On this theory of the law the United States would be obliged, by reason of the Kellogg Pact, to await the outcome of arbitration, but Great Britain, on the other hand, relying upon the superior obligation of the League Covenant, which was not superseded by the obligations undertaken by the League members in signing the Kellogg Pact, would claim, with every hope of success in its own prize courts, and in the Permanent Court, to be justified in exercising force to give effect to Article 16 of the Covenant. This recourse to arbitration would undoubtedly postpone the decision of the question at issue until after the end of the war, and thus indirectly accomplish the enforcement of the economic blockade against the covenant-breaking State throughout the war period, leaving the United States to whatever relief, if any, in the way of reparation or subsequent settlement of the question the decision of an arbitral tribunal might offer.

If the United States is willing to be placed in this position of inferiority at sea during a war in which it is a neutral, it would seem to be preferable to establish that situation on a basis of treaty stipulations voluntarily entered into by the United States, rather than to have it imposed by other nations through international agreements to which the United States is not a party.

CHANDLER P. ANDERSON.

## THE NEW PROTOCOL FOR AMERICAN ACCESSION TO THE PERMANENT COURT OF INTERNATIONAL JUSTICE

The several proposals advanced prior to 1929 for American accession to the Protocol of Signature of the Permanent Court of International Justice have been discussed in this JOURNAL.[1] At the present time a new proposal, in the form of a protocol, has received the official approval of practically all the signatory states, and of the executive branch of the United States Government. It has also been endorsed by Senator Swanson, senior Democratic member of the Senate Committee on Foreign Relations. It is the result of suggestions made by Mr. Elihu Root to a Committee of Jurists which met in Geneva in March, 1929. Presumably it will in due course be submitted to the Senate of the United States for advice and consent to ratification. Like most documents of the kind, it is the outgrowth of several draft texts, although its original basis has emerged from examination by numerous international bodies with probably fewer changes than fall to the lot of most drafts of international agreements.

The Committee of Jurists referred to above, was called together by the Council of the League of Nations on December 14, 1928, in response to a resolution adopted by the Assembly of September 29th of that year. The committee was originally assembled to consider whether any amendments of the Court Statute would be desirable. On March 9, 1929, however, the Council charged the committee with examining also the question of the ac-

[1] This JOURNAL, Vol. XX, pp. 330, 552; Vol. XXI, p. 1; Vol. XXII, pp. 599, 776.

cession of the United States. This action was inspired by a note written by Secretary of State Kellogg on February 19, 1929, to the governments of the signatory states and to the Secretary-General of the League. This note, couched in most friendly terms, explained why the United States Government was unable to accept all the suggestions which many of the signatory states had made by reference to the Final Act and Preliminary Draft of a Protocol adopted by the conference of signatory states at Geneva in September, 1926. It concluded with the intimation that no very great divergence of view separated the two positions and with the expression of a confident hope that informal discussions would lead to a satisfactory formula of reconciliation.

Mr. Root submitted to the Committee of Jurists on March 11th, a redraft of Article 4 of the preliminary draft of a protocol prepared by the conference of signatories in 1926. This Article 4 dealt with the matter of advisory opinions as involved in the second part of the Senate's fifth reservation. No other of the Senate's conditions had given rise to serious difficulty. This redraft was briefly discussed by the committee, was approved in principle, and in slightly modified form, referred to a drafting committee. The committee reported back a complete draft protocol, covering all of the Senate reservations and, consequently, all of the 1926 draft protocol. This complete draft was also based on a text prepared by Mr. Root. The obvious function of this new draft was to bridge the gap between the Senate reservations and the concessions offered by the signatory states in 1926. Before examining the provisions of this new protocol, its further history may be noted. It was approved by the Council of the League on June 11, 1929, and referred to the United States, the signatory states and the Assembly. On August 31st, it was referred by the Council also to the conference of signatory states which met in Geneva on September 4th. On the first day of its sessions, this conference unanimously adopted the draft protocol without change. On the following day announcement was made that the Minister of the United States at Berne had delivered to the Secretary-General of the League an *aide-memoire*, dated August 14th, wherein it was declared that Secretary of State Stimson, after careful examination of the protocol, was satisfied that it "would effectively meet the objections represented in the reservations of the United States Senate and would constitute a satisfactory basis for the adherence of the United States." On September 14th the protocol was approved by the Assembly and promptly opened for signature. Fifty states have signified their individual approval by signing. The signature of the United States was affixed, by authority of the President, on December 9, 1929.

The preamble of the protocol describes it as an agreement regarding the adherence of the United States "subject to the five reservations formulated by the United States in the resolution adopted by the Senate on January 27, 1926." Article 1 declares that the signatory states "accept the special conditions attached by the United States in the five reservations mentioned

above to its adherence to the said protocol upon the terms and conditions set out in the following articles." The theory of the text is thus that where any term or condition to the acceptance of a reservation is desired, it is set forth expressly in the protocol as an exception to the general acceptance. Where no term or condition is mentioned, the reservation is accepted without any variation. Thus, no separate mention is made of the first and third reservations, which respectively provide that adherence to the court protocol "shall not be taken to involve any legal relation . . . to the League of Nations," and that the United States "will pay a fair share of the expenses of the court as determined and appropriated from time to time by the Congress of the United States."

Article 2 of the protocol accepts the second reservation, which sought to accord the United States an equality of voting power in the election of judges. Since this arrangement would effect an amendment of Articles 4 and 10 of the statute, it was considered desirable to add to the language of the amendment the unequivocal statement that "The vote of the United States shall be counted in determining the absolute majority of votes required by the statute." This addition may be considered a "term" rather than a "condition" of acceptance.

Article 3 of the protocol accepts the latter part of the fourth reservation, which provides that the statute "shall not be amended without the consent of the United States." By way of "terms and conditions" this article makes the provision reciprocal and states the general rule of international law applicable to treaties: "No amendment of the statute of the court may be made without the consent of all the contracting states."

Article 4 of the protocol accepts the first part of the fifth reservation which stipulated that the court should render advisory opinions "publicly, after due notice to all states adhering to the court and to all interested states, and after public hearing or opportunity for hearing given to any state concerned." This requirement had been already met by the Rules of Court, particularly as revised on July 31, 1926, after the adoption by the Senate of its resolution containing the reservations. But Secretary Kellogg, in his note of February 19, 1929, had pointed out that the court could change its rules at any time. Article 4 of the protocol perpetuates these provisions in treaty form, since it incorporates by reference the applicable Article 73 and 74 of those rules. The "terms" of acceptance here thus take the form of providing detailed procedure for the requisite notice, public hearing and public delivery.

Article 5 of the protocol contains the acceptance of the second part of the fifth reservation, which provided that the court should not without the consent of the United States "entertain any request for an advisory opinion touching any dispute or question in which the United States has or claims an interest." The main plan of the article is to do away with the present unsatisfactory situation, whereunder the United States would not be in a position, even if the reservations were accepted as they stand, to make its

objection timely, and as the result of adequate information. This result is achieved by an accumulation of safeguards. In the first instance, the Secretary-General of the League is to inform the United States, "through any channel designated for that purpose by the United States," "of any proposal before the Council or the Assembly of the League for obtaining an advisory opinion from the court." In the second instance, if desired, an exchange of views "*as to whether an interest of the United States* is affected" takes place between the United States and the Council or Assembly. In the third instance, to provide for a situation in which the proposal might come before the Council or Assembly in the last moments of its session, the Registrar notifies the United States whenever a request for an advisory opinion comes to the court. A time limit is set for the submission to the Court of a written statement by the United States concerning the request. In the fourth instance, proceedings before the court are stayed to permit of the exchange of views, if such has not already taken place, and if the United States advises the court that its interests are affected. In the fifth instance, the Council, the Assembly and the court, if the occasion arises, must attribute "to an objection of the United States the same force and effect as attaches to a vote against asking for the opinion given by a member of the League of Nations in the Council or in the Assembly." Lastly, if all of these steps result in lack of agreement, and if the United States "is not prepared to forego its objection," the United States, or the present signatories acting by a two-thirds majority, may exercise the powers of withdrawal provided for in Article 8. It is expressly stated that such withdrawal "will follow naturally without any imputation of unfriendliness or unwillingness to coöperate generally for peace and good will." The motive is expressed at greater length in Mr. Root's original draft, in which it is said that such eventual disagreement would indicate that "the arrangement now agreed upon is not yielding satisfactory results," "owing to a material difference of view regarding the proper scope of the practice of requesting advisory opinions."

Particular attention may be directed to the fact that the exchange of views would have for its object the determination of the question whether an interest of the United States was affected. If the United States convinces the Council of this fact, it appears from the opening phrase of Article 5, as well as from the general basic phrases of acceptance, in the preamble and in Article 1, that the request will be dropped unless the United States consents to its submission. It would be the failure to agree upon the effect on an interest of the United States which would induce the belief that the plan of coöperation failed to meet the confident expectation of the contracting parties. The withdrawal would, therefore, be due to a much more basic divergence of opinion than mere disagreement as to the desirability of seeking an opinion on a particular question or dispute.

In a letter dated November 18, 1929, to President Hoover, Secretary

of State Stimson thus summed up the situation with respect to advisory opinions and the interests of the United States:

> It seems to me, therefore, that the dangers which seemed to inhere in the rendering of advisory opinions by the court at the time the question was last presented to this government in 1926 have now been entirely removed, both by the action of the court itself and by the provisions of these new protocols. The objections which caused the Senate reservations have been met. Advisory opinions can no longer be a matter of secret procedure but must follow the forms and receive the safeguards of all formal court proceedings in contentious cases.

It is pertinent to note also a provision in the suggested amendments to the statute. It is proposed to include in the statute a new chapter dealing with advisory opinions. The articles in this new chapter consist chiefly in a reproduction of those articles of the Rules of Court which deal with the procedure governing the rendering of advisory opinions. The new Article 68 of the statute provides: "In the exercise of its advisory functions, the court shall further be guided by the provisions of the statute which apply in contentious cases to the extent to which it recognizes them to be applicable." One of the articles of the statute included in this reference is Article 36, which provides: "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." It may be suggested that if this article is applied to advisory opinions bearing on actual disputes between states, the effect would be to give statutory force to the doctrine of the Eastern Carelia Case, that is, that the court could not render an advisory opinion regarding a dispute to which a state not a member of the League was a party, without the consent of that state.

Returning to the text of the protocol, it is found that Article 6 gives to the provisions of this protocol the same force and effect as the provisions of the statute itself. It further provides that any future signature of the protocol of December 16, 1920 "shall be deemed to be an acceptance of the provisions of the present protocol." Article 7 deals with ratification and the time at which the protocol shall come into force.

Article 8 contains the provisions regarding withdrawal. The United States may withdraw at any time by notifying the Secretary-General of the League of Nations. The protocol would cease to be in force upon the Secretary-General's receipt of this notification. The other contracting states can likewise bring about the termination of the protocol by a notification to the Secretary-General, but for this purpose at least two-thirds of the contracting states must give notice within one year from the time at which one of their number sends a similar notification to the Secretary-General. This article follows very closely the provisions of Article 7 of the Preliminary Draft of a Protocol drawn up in September, 1926.

If the question of final American participation in the work of the court is

argued on its merits in the Senate, it would seem that one or both of two issues would present themselves. In the first place, it may be debated whether the new protocol actually does constitute an acceptance of the Senate's five reservations, together with a plan of procedure for their application in practice. In the second place, assuming that it is argued that the protocol does not constitute an acceptance, it may be debated whether, notwithstanding this fact, the protocol gives adequate protection to the interests of the United States which the Senate desired to safeguard. Answers to these questions are to be found in Secretary Stimson's letter of November 18, referred to above.

PHILIP C. JESSUP.

## TARIFF RELATIONS WITH FRANCE

The State Department has recently published the correspondence relative to the happy settlement of the serious tariff controversy with France.[1] The cordiality of our relations with our first friend and recent ally had already been somewhat ruffled by the irritation aroused over the Debt Settlement and over the drastic application of the Volstead Act, which suddenly cut off the importation of French wines. Then came the high rates of the Fordney Tariff of 1922, adopted at the very moment when war-burdened Europe was expected to repay its indebtedness. The result was no little bitterness, especially in France. In view of the well-recognized liberty of every sovereign state in the matter of tariff, no protest was possible. But when the United States obtained the benefit of the minimum rates under the Franco-German Treaty of Commerce of August 17, 1927, without any apparent reciprocal benefit to French exporters, France by a presidential decree of August 30, 1927, established a discriminatory régime against American exports to date from September 6, 1927.

This brought a prompt protest from the United States. In the correspondence which followed, the two governments stated their respective views with force and some acerbity. The controversy between the two states involved an important difference of doctrine. The United States considers that tariff regulations are entirely a matter of domestic concern, provided that there be no discrimination against the imports of a particular state. Consistently with this view, the United States advocates the adoption of the unconditional form of the most-favored-nation clause, the effect of which is to give to all those who come under the stipulation the full benefit of any concession made to a third state. But France includes in her tariff, minimum and maximum rates, and looks to the conclusion of reciprocity treaties with particular states to determine the rates she will apply within

[1] Press release Nov. 20, 1929, covering correspondence of 1927, 1928 and 1929. See also press releases of October 3, 1927 and May 25, 1928.