to have this *modus* renewable at the request of either party for six month periods without limit. The countries were unable to agree upon this point of time and so the negotiations for a *modus* came to an end in November, 1926.

China felt that if the parties earnestly wished to have a new treaty, it could be easily negotiated before a definite date, considering the equal treaties already concluded with Germany, Austria, Finland, Chile and other countries which might serve as models. The treaty with Austria was ratified in June last and is the latest "equal" treaty negotiated with a Western Power. China also felt that the Belgian suggestion contemplated the indefinite continuance of the *modus* on one pretext or another without the conclusion of a new treaty which China was anxious to negotiate promptly. The fact is that the proposed *modus* gave Belgium practically all the rights which she enjoyed under the 1865 treaty, and she lost nothing and China gained nothing by this plan. Belgium, on the other hand, apparently feared that conditions might intervene, which would leave her without either a treaty or a *modus* if a definite date were fixed. She also seemed to feel that she should first await the results of the work of the Customs Conference and the Extraterritoriality Commission, since she was participating in their deliberations.

The negotiations for a *modus* terminated on November 5, 1926, when the Belgian Government declined the last Chinese proposal for the reasons stated and added that she felt impelled (as she had several times hinted theretofore) to take the question of the interpretation of Article XLVI to the International Court of Justice, and suggested that they agree upon the terms of a *compromis*.

In its reply of November 6, 1926, the Chinese Government regretted the failure of the negotiations for a *modus* over the point of setting a definite time when the new treaty would be concluded, which China regarded "as a proof of the earnestness of both governments in their undertaking to conclude a new treaty within a reasonable period."

The Chinese Government then gave notice of the formal termination of the 1865 treaty as of October 27, as follows:

> In the face of the position now taken by the Belgian Government, the Chinese Government felt that there was no other course open to them but to declare that the Sino-Belgian Treaty of 1865 was terminated. Accordingly, a Presidential Mandate, an English translation of which is herewith enclosed, has been issued to that effect with the instruction that negotiations for the conclusion of a new treaty be started with Belgium as soon as possible on the basis of equality and mutual respect for territorial sovereignty. It will be noted, however, that in the meantime the local authorities are ordered to extend full and due protection to the Belgian Legation, consulates, nationals, products and ships in China

> in accordance with the rules of international law and usage, and the Ministries concerned are ordered to propose, in conformity with international practice, arrangements for their favorable treatment and submit these for consideration, approval and enforcement.

On the same day the Chinese Government issued a statement reviewing the negotiations and declaring its position in part as follows:

> On the other hand, it hardly need be emphasized, that no nation mindful of its destiny and conscious of its self-respect, can be fettered forever by treaties which shackle its free and natural development and which are repugnant to the best traditions of international intercourse. Fruitful source of misunderstanding and conflict, they are in their very nature bound to come to an end sooner or later. To endeavor to preserve them in the face of radically changed conditions and against the progress of modern international thought and life is to forget history and its teachings. It is to remove the injustice and danger of such treaties that Article 19 of the Covenant of the League of Nations expressly provides for the possibility of their revision from time to time.
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> The general right of revision being admitted, the right of both parties to a treaty to terminate it by notice, where it contains a definite clause for revision at stated intervals, is all the more to be recognized. It would be neither fair nor equitable to claim that such right appertains to only one of the two parties. If, as contended by the Belgian Government, Article 46 of the treaty of 1865 is to be construed as giving solely to the Belgian Government the right to revise the treaty, then such a provision would in itself constitute one of the unilateral and unjust privileges against which the Chinese Government protest and which is manifestly incompatible with the spirit of a treaty based on equality and mutuality which Belgium expressed herself as being ready to conclude.

In reply to Belgium's offer to prepare a joint *compromis*, the Chinese Government in a note of November 16, 1926, pointed out that

> the point at issue between the two Governments is not the technical interpretation of Article 46 of the treaty of 1865, an article which is a striking symbol of the inequalities in the entire instrument. . . . The real question at bottom is that of the application of the principle of the equality of treatment in the relations between China and Belgium. It is political in character and no nation can consent to the basic principle of equality between states being made the subject of a judicial inquiry. . . . This declaration [of termination] is in conformity with the spirit of Article 19 of the Covenant of the League of Nations, which clearly recognizes the fundamental principle of *rebus sic stantibus* governing international treaties which have become inapplicable. Consequently, if an appeal is to be made to an international tribunal at all, the Chinese Government believed that it should be brought before the Assembly of the League by virtue of Article 11 of the Covenant.

Not being able to obtain a joint *compromis*, Belgium, on November 25, 1926, addressed a unilateral application (under Article 40 of the Statute) to the International Court, reviewing the facts and raising the question as to

China's right to denounce the treaty of 1865 under Article 46. The petition prayed the court

> to declare and judge, either in the absence or the presence of the said Government [of China], and after such time limits as the court may be pleased to fix, that the unilateral denunciation of the treaty of November 2, 1865, by the Government of the Chinese Republic was not justified.
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> Pending said decision to indicate all provisions, measures to be taken for the safeguarding of the rights recognized by this treaty on Belgium and its *ressortissants.*

This application of Belgium was based upon the fact that both Belgium and China had theretofore agreed to accept as compulsory, *ipso facto* and without special agreement, the jurisdiction of the court in the classes of legal disputes set forth in Article 36 of the Statute:

(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 and extent of the reparation to be made for the breach of an international obligation.

This article also provides that

> In the event of a dispute as to whether the court has jurisdiction in these cases, the matter shall be settled by a decision of the court.

On November 26, 1926, the Registrar of the International Court notified the Chinese Minister at The Hague of the filing of the Belgian application and enclosed a copy of the same. The Registrar, among other things, called the attention of the Minister to the right of the parties, under Article 31 of the Statute, to select a judge of their own nationality to sit upon the bench. On January 3, 1927, the agents of Belgium filed with the court, within the prescribed time, the memorial of their government concerning the case, which was duly notified to the Chinese Government. The memorial reviews the diplomatic correspondence and negotiations between the two governments, and states the question before the court as follows:

> The question is therefore whether the unilateral denunciation by the Chinese Government of the Sino-Belgian Treaty can be considered as valid from a legal point of view either under the terms of the treaty itself or in virtue of the general principles of the law of nations.
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> The memorial then presents the arguments of Belgium under three headings:
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> (1) The terms of Article 46 of the Sino-Belgian Treaty.
> (2) The principle of the judicial equality of states.
> (3) The principle *"rebus sic stantibus."*

Finally, the memorial petitions the court that pending a decision the treaty of 1865 should be continued as a protective measure on behalf of Belgian interests in China.

Subsequently the court set March 16, 1927, as the date for China's first reply, and June 17 for her second reply, and the President of the court, by virtue of Article 41 of the Statute, ordered provisional measures for the protection of Belgian subjects, property and rights, based more or less upon certain articles of the treaty of 1865. Subsequently, negotiations were reopened between the two countries with reference to the conclusion of a new treaty, and Belgium asked for a continuance of the case and the withdrawal of the protective measures ordered by the court for the safeguarding of Belgian interests in China. It is understood that the court has acted accordingly.

This case is interesting as showing the method of procedure of an aggrieved state in bringing a case before the International Court by a unilateral petition and without the preparation of a *compromis*. Would the court render a decision on the *ex-parte* presentation of the Belgian Government should China decline to reply to the Belgian memorial? A more interesting question, however, is the relation of the composition of the court to the parties in interest and to the questions at issue. It should be observed that all except two of the members of the court who would pass upon this case are nationals of countries who have similar interests in China, which would be best maintained by upholding the Belgian contention in this case. In other words, the case would be decided by judges whose governments would be interested in continuing in force the Belgian Treaty of 1865.

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MEXICAN LAND LAWS

It was observed in an editorial comment in this JOURNAL (July, 1926, p. 526) on the subject of Mexican legislation concerning titles to land and to subsoil products that: "The situation would seem to have called for a good deal of justification and forbearance on both sides of this lamentable diplomatic controversy." Subsequent correspondence given out by the Department of State on November 24, 1926, indicates that this forbearance had been subjected to an excessive strain, and that a deadlock had been reached. The Department of State, having exhausted every resource of legal argument and friendly diplomatic warning, was left in the uncomfortable position of awaiting concrete cases of injury to American rights which might warrant formal protests and specific claims for redress. Secretary Kellogg, in a note to the Mexican Minister for Foreign Affairs, dated July 31, 1926, thus summarized the general principles upheld by the American Government in this controversy:

> First. Lawfully vested rights of property of every description are to be respected and preserved in conformity with the recognized principles of international law and equity.
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> Second. The general understanding reached by the Commissioners of the two countries in 1923, and approved by both Governments at the