THE CLASSIFICATION OF INTERNATIONAL DISPUTES.

The phrase "questions of a legal nature" is employed in the Conventions for the Pacific Settlement of International Disputes of 1899 and 1907, as well as in the Statute of the Permanent Court of International Justice, to denote disputes considered specially suited for arbitration.

This naturally implies a general understanding, at least, of what is meant by *legal* disputes and, conversely, what questions are to be included under the designation of *political* disputes. As a matter of fact, however, the classification of international disputes is one of the most difficult problems in international law. It lies at the very basis of obligatory arbitration. Nations solicitous of their essential interests and conscious of the sanctity of treaty engagements are unwilling to pledge themselves by vague general clauses that may entail more than they are willing or able to fulfill. Roosevelt vigorously stated this fact in commenting on the treaties of arbitration negotiated in 1911 by the United States with Great Britain and France:

> "It would be not merely foolish but wicked for us as a Nation to agree to arbitrate any dispute that affects our vital interest or our independence or our honor; because such an agreement would amount on our part to a covenant to abandon our duty, to an agreement to surrender the rights of the American people about unknown matters at unknown times in the future. Such an agreement would be wicked if kept, and yet to break it—as it undoubtedly would be broken if the occasion arose—would be only less shameful than keeping it. . . . Of course the same reasons which make it impossible to agree to arbitrate questions that involve our vital interest, independence, or honor, apply to any proposal to submit to others the question whether or not a given dispute of such a kind is 'justiciable,' or does or does not involve such questions and therefore should or should not be arbitrated." [1]

[1] In the *Outlook* for 1911, p. 565.

The Hague Conference of 1907 fully realized the importance of this problem of the classification of international controversies. The First Commission and Subcommission organized for the purpose devoted many weeks to the task. The practical results were negative but the discussions were of immense value in bringing into high relief the principal aspects of the problem.

An attempt was made to secure an agreement on a list of subjects which might be recognized as being peculiarly suitable for arbitration. On only eight out of thirty questions thus submitted was it possible to secure a majority. The vote on the following seven subjects was thirty-one in favor, eight against, and five not voting:

Reciprocal free aid to the indigent sick.
International protection of workmen.
Means of preventing collisions at sea.
Weights and measures.
Measurement of vessels.
Wages and estates of deceased seamen.
Disputes concerning pecuniary claims for damages when the principle of indemnity is recognized by the parties.

On the subject of the protection of literary and artistic works the vote was twenty-six in favor, nine against, and nine not voting.

It would be difficult to conceive of subjects more innocuous or "anodyne," as one of the delegates at this conference characterized this list, questions less likely to cause serious discussion or controversy. Not only was unanimity impossible, but thirteen nations out of forty-four were either opposed to, or refrained from voting on the first seven; and eighteen nations were either opposed to or refrained from voting on the other question.

This is all the more significant when one recalls the fact that these votes were not in open conference and were distinctly understood to have no binding force whatever, being subject to further review before formal adoption.

It is of interest to note also the nature of the other subjects which were unable to command a majority of votes in the Subcommission:

Regulation of commercial and industrial companies.
In cases of pecuniary claims arising from acts of war, civil war or the arrest of foreigners or the seizure of their property.
Sanitary regulations.
Equality of foreigners and nationals as to taxes and imposts.
Customs tariffs.
Regulations concerning epizooty, phylloxera, and other similar pestilences.
Monetary systems.
Right of foreigners to acquire and hold property.
Civil and commercial procedure.
In case of pecuniary claims involving the interpretation of application of conventions of every kind between the parties in dispute.
Conventions providing for repatriation.
Postal, telegraph, and telephone conventions.
Taxes against vessels (dock charges, lighthouse and pilot dues), salvage charges and taxes imposed in case of damage or shipwreck.
International private law.
Patents, trade-marks, and trade name.
Geodetic questions.
Emigration.

It is instructive also to note the votes in the Subcommission on certain of these subjects:

Emigration: five in favor, six against, and seven not voting.
Geodetic questions: six in favor, seven against, and five not voting.
Patents, etc.: four in favor, nine against, and five not voting.
Civil and commercial procedure: nine in favor, four against, and five not voting.

International private law: nine in favor, three against, and six not voting.

Sanitary regulations: nine in favor, seven against, and two not voting.

Regulations concerning epizooty, etc.: eight in favor, six against, and four not voting.

The voting was influenced, doubtless, in some cases by considerations of a diplomatic nature for ulterior purposes in the deliberations of the Conference as a whole. The failure of the Conference, however, to agree on even a slight classification of differences suitable for international adjudication is of the deepest significance. The principal reasons for this failure to agree are the following:

I. Nations find it easier to enter into special agreements than into general agreements of a universal character. Countries whose interests are in no way in conflict, which, by reason of geographical location, if for no other reason, are in no great danger ever of going to war with each other, may find but little difficulty in agreeing on a comprehensive list of questions they will submit to arbitration, even to obligatory arbitration. Denmark and Portugal may so agree; Norway and the Argentine Republic; Spain and Siam; Holland and Switzerland. Even contiguous nations enjoying friendly relations, such as Canada and the United States, or Germany and Austria, may go a long way in these respects.

The situation is obviously different when it concerns a treaty between Denmark and Germany; Portugal and Spain; Brazil and the Argentine; Germany and France; or Holland and Belgium. The conflicts of interests of an economic or territorial kind that may arise between near neighbors, or between rival competitors for commercial and strategic advantages, such as coaling stations and naval bases, preclude a detailed and comprehensive classification of questions suited for international adjudication. It is a good rule of international intercourse as well as of ordinary business transactions to be sure of what you are pledging,

and to pledge no more than you are prepared to fulfill. This is the dictate of good will and good faith, as well as of prudence.

With respect to general treaties of a universal kind between many signatories, the engagements entered into must of necessity be in general guarded terms, subject to diverse interpretations and controversies, or qualified by the customary devitalizing reservations concerning vital interests, independence, and honor.

The Hague Conference of 1907 demonstrated the extreme difficulty of securing precise agreements that do not open the door to serious differences of interpretation. It revealed the fact that nations are compelled to take into account the factors of sympathy, confidence, and good faith. They necessarily prefer to choose with the greatest care those other nations with which they are willing to negotiate precise agreements of momentous significance. They cannot put into general treaties of a universal character the engagements they may be willing to promise in individual treaties with a single other nation. Statesmen animated with generous sentiments and fine idealism are in no way warranted in gambling recklessly with the precious interests of millions of their nationals. Such an attitude, no matter how generous, is quite likely, in the long run, to compromise and discredit the very cause they may have most at heart.

II. This unwillingness to enter into specific pledges by general treaties is a difficulty of a subjective kind which may be overcome through increasing confidence and mutual good will. A difficulty of a much more serious sort is the utter impossibility of arriving at a satisfactory distinction between questions of a *legal* nature and questions of a *political* nature.

We may resort to generalizations and say that certain matters, such as the moral right of a people to a separate political existence, or the protection of the economic and commercial interests of a nation, are of a political character. So likewise we may reserve questions of national policy like the Monroe Doctrine and questions of domestic jurisdiction like immigration, as being primarily political and non-legal in their nature. We

may say that questions to which no accepted principles of international law apply are *ipso facto* unsuited for legal settlement.

Such generalizations are of slight value, however, in the absence of authoritative tests and criteria to enable us to classify a given controversy under its appropriate heading. They thus lead only to fresh discussion and contention.

Baron Marschall von Bieberstein, one of the most distinguished delegates at the Hague Conference of 1907, in commenting on the scheme for making arbitration obligatory in matters of a *legal* order, observed:

> "What is the meaning of this word? It has been said that it may exclude 'political matters.' Now it is absolutely impossible, in a world treaty, to trace a line of demarcation between these two notions. A question may be legal in one country, and political in another one. There are even purely legal matters which become political at the time of a dispute. One of our most distinguished colleagues told us the other day, on another occasion that 'politics is the realm of international law.' Do we desire to distinguish 'legal' questions from technical and economic questions? This would also be impossible. The result is that the word 'legal' states everything and states nothing, and in matters of interpretation the result is just the same. It has been asked: Who is to decide in case of some dispute, whether a question is or whether it is not legal? So far we have had no answer. Yet, this word 'legal' is the nail on which we have hung the whole system of obligatory arbitration. . . . If this nail is not solidly fastened, everything hung on it will fall to the ground." [2]

Attention was drawn by another delegate to the fact that even the interpretation of the clause of a treaty relating to railroad tariffs might imply a non-justiciable question if, for example, freight cars are held back for use in military mobilization at a moment of great tension in diplomatic relations.

It is true that many international controversies contain what Doctor Wehberg has termed a "legal core." It is just as true, however, to say that many legal questions have a *political core.*

[2] Proceedings of the Hague Peace Conference, Carnegie Endowment for International Peace, Vol. II, p. 50.

This fact was amply demonstrated in the discussions and the conclusions of the First Commission of the Second Hague Peace Conference. Doctor Drago of the Argentine Republic declared that it was inacceptable that laws directed against epizooty or other diseases of animals or of plants should be submitted to arbitration! And M. Ruy Barbosa of Brazil "could not admit that a State might be constrained to submit to arbitration questions which, in its opinion engaged its essential interests; it should remain itself the judge as to the existence of these interests." [8]

This would seem to be entirely exact even though an unpleasant truth. The fostering and the protection of national interests may not be transferred with safety or propriety from the hands of the peoples immediately concerned. The reconciling of conflicting interests is a task for diplomacy, not for courts of justice. Everything—for the sake of justice and of peace—depends ultimately on the free exercise by a nation of its independent judgment and voluntary consent.

In view of all these considerations, to attempt to draw up a rigid classification of legal questions which shall be automatically submitted to international adjudication is impossible, futile, and undesirable. No definite and permanent distinction can be made with any safety. If even a small list were agreed upon, as indicated above, the matters treated would be on the whole of a negligible character. And the questions which are most likely to disturb the peace of nations are those peculiarly political questions involving control of raw products, of markets, of strategic ports, and other similar problems affecting national trade and movements of populations. Any classification of disputes, under these circumstances, becomes more or less academic and valueless.

III. Another reason why classification is impossible is the absence of accepted principles of international law to apply to various important categories of human interests as, for example,

[8] *Idem.*

the rights of aliens, the civil and the penal responsibilities of States towards foreigners, and the rights of foreign creditors of nations that do not carry out their obligations. These are all weighty matters, and yet the law of nations is lamentably deficient in these respects.

A serious divergence of opinion developed in the Advisory Commissions of Jurists on the Permanent Court of International Justice concerning this question whether the Court should assume jurisdiction in cases where no principles and rules of law applied. Mr. Root and Lord Phillimore, representing on the one hand, the common law system of jurisprudence, strenuously insisted that an international court of justice should never have the right to legislate. M. Loder and M. de Lapradelle, however, representing, on the other hand, the continental system of jurisprudence, quite as strenuously insisted that large powers should be given to a court in order that there should never be a denial of justice. M. de Lapradelle said: "it is not possible to admit a declaration of *non-liquet* by an international court; a denial of justice must be excluded from the international court just as from national courts." [4]

Lord Phillimore emphasized the contrast between these two schools of jurisprudence in the following language:

> "In his view these divergences arose from the continental idea of justice; at the outset strict limitations are imposed on the judges; then through fear of restricting them too much they are given complete freedom within these limits. The English system is different: the judge takes an oath 'to do justice according to law.'" [5]

It would be unfortunate if this divergence of views on so important a question were to be regarded as essentially a divergence of opposing schools of jurisprudence. While it is inevitable that international law should be approached from differing angles of national schools of jurisprudence, we are in duty bound

[4] Procés-Verbaux of the Proceedings of the Advisory Committee of Jurists, etc., p. 312.

[5] *Idem*, p. 315.

to analyze it scientifically and objectively. The law of nations,—it must constantly be reiterated—is *sui generis*. It must not be obscured by inaccurate analogies drawn from particular systems of law. We should recall the basic characteristic of international law, namely, that it rests upon common consent freely given; that it is not imposed either by sovereign executive authority or even by a supreme court of justice. It is thus fundamentally unlike other law.

That there is some force to the arguments of Mr. Root and Lord Phillimore was indicated by certain admissions of M. Loder, (afterwards President of the World Court) in discussing the proposition of Baron Descamps for the establishment of a High Court of International Justice to judge international crimes.

> "M. Loder was inclined to think that, in wishing to establish a Court for the trial of international crimes, the President was beginning at the wrong end of the problem. He recalled Beccaria's rule '*Nulla pœna sine prævia lege pœnali*,' and asked what system of law should be applied by the new Court. He acknowledged that law could be formulated and, like M. Altamira, thought that it would be useful to do so. The President's plan, however, suggested the establishment of a Court before defining the law to be applied by it. Crimes were mentioned in it which were not yet defined. Under such circumstances the Court could only be of a political nature; especially as each State would be represented by a judge.
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> "M. Loder was in favour of the gradual extension of the jurisdiction of the permanent Court, the organization of which they were now planning, but he was absolutely opposed to the idea of the application of undefined penalties to undefined crimes by a political Court." [6]

It would appear that this objection against the power of an international tribunal to legislate in the absence of principles of law applicable to the litigation is fundamental. Nationals cannot expose their interests to the subjective notions of jurists of diverse national schools of thought. They must have assented

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[6] *Idem*, p. 504.

in advance to the principles of law to be invoked in a given controversy. Such principles may not safely be imposed by the arbitrary decision of a supreme international court.

It follows that all classification of disputes suitable for judicial review is impossible so long as States remain uncertain concerning the exact nature of the law to be applied. Every wrong should have its remedy. The absence of legislation or of generally accepted principles on which to base a remedy does not imply the right of a tribunal to act either as a legislator or as an autocrat. The wisdom of granting such great power over nations may at least be seriously questioned.

IV. Another difficulty in the way of classification is the uncertainty concerning the nature and the efficiency of the international tribunals which might have jurisdiction in certain categories of disputes, such as pecuniary claims against States, and cases involving international private law. These are matters of a technical nature requiring tribunals specially constituted to render proper decisions, particularly if the international court should function as a court of appeal with respect to decisions of national courts.

This objection, however, is of lesser importance as involving a matter of procedure rather than of principle. It may be met in the process of time by the development of competent tribunals commanding general confidence.

V. Still another objection is that, in indicating a list of controversies suitable for judicial decision, the effect would be virtually to create a code of international law on the principle of *nulla pœna sine prævia lege pœnali.* To state that a question is justiciable implies the existence of principles generally recognized and accepted.

A code of international law in the sense of a comprehensive well articulated system of principles and rules such as a Code Napoleon may be impossible of creation. Codification, however, viewed as the progressive enlargement of the law of nations would appear feasible and desirable. In so far as this process

would result in the indication of remedies for international wrongs, it would undoubtedly facilitate recourse to international justice.

The preceding rapid survey of the principal difficulties in the way of the classification of international disputes may serve to bring out into higher relief the undoubted fact that nations actuated by the highest ideals and generous motives are considerably restricted by the very nature of things. They may abhor war and desire justice, and yet, because of their conflicts of essential interests and honest differences of opinions concerning rights and remedies, they are often bewildered and embarrassed. An equitable, if not a strictly legal, adjustment of their differences is not infrequently most difficult, or even, impossible of attainment. The question then becomes one of evaluating justly the various agencies and methods available for the peaceful settlement of these differences.

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