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The Senate and the Arbitration and Adjudication of International Disputes†

Introduction

Most writers on American diplomatic history regard the legal settlement of disputes between governments as an important and integral element of American foreign policy. Arbitration was practiced widely in the last century, and there was an astonishing burst of enthusiasm for arbitration and adjudication at the end of that century and the beginning of the present one. Since then, much of the fervor seems to have departed notwithstanding the American declaration of adherence to the International Court of Justice. Concomitantly, arbitrations and adjudications in the last twenty years have been surprisingly few in number[1] Happily the tide may be changing.

Many reasons have been advanced to explain this apparent recent disinterest in the legal settlement of disputes, among them the alleged reluctance of the Senate to consent to treaties that would give the President and the Department of State the authority to submit

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† In an article on a subject as varied and vast as the present one it is obviously impossible to cite every treaty decision or comment having a bearing on the topic. Hence, secondary sources summarizing or listing primary sources will often be used when a citation to the former permits the elimination of a necessarily long enumeration of primary sources. Moreover, writing at a small college with modest library facilities, the author is acutely aware of the absence in many libraries of many documentary sources. Most small colleges, for example, would find it too expensive to subscribe to the full official records of the International Court of Justice. An effort has, therefore, been made to refer to manuals and summaries that might be available in small libraries as well as to the official texts.

In general, because of the multiplicity of sources, the citations must necessarily be selective and illustrative rather than comprehensive.

[1] The recent use of the international arbitral and judicial processes are discussed *infra* pages 582-584

important disputes that might arise in the future to legal determination by an international tribunal,[2] whether it be an *ad hoc* arbitral commission or an existing international court. (For purposes of convenience, the term "international tribunal" will be used henceforward to refer to either an arbitration tribunal, court or commission, or an international court.)

It is by no means easy to analyze the precise motives and attitude of the Senate, or to foretell its future viewpoint, as its policies have been influenced by personal, political, constitutional and historical considerations that vary from period to period, and are often difficult to identify and document. Nevertheless, the effort is worth making as any comprehensive effort to promote the pacific settlement of disputes must take into consideration, among several other factors, the past role of the Senate and the probabilities of future Senate attitudes.[3] As the adjudication, in contradiction to the arbitration, of disputes has received serious consideration only in this century, the first part of this paper reviewing the early efforts of the United States will necessarily have to dwell primarily on the arbitral process.

The Constitutional Role of The Senate

The Senate can exercise considerable influence on the policy of the United States regarding the arbitration and adjudication of international disputes through its right (1) to give its advice and consent to the ratification of treaties; (2) to approve Presidential appointments requiring Senate confirmation of persons to serve on or before international tribunals; (3) to make, in conjunction with the House of Representatives, appropriations needed to meet the expenses of an

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[2] The author has summarized the reasons for this disinterest in a comment in the Virginia Journal of International Law, Vol. 5, pp. 201 *et seq.* entitled, "Present Trends in the Policy of the United States on the Legal Settlement of Disputes." He has also referred to them in a paper presented to the 1965 Washington World Conference on World Peace Through Law, *World Peace Through Law–The Washington World Conference*, 1967, p. 303.

Among the many factors curtailing the use of arbitration or adjudication are the vogue for lump sum settlements; the ideological difficulties of the cold war, the unwillingness of some of the newer states to accept the established rules of international law, particularly with regard to the responsibility of states; the fluidity of some portions of international law, *e.g.* on the marginal sea; and the astonishing ignorance among the diplomatic community of the uses and processes of international arbitration and adjudication.

While not directly concerned with arbitration or adjudication Chapter VI of Kenneth S. Carlston, *Law and Organization in World Society*, 1962, entitled "Law and the Provision of Order in the International System," provides a broad background for the subject.

[3] The other factors summarized in note 2 should not be minimized. To try to analyze them in depth in this article, which is devoted to the influence of the Senate on arbitration and adjudication, is not, however, possible.

arbitration or an adjudication and for the payment of an award, if any, against the United States; and (4) to investigate and criticize the policies of the Executive. In addition, there have been two or three occasions when individual senators took part directly in the arbitral process.[4]

The right of the Senate to pass upon treaties is, from a practical standpoint, the primary factor to consider in evaluating its role. In the entire history of American diplomacy, there has never been any instance when an appropriation needed to meet the obligations of a treaty, including an arbitration treaty, was ever denied by the Congress.[5] Neither does there appear to be any record of the Senate withholding its approval of any jurist selected to take part in the proceedings of an international body.[6] Hence, the main lever that the

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[4] Senator John Tyler Morgan of Alabama participated in the Bering Sea Arbitration (Moore, *A Digest of International Law*, 1906, Vol. 1, p. 907). According to his biographical sketch in the *Dictionary of American Biography* (Vol. XIII, p. 181), "he alone voted against Great Britain on every major question." Senator Lodge was one of the American members on the arbitral body that resolved the Canadian Alaskan boundary dispute in 1903. While his appointment was criticized, the criticism was based on his alleged lack of impartiality rather than on his senatorial status. Thomas A. Bailey, *A Diplomatic History of the American People*, 1964, p. 509.

[5] In a footnote on page 289 of *A Diplomatic History of the United States*, 1965, Professor Bemis states:

> See also Holbert N. Carroll, *The House of Representatives and Foreign Affairs*, (Rev. ed. 1966), p. 9.
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> Through discussion and correspondence, the author has endeavored to obtain confirmation from the Department of State that the Congress has never withheld funds needed for an arbitration as a means of expressing displeasure with the principle of arbitration. Apparently there are no records from which the Department can supply a ready answer. Possibly a detailed examination of Departmental and Congressional archives might uncover some instance when appropriations were withheld or curtailed because of Congressional disapproval of an arbitration. It seems unlikely, however, that any such instance would be discovered.
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> *On a number of occasions, but notable in the debates on Jay's Treaty of 1794, on the 'Gadsen Purchase' of 1853, and on the Alaska Treaty with Russia of 1867, vigorous objection has been made in the United States House of Representatives to making the appropriations necessary to carry into effect a treaty ratified by the Senate and proclaimed by the President. In no such case has the opposition been successful; thus an international issue on such a point has never been precipitated.* [Emphasis added.]

[6] The pattern of appointments has not been altogether uniform. Many nominations of Commissioners and Agents were submitted to the Senate, particularly in the early days of our history. For example, James Trecothick Austin was appointed as Agent in the Bay of Fundy Arbitration by and with the advice and consent of the Senate. (Moore, *History and Digest of International Arbitrations to which the United States Has Been a Party*, 1898, Vol. 1, p. 53.) In later years appointments seem to have been made by the President alone or even by the Department of State. The author was appointed by the Department of State to serve as United States Member on the United States-Japanese Property Commission. Here, however, the constitutional pattern was complicated by the fact that he was already a Foreign Service Officer appointed by the President, by and with the advice and consent of the Senate, and that he

Senate has actually used to impose its views on the executive regarding the legal settlements of disputes is its constitutional right to participate in the treaty-making process.

Treaties Versus Executive Agreements

Before attempting to discuss the attitude of the Senate toward treaties relating to the arbitration and adjudication of disputes, one must have a clear understanding of the dividing line between treaties and other international agreements in the constitutional sense. Obviously, if an international dispute can be submitted to an international tribunal by virtue of an executive agreement not requiring the approval of the Senate, its role may well be limited to that of crit.

Sometimes, of course, the Senate gives its genera. approval in advance to an executive agreement by consenting to legislative or treaty provisions which visualize executive agreements for the implementation. Such implied approval is clearly different from the specific approval of an individual treaty.

One would imagine that an insight into this constitutional problem could easily be reached by a consultation of the copious material already available in print on the subject of treaties and executive agreements.[7] Unfortunately, there does not seem to be any systematic analysis which sheds light on the topic under consideration.

There would appear to be at least four separate situations in which a treaty, rather than an executive agreement, is required to commit the United States to the settlement of a dispute through arbitration or adjudication. Each deserves mention:

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served on the Commission while continuing to perform his other duties. As in the case of appropriations, it is extremely difficult to document a negative proposition, i.e., that the Senate has never used its power to withhold its consent to appointments to arbitral tribunals as means of expressing displeasure. The author therefore has to base his conclusions on the fact that he has never heard or read of such an instance. And in this situation as well, the available records of the Department do not apparently supply a ready answer.

The fact that the Senate is fully aware of the possibility of controlling arbitrations through the medium of this power, is shown by the insistence of the Senate on approving the designations of any American commissioners who might have been selected to serve on the Anglo-American tribunal that the unfortunate and stillborn Olney-Pauncefote Treaty unsuccessfully tried to create. Richard W. Leopold, *The Growth of American Foreign Policy*, 1962, p. 285.

[7] See Elbert M. Byrd, Jr., Treaties and Executives Agreements in the United States–Their *Separate Roles and Limitations*, 1960. Gerhard Von Glahn, *Law Among Nations*, 1965, pp. 413, *et seq* and particularly footnote 5 on page 416 which lists a number of articles on treaties and executive agreements and Lester B. Orfield and Edward D. Re, *Cases and Materials on International Law*, 1965, p. 40, which gives notes on executive agreements, giving a number of citations. The list could be prolonged indefinitely.

1. The importance of the subject matter.

It is obvious that when a matter of high political importance is to be submitted to legal settlement, the agreement should be embodied in a treaty. Thus it would be almost inconceivable to submit a boundary dispute to an international tribunal other than by treaty.[8] It may, sometimes, be difficult to draw the line between what is important and what is relatively unimportant. Fortunately, in most instances, common sense, fortified by past precedents, will supply the answer.

2. The necessity for funds.

The cost of arbitration falls into three categories. There are, to begin with, the expenses of the American member of the Commission, of the American Agent, and of the subordinate members of their respective staffs. There are, in addition, the joint expenses of both governments or, if it is a multilateral arbitration, of all governments concerned, required to defray the cost of the salaries and allowances of the neutral member or members and the upkeep of the secretariat. Finally, there is the amount of the award, if any, against the United States.

When the expenses are relatively small and there is no possibility of a monetary award having to be paid by the United States, the Department of State may be able to provide for the arbitration by assigning or detailing personnel from the rolls of the Department of State or the Foreign Service.[9] Under present practice it can also obtain relatively limited funds under the general rubric in the Department of State Appropriations Acts entitled, "International Conferences and Contingencies."[10] Where, however, there is an award against the United States or the operating expenses are heavy, a specific appropriation is

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[8] The United States initiated the practice of submitting boundary disputes to arbitration by the Jay Treaty of 1794. Malloy, *Treaties, Conventions, International Acts, Protocols and Agreements Between the United States and Other Powers, 1776–1909* Vol. I, p. 593.

[9] The Foreign Service Act of 1946, as amended, specifically authorizes the assignment of Foreign Service personnel for duty with an international organization, commission or body. (22 U.S. C. 961)

[10] In such instances the amount needed is submitted to the Congress even though a separate appropriation is not made. See, by way of illustration, the justifications submitted for the expenses of the United States–Italian Conciliation Commission and the United States–Japanese Property Commission in *Department of State and Justice, the Judiciary and Related Agencies Appropriations for 1961. Hearings before the Subcommittee of the Committee on Appropriations of the House of Representatives.* Eighty-sixth Congress, Second Session, p. 1042.

needed.[11] In such instances, a treaty is required.

In the absence of a treaty, both the Senate and the House may, as a matter of principle, refuse to appropriate the necessary funds.[12] Even more important, an appropriation predicated *solely* on an executive agreement is subject to challenge in the House on a point of order under Rule XXI–a of the "Rules of the House of Representatives" which provides that "no appropriation shall be reported in any general appropriation bill, or be in order as an amendment thereto, for any expenditure not previously authorized by law . . ." If the challenge is sustained it can mean that the appropriation will be eliminated.[13] (There are ways and means to circumvent a point of order and to reinstate an eliminated appropriation, but it is far preferable, and more prudent, to make certain in advance that the appropriation will be sustained.) While Rule XXI-a refers to "law," it has been held on a number of occasions that a treaty will serve in lieu of legislation. One of the precedents dealt specifically with an appropriation to pay an award against the United States in favor of Germany made by the King of Sweden acting as a court, i.e., as sole arbitrator.[14]

Lastly Section 665 of Title 31 of the United States Code prohibits the creation of an obligation in excess of the amount of appropriated funds and prescribes penalties on Federal officials for assuming such an obligation. An agreement to pay an award to which consent has not been given in advance by the Congress, and for which funds which are not available, risks falling within the prohibition.

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[11] The expenses of the Mixed Claims Commission, United States and Germany, were provided for by a specific appropriation (43 Stat. 215 [1924] even though there was no award against the United States.

[12] An indication of what may be the attitude of the Senate is provided for by the comments of certain senators on the *I'm Alone* arbitration with Canada which required the payment of awards by the United States. Senator Norris seemed to feel that the President had exceeded his authority. *Congressional Record*, Vol. 79, Part 1, p. 968 (Jan. 25, 1936).

In actuality the submission of the dispute to arbitration was based on Article IV of the "Convention between the United States and Canada for prevention of smuggling of intoxicating liquors" (43 Stat., Part 2, 1761). The correspondence on the *I'm Alone* case resulting in the submission of the dispute to arbitration may be found in *Foreign Relations of the United States*, Vol. II, (1929) , p. 23 *et seq*. In particular see page 47.

[13] Lewis Deschler, *Constitution, Jefferson's Manual and Rules of the House of Representatives*, 1963, p. 426. Paragraph 1135 of Cannon's *Precedents of the House of Representatives of the United States*, Vol. Vii, p. 207 (1935) states: "A convention arrived at by Executive correspondence and not formally verified by the contracting parties was not held to constitute a treaty to the extent of authorizing an appropriation or an appropriation bill."

[14] Hind's *Precedents of the House of Representatives of the United States*, 1907, Vol. IV, p. 426. See also *Id*., Vol. IV, p. 391: Cannon, *supra* note 13, Vol. VII, p. 204; p. 208 (An Indian Treaty); p. 109; p. 211; p. 213 (An Indian Treaty); p. 215, p. 216; p. 217.

3. The Possibility of Conflict with Existing Federal Laws Relating to Arbitration.

Under the rulings of the Comptroller General of the United States, a federal agency may not legally enter into an arbitration agreement envisaging the settlement of an unliquidated damage claim which the agency is not authorized to settle in the first instance. The same reasoning would presumably apply to an intergovernmental arbitration. It is true that the Comptroller General has not ruled on any arbitration under an executive agreement. He has, however, expressed his views in unequivocal language in a case involving a government department and a foreign corporation. The Navy Department had made a contract with Aktiebolaget Bofors of Sweden, for the production under license of certain Bofors 40 mm. guns for use of the United States. Bofors claimed that the distribution of its products under Lend Lease violated the agreement, and tried to sue in the Federal District Court. The suit was ineffectual because the amount involved was too large for the jurisdiction of the court. As the contract contained an arbitration clause, the Navy Department questioned the Comptroller General as to the legality of undertaking arbitration proceedings. The Comptroller General said:

> The conclusion seems warranted that, in the absence of statutory authorization, either express or implied, officers of the government have no authorization to arbitrate or agree to submit to arbitration claims which they themselves would have no authorization to settle and pay.[15]

If faced by an inter-governmental executive agreement, it is conceivable, in view of the high status accorded such agreements by the Supreme Court,[16] that the Comptroller General might take a different viewpoint. If, however, one proceeds from the apparently accepted premise that only a treaty can overrule existing federal law,[17] it is difficult to see how the Comptroller General could take a position in an intergovernmental situation other than the one taken in the Bofors case.

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[15] Decisions of the Comptroller General of the United States, Vol. 32, p. 333 (1953), at p. 336.

[16] United States v. Belmont, 301 U.S. 324 (1937).

[17] United States vs. Jay W. Cappes, Inc., 204 F. 655. (1953). The case is given although not *in extenso*, in Bishop, *International Law-Cases and Materials*, 1962, p. 98. See also note following the case on p. 100.

4. The Insistence of the Senate That an Arbitration Agreement Stemming from an Earlier Treaty Be Submitted to It for Its Advice and Consent.

In ratifying general treaties of arbitration, the Senate has often insisted that the actual *compromis* on a particular dispute be submitted to it either under the terms of the treaty itself, or under the wording of a reservation approved by the Senate. Thus, the Senate gave its consent to the 1907 Hague Convention on the Pacific Settlement of Dispute with this reservation:

> That the United States approves this Convention with the understanding that recourse to the permanent court for the settlement of differences can be had only by agreement thereto through general or special treaties of arbitration heretofore or hereafter concluded between the parties in dispute.[18]

The question naturally arises at this point as to what disputes may be submitted to an international body through executive agreement. Admittedly, it is hard to list every possible category with any assurance that the listing is complete. Three, nevertheless, readily come to mind. They probably cover the bulk of the situations under consideration.

Disputes relating to pecuniary claims made on behalf of private American citizens against foreign governments have often been submitted to arbitration by an executive agreement.[19] It is generally recognized that in such cases the United States is in reality acting on behalf of the claimant, even though in theory the claim is that of the state. Hence, the arbitration is essentially intergovernmental in *form* rather than in *substance*. For reasons previously explained, an executive agreement may not suffice when the United States is submitting itself as a defendant and exposing itself to liability for wrongs suffered by an alien.[20] It seems equally clear that a dispute may be submitted to arbitration or adjudication by way of an executive agreement when a treaty or other international agreement approved by the Senate or by the Congress as a whole has provided for the arbitration of future disputes under such agreement without the stipulation that the *compromis*

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[18] Malloy, *Treaties*, Vol. II, pp. 2247-8.

[19] The executive agreements initiating arbitrations are listed in a Department of State memorandum incorporated into the *Congressional Record* of January 25, 1935 (Vol. 79, Pt. 1, pp. 969-970). The memorandum refers to forty arbitrations up to 1935 of which fifteen took place according to agreements entered into in the last century. Since the arbitrations are listed chronologically, it is easy to determine the earliest.

[20] Possibly for that reason the new Gut Dam Arbitration with Canada, was established by a treaty. TIAS 6114. The Senate approved the treaty by a vote of 74-0. *Congressional Record*, Vol. III, Part 16, p. 22232.

be submitted to the Senate for its consideration and approval.[21] Moreover, an executive agreement entered into by virtue of the inherent power of the executive, or pursuant to a statute vesting authority in the executive, may provide for its interpretation through arbitration or adjudication.[22]

It is evident, therefore, that while there are a number of instances in which an arbitration or adjudication can be initiated by the executive, the overriding authority of the Senate is still very great.

Arbitration Prior to the First Hague Conference of 1899

In the first century or so of American diplomatic history, starting with the Jay Treaty of 1794, arbitration played a prominent role in the settlement of disputes.[23] Some of the arbitrations were successful and some were abortive. Usually provision for the arbitrations was by conventions approved by the Senate.[24] Most of the agreements related

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[21] As will be seen later, disputes submitted under the Hague Convention of 1899 were submitted by executive agreement.

[22] The Air Transport Services Agreement with France of March 27, 1946, (61 Stat. 3445) was an executive agreement which provided for arbitration in Article X. There has actually been an arbitration under that article. (58AJIL p. 1016 Oct. 1964).

Also of interest are the arbitration provisions in the investment–guarantee agreements. The agreements are effected by an exchange of notes, the one with Jamaica (14 UST, Part 1 at p. 1) being typical. The entire investment-guarantee program is authorized by Sections 2181 *et seq* of Title 22 of the United States Code. The law provides that the President shall make suitable arrangements for protecting the interests of the United States.

[23] According to John Bassett Moore, the United States participated in sixty-eight international arbitrations up to World War I. John Bassett Moore, *The Principles of American Diplomacy*, 1918, p. 322. The number may vary depending upon the method of computation. One commission under the Jay treaty took cognizance of two sets of claims, one of American citizens against Great Britain and the other of British subjects against the United States. (Moore, *supra*, p. 310). Should that be counted as one or two arbitrations? See also the table of international arbitrations at the end of Vol. III of Marjory Whiteman, *Damages in International Law*, 1943. The table refers only to arbitrations involving pecuniary claims. It is obvious, therefore, that it does not include all arbitrations. It is interesting that Professor Quincy Wright in his article on "Arbitration, International" in the *Encyclopedia Americana*; says: "The United States has been active in the use of arbitration. Prior to World War I, it submitted 83 controversies with 25 nations to this process, a number exceeded only by those submitted by Great Britain." (1966 edition, Vol. 2, p. 142). A.M. Stuyt, *Survey of International Arbitrations*. 1794-1938, (1939), purports to list all arbitrations, including those to which the United States has been a party, in that period.

[24] The treaties approved by the Senate provide for arbitration from the beginning of the Republic to the turn of the nineteenth century are much too numerous to mention individually by name or even to identify by country. In Volumes I and II of Malloy's *Treaties*, etc., *supra*, the treaties, or the pertinent portions thereof when other subjects are covered, appear on pages 183, 185, 190, 319, 321, 332, 346, 387, 432, 438, 535, 539, 540, 593, 594, 595, 596, 614, 615, 616, 617, 633, 634, 646, 664, 673, 688, 700, 746, 766, 1101, 1105, 1117, 1128, 1133, 1134, 1136, 1138, 1167, 1362, 1406, 1408, 1411, 1458, 1589, 1650, 1856, 1868, 1981. Some treaties are merely extensions of earlier ones. See also Senate Document no. 373,

solely to the arbitrations which they envisaged.[25] Others, for example the Jay Treaty, dealt with additional subjects as well.[26] A relatively few arbitrations were initiated by executive agreements standing alone, that is, without having previously been authorized by treaty or legislation.[27] Among the more significant disputes submitted to arbitration were those concerning claims, boundaries, fisheries and the determination of neutral rights and obligations.[28]

There is no indication that the Senate ever interposed any objection to the arbitration of *existing* disputes. On the contrary, every proposed arbitration seems to have been approved without serious question.

As the nineteenth century progressed, a greater and greater enthusiasm for arbitration was generated. The first faltering steps were taken to agree to settle by arbitration disputes which had not yet arisen. Thus, Article XXI of the Treaty of Guadalupe Hidalgo, ending the war with Mexico in 1848, looked to arbitration for the settlement of future disputes. The article was, however, hedged about with so many restrictions that it scarcely qualifies as a binding obligation.[29]

By the fourth quarter of the century, the adherents of arbitration were becoming more and more vocal. The House of Representatives passed a resolution in 1874 favoring arbitration, but an unsuccessful attempt was made in 1883 to negotiate a general arbitration treaty with Switzerland.[30]

The first International Conference of American States of 1889 prepared a draft treaty which provided for the obligatory arbitration of disputes in all cases except those which "in the judgment of any one of the nations involved in the controversy may imperil its independence."

62nd Congress, 2nd Session (1912) entitled, *List of Arbitration Treaties and Conventions Submitted and Acted Upon by the United States Senate*. For an earlier list see the *Congressional Record* for February 15, 1905, Vol. 39, Part 3, p. 2628. This list shows 44 arbitration agreements submitted to the Senate and only 7 not submitted.

[25] As an example picked at random, see the 1822 "Convention for Indemnity Under Award of Emperor of Russia as to the true construction of First Article of the Treaty of December 24, 1814." Malloy, *supra*, Vol. I, p. 634.

[26] Malloy, Vol. I, *supra*, p. 590, Articles V, VI, VII and VIII relate to arbitration.

[27] See note 19 *supra*.

[28] A good historical review of the early arbitrations to which the United States was a party is contained in John Bassett Moore, "International Arbitration; Historical Notes and Projects" in Vol. II, pp. 38 *et seq.* of *The Collected Papers of John Bassett Moore*, 1944.

[29] Malloy, *supra*, Vol. I, p. 1117. The article was confirmed in the Gadsden Treaty of 1853. Malloy, Vol. I, p. 1124.

[30] Moore, "International Arbitration" in his *Collected Papers*, *supra*, Vol. II, p. 80.

The treaty, although signed by the United States and a number of other nations after the adjournment of the conference, never materialized, owing to its rejection by "some important governments of South America."[31]

At about the same period, the United States signed a "Treaty of Amity, Commerce and Navigation" with the Independent State of Congo which provided in Article XIII for the arbitration of disputes arising under the Treaty. For the first time, the United States was committed to arbitration with regard to possible disputes which might arise in the future.[32] Obviously, in view of the then meagerness of American interests in the Congo, this commitment had little practical significance.

Meanwhile, the British Parliament was also becoming interested in an arbitration treaty with the United States. In 1888 two hundred and thirty-five members of Parliament sent a communication to the American authorities urging that such a treaty be signed. In 1890, the Congress, spurred by that invitation and by the growing interest in arbitration, passed a concurrent resolution requesting the President "to invite from time to time, as fit occasions may arise, negotiations with any government with which the United States has or may have diplomatic relations, to the end that any differences or disputes arising between the two governments which cannot be adjusted by diplomatic agency may be referred to arbitration, and be peacefully adjusted by such means." The House of Commons responded in turn in 1893 with a favorable resolution, and the negotiations that eventually resulted in the Olney-Pauncefote Treaty of 1897 were undertaken.[33] Unhappily,

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[31] John Bassett Moore, *A Digest of International Law*, Vol. VII, 1906, pp. 70-72, *The International Conferences of American States*, 1889-1928, edited by James Brown Scott, 1931, pp. 40-44. In addition to recommending a cisatlantic arbitration agreement, the Conference expressed "the wish that controversies between them [the Republics of America] and the nations of Europe be settled in the same friendly manner."

[32] Malloy, *supra*, Vol. I, p. 332. See also the rather peculiarly phrased provision on arbitration in Article IV of the General Act for the Repression of African Slave Trade which is not truly intergovernmental in nature, Malloy, *supra*. Vol. II, p. 1981. The conclusion that the Congo Treaty was the first that provided for the arbitration of future disputes, is derived from a failure to find any earlier treaty in Malloy, *supra* Volumes I and II. Nor is any such treaty listed in the World Peace Foundation Pamphlet (Vol. 5, No. 5, Part 3) entitled *Arbitration Engagements Now Existing in Treaties, Treaty Provisions and National Constitutions*, or mentioned in any other sources available to the author. See also Robert R. Wilson *Clauses Relating to Reference of Disputes in Obligatory Arbitration Treaties*. 25 AJIL 469 (1931).

[33] Danna Frank Fleming, *The United States and the World Court* 1945, p. 17. The American and British resolutions are given as Annex VII to an article written by John Bassett Moore, entitled, "International Arbitration: Historical Notes and Projects," reproduced in *The*

the border dispute between Venezuela and British Guiana, in which the United States became involved because of England's supposed violation of the Monroe doctrine, took place in the intervening years. America's latent hostility toward Great Britain was spurred by the dispute. Anti-British feelings, generated by two wars, by innumerable controversies which had led to the brink of war—such as the Oregon boundary dispute and the McLeod imbroglio—and by many less notable, but nevertheless aggravating, disputes and misunderstandings, were revived. As a consequence, the Senate's necessary two-thirds majority for approval lacked three votes. Considering the circumstances, the number of favorable votes which the treaty received is surprising.[34]

The Hague Conference of 1899 and the Pre-World War I Years

The setback received by the failure of the Senate to approve the British treaty was obviously regarded by the executive as a transient defeat attributable to special circumstances. In fact, at the First Hague Conference of 1899, the American delegates were enjoined to go a step beyond the approval of arbitration in general and to propose, at an appropriate moment, a plan for an international tribunal.[35] Although the intended tribunal never came into being, the Conference did establish the Permanent Court of International Arbitration.[36] Moreover, the Convention creating the Court, which was duly approved by the Senate, seemed to give the President discretion to submit controversies to the Court without having to seek the approval of the Senate in each case. Accordingly, the first case submitted by the United States, the Pious Fund Case, was referred to the Court on the basis of a

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Collected Papers of John Bassett Moore, Vol. II, pp. 27 et seq. The resolutions appear on page 54. See also Moore's *Digest, supra*, Vol. VII, pp. 74-78.

[34] As stated by Richard W. Leopold in his *The Growth of American Foreign Policy*, 1962, p. 284: "However logical it may have seemed to launch the experiment in compulsory arbitration with Great Britain, it was tactically unwise. In 1897 the currents of Anglophobia still ran deep. The alleged bullying of Venezuela was not forgotten. Silverites saw in England the chief bastion of the gold standard, canal men resented the refusal to abrogate the Clayton Bulwer Treaty; politicians feared the Irish vote."

The Venezuelan dispute is described at length in the sketch of Richard Olney by Montgomery Schuyler, Vol. VIII of *The American Secretaries of State and Their Diplomacy*, 1958, pp. 291 et seq.

[35] Moore's *Digest supra*, Vol. VII, pp. 82-83; Danna Frank Fleming, *The United States and the World Court*, 1945, pp. 18-19.

[36] James Brown Scott, *The Hague Peace Conferences of 1899 and 1907*, 1909, Vol. I, pp. 254-385.

protocol signed by the Secretary of State and the Mexican Ambassador.[37]

The principle of compulsory arbitration found further support in the Pan-American Treaty for the arbitration of pecuniary claims concluded on January 30, 1902 and ratified by the United States almost three years later. Under the treaty the parties agreed to submit to arbitration "all claims for pecuniary loss or damage which may be presented by their respective citizens, and which cannot be amicably adjusted through diplomatic channels and when said claims are of sufficient importance to warrant the expenses of arbitration."[38] As the treaty had a duration of only five years, it was renewed in a convention signed on August 13, 1906 to continue in force until December 31, 1912.[39] On August 11, 1910, a new treaty, which was to come into force upon the expiration of the former, prolonged the obligations of the parties indefinitely.[40]

In the meantime, Secretary Hay, spurred by an election promise made by President Roosevelt, and probably encouraged by the willingness of the Senate to permit arbitration under the umbrella of a general pact, and by its approval of the Pan-American agreement of 1902, negotiated a series of arbitration treaties covering all future disputes except those involving the vital interests, the independence, or the honor of the contracting states or affecting the interests of the third states. The Senate, notwithstanding the broad exceptions indicated above, insisted that the treaties be amended to provide that each separate *compromis* be submitted to it for approval as a "Treaty" under the Constitution. Secretary Hay thought that treaties containing such an amendment were valueless and did not press them. Hay died in June

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[37] Article XXXI of the Convention merely provided: "The Powers who have recourse to arbitration sign a special Act (Compromis), in which the subject of the difference is clearly defined, as well as the extent of the Arbitrator's powers. This Act implies the undertaking of the parties to submit loyally to the award." Malloy, *supra*, Vol. II, p. 2026. The Pious Fund protocol appears in Malloy, *supra*, Vol. I, p. 1194. The Orinoco case was also submitted to the Court by a Claims Protocol which was not approved by the Senate. It is particularly interesting that the protocol was signed on February 13, 1909, almost a year after the Senate, on April 12, 1908, advised the ratification of the 1907 Convention for the Pacific Settlement of International Disputes, that is long after Senatorial policy had become evident. Malloy, Vol. II, pp. 1881 and 2220 respectively. The Orinoco case is discussed by William Cullen Dennis in an article entitled "The Orinoco Steamship Case Before the Hague Tribunal," 5AJIL 35 (1911).

[38] Malloy, *supra*, Vol. II, p. 2063.

[39] Redmond, *Treaties, Conventions, International Acts, Protocols and Agreements between the United States and Other Powers*, 1910-1923 (continuing Malloy, *supra*, as Vol. III), p. 2879.

[40] Redmond, cited *supra*, p. 2922.

of 1905. He was succeeded by Secretary Elihu Root, who considered that the treaties, even with the Senate amendment, were better than nothing and brought twenty-five such agreements into force.[41] The French convention is typical of the Root treaties. It stipulated:

> In each individual case the High Contracting Parties, before appealing to the Permanent Court of Arbitration, shall conclude a special Agreement defining clearly the matter in dispute, the scope of the powers of the Arbitrators, and periods to be fixed for the formation of the Arbitral Tribunal and the several stages of the procedure. It is understood that on the part of the United States such special agreements will be made by the President of the United States, by and with the advice and consent of the Senate, and on the part of France they will be subject to the procedure required by the constitutional laws of France.[42]

The same position was taken by the Senate in approving the Second Hague Convention of 1907 for the Pacific Settlement of International Disputes.[43] Consequently, it was thereafter necessary to obtain Senate approval of each *compromis*. Such approval was in fact procured in future arbitrations such as the famous North Atlantic Fisheries Case.[44]

Despite the Senate's unwillingness to permit the executive to enter into arbitrations under the broad canopy of a comprehensive convention, President William Howard Taft negotiated general treaties of arbitration with France and Great Britain in 1911. Provision was made for the arbitration of all justiciable differences with the stipulation that in case of disagreement "as to whether or not a difference is subject to arbitration," a joint commission would decide.

The Senate objected on the ground that the Joint Commission usurped the powers of the Senate "to pass upon all questions involved in any treaty submitted to it in accordance with the Constitution." In

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[41] Julius W. Pratt, *A History of United Foreign Policy, 1955, p. 454;* Richard W. Leopold, *The Growth of American Foreign Policy*, 1962, pp. 284 et seq. In the period covered by the turn of the century, the enthusiasm for arbitration rose to extraordinary proportions. In fact an annual convention of prominent jurists and other supporters of international arbitration was held every year at Lake Mohawk. Its proceedings, stretching from 1895 to 1916, constitute an eloquent evidence of the faith in arbitration.

[42] Malloy, *supra*, Vol. I, p. 549.

[43] Malloy, *supra*, Vol. II, p. 2247. The pertinent part of the reservation to The Hague Convention has been quoted above in the body of this article on page 571.

[44] Malloy, *supra* Vol. I, p. 835.

view of the Senate's attitude, President Taft refused to pursue the treaties any further.[45]

What is the explanation for the Senate's apparent change in attitude after 1899? A simple answer is hard to find, particularly after a lapse of over sixty years. Undoubtedly, it was a combination of factors. One of these may be that at the turn of the century the Senate became dominated by conservatives.[46] The character of Theodore Roosevelt—who often took matters in his own hands, was not always considerate of the wishes of the Congress, and had an eagerness for foreign adventure—may also have had its influence on the Senate.[47] There were, moreover, a number of subjects that the Senate came to regard as unsuitable for arbitration, such as the Monroe Doctrine, immigration, state debts, the interoceanic canal and tariffs, all of which the Senate

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[45] Herbert F. Wright, "Philander Chase Knox" in *The American Secretaries of State and their Diplomacy*, Vol. IX, pp. 345-348 et seq.; U.S. Congress, Senate Committee on Foreign Relations. *Report of the Committee on Foreign Relations together with the views of the minority upon the general arbitration treaties with Great Britain and France signed on Aug. 3, 1911, and the proposed committee amendments* 62nd Congress, 1st Session, Senate Document 98 (Senate Documents Vol. 30). Theodore Roosevelt, under whose auspices the earlier arbitration treaties with England and France. *The Works of Theodore Roosevelt*, prepared under the auspices of the Roosevelt Memorial Foundation, Vol. XVIII, pp. 418 et seq. (1925).

According to George E. Mowry, in *The Era of Theodore Roosevelt 1900-1912* (1955), at page 279: "Blithely overlooking his stout defense of arbitration a few years back, he (Roosevelt) exerted himself in opposition as he had in few other instances after leaving office."

[46] See Mowry, *supra*, p. 115

[47] It is too much to expect to find an official Congressional Statement indicating that the position of the Senate concerning arbitration was influenced by personal distrust of the Executive. Nevertheless the minority report of the Senate Foreign Relations Committee on the pending arbitration treaties came quite close to expressing that sentiment. The minority, it should be pointed out, was a minority because it wanted the treaties rejected altogether on the ground that they were an unwarranted extension of Article XIX of the Hague Convention I. If, however, the treaties were to be approved, the minority, in accord with the majority, wanted every *compromis* submitted to the Senate. They adverted to the limitations of the treaty power and referred to the authors of the Constitution saying: "They therefore feared that a President, especially if he happened to be by nature of a strenuous and militant disposition, would rather court opportunities to involve his country in foreign quarrels than to seek to preserve peaceful and harmonious relations with all the world." (Senate 58th Congress, 3rd Session, Document No. 155, p. 8.) Later in the report the minority returned to the subject in these words, "It would, perhaps, require greater restraint than Americans of this generation seem to have to cause the President to decline such autocratic powers [submitting controversies to arbitration] in settling differences with foreign governments and stronger powers of self restraint or self abnegation than are practiced by European rulers, to resist this despotic rule when adopted by World Powers." (*Id.*, p. 19)

Considering the necessities of Senatorial courtesy and the respect due the President, the language probably went as far as it could to express the distrust of the Senate, or at least of an important segment thereof.

It is interesting that Roosevelt himself was forthright in his views of the Senate. In a letter of March 23, 1905, he said: "I do not much admire the Senate because it is such a helpless body when efficient work for good is to be done." Joseph B. Bishop, *Theodore Roosevelt and His Time*, 1920.

considered to be of domestic concern. This mistrust of arbitration may have been stimulated by the realization that on some of the topics just mentioned, Congressional action might have made the United States vulnerable in international law. Thus the Chinese exclusion act of 1879, vetoed by President Harrison, had been passed in violation of the Hay-Burlingame Treaty with China.[48]

Moreover, the states of the Union could not be sued in the courts of the United States on defaulted debts, which meant that a foreign creditor's only recourse was to diplomatic interposition or arbitration.[49] At one point, there was a move afoot in Congress to build an interoceanic canal in defiance of the Clayton-Bulwer Treaty which provided for joint British and American participation in such a venture.[50]

Given sufficient authority, Roosevelt could conceivably have submitted a dispute on one of the delicate subjects to arbitration, particularly in view of his professed interest in arbitration.[51] It is not too far-fetched to suppose that as a consequence, the leeway that the Senate might have extended to the relatively moderate and cautious McKinley was not extended to the headstrong Roosevelt. Taft was not an aggressive president, but by the time he took office the pattern had been established, and mistrust of the executive had been engendered.

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[48] (Thomas A. Bailey, *A Diplomatic History of the American People*, 1964, p. 394.) While the act in question did not come into being because of the Presidential veto, other acts aimed at Chinese immigrants did come into force. The Act of October 1, 1888 prohibited the re-entry of certain Chinese. When it was pointed out that the Act contravened the provisions of earlier treaties, the Supreme Court said: "It must be conceded that the Act of 1888 is in contravention of express stipulations of the Treaty of 1868 and of the supplemental treaty of 1880, but it is not on that account invalid or to be restricted in its enforcement." The Chinese Exclusion case, Chao Chan Ping v. United States, 130 U.S. 581, p. 600 (1889). One can imagine how much consideration would have been given to the American statute in an international tribunal.

[49] Monaco v. Mississippi 292 U.S. 313 (1934) is the leading case on the subject. While considerably later in point of time than the period of the Roosevelt administration, it largely reiterates previously accepted views. Of interest in this connection are the views of Judge Jessup as expressed in his book, *International Security*, 1935: "This Senatorial attitude was inspired in large part by the fear of Senators from the Southern states that the President might submit to arbitration the liability of their states to pay their repudiated bonds."

[50] Bailey, *supra*, p. 486.

[51] As previously indicated, Roosevelt had made an election promise to sponsor a series of bilateral pacts requiring arbitration in certain classes of dispute. At the 1907 Hague Conference, "Choate was instructed to support obligatory arbitration as broad in scope as now appears to be practicable." Howard K. Beale, *Theodore Roosevelt and the Rise of America to World Power*, 1956, p. 350.

There seems little doubt that Roosevelt considered himself a man of peace–a belief that was fostered by his receipt of the Nobel Peace Prize.

After the turn of the century, the Senate seems to have been favorable to arbitration as a principle, but remained quite unwilling to commit the United States in advance to arbitrate matters related to what the Senate considered vital interests. The Latin American pecuniary claims treaty was obviously considered to be of a technical character so it did not meet with opposition either originally or at the time of renewal.

World War I and the Inter-War Years

During the First World War, the efforts to promote arbitration were largely set aside. The Pan American nations did discuss the problem, however, and there were two or three arbitrations conducted during the war.[52] The European nations were quite naturally oblivious to anything but the grand design of winning the war. The one recorded arbitration involved the internment of German warships by the Netherlands.[53]

After the war, emphasis was placed on international adjudication rather than on international arbitration. Attention was directed primarily to the newly-created Permanent Court of International Justice, more familiarly known as the World Court.

After an initial hesitation, it looked as if American participation in the World Court would be assured by popular feeling and the skillful ministrations of Elihu Root. The stumbling block proved to be the fifth reservation insisted on by the Senate as a condition to American membership in the Court. That reservation severely limited the right of the League of Nations to ask the World Court for an advisory opinion over American objections. The long story of the fight over that reservation, and the effect that it had in keeping the United States out of the Court is covered elsewhere, and is too complicated to recapitulate or even to summarize, in this article.[54] A noteworthy fact is that the fifth reservation had the support of Judge John Bassett Moore. Judge Moore, who sat on the Court as the first American judge,

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[52] *Proceedings of the Second Pan American Scientific Congress. Section VI. International Law. Public Law and Jurisprudence,* Washington, G. P. O. (1917). Vol. VII, pp. 153, 162, and 177, 218 and 241. Stuyt, *Survey of International Arbitrations* 1794-1938 (1939), pp. 331-333.

[53] Stuyt, *supra,* p. 334.

[54] See Manley O. Hudson, *The Permanent Court of International Justice* (1964), pp. 211 et seq.; Danna Frank Fleming, *The United States and the World Court* (1945); and David Jayne Hill, *The Problem of a World Court* (1927), pp. 130 et seq.; Quincy Wright "The United States and the Permanent Court of International Justice," 21 AJIL (1927), pp. 1-26.

and was rightly regarded as one of the foremost international jurists of his day, opposed advisory opinions. He had expressed his views in a long memorandum of February 28, 1922.[55] At the time of the debate in 1925, Judge Moore apparently collaborated with the members of the Senate in preparing the reservations.[56] Moreover, on January 18, 1926, Senator William E. Borah put into the record another memorandum by an undisclosed jurist, which has generally been attributed to Judge Moore.[57] As a consequence, American entry into the Court was conditioned on the acceptance of the fifth reservation by the existing members of Court. That acceptance was not forthcoming, at least not in a form acceptable to the Senate.

It is an anomaly that a judge on the Court—one of its strongest supporters—was instrumental in suggesting conditions which effectively precluded American participation in the Court. It is, of course, impossible to determine whether, without Judge Moore's intercession, the fifth reservation would have been adopted by the Senate, since there was considerable hostility to the Court in any event. It may well be, however, that Judge Moore's influence was decisive at the critical time. Later attempts were made to have the United States declare its adherence to the Court, but none of them succeeded.[58]

Between the two wars, the United States participated in several arbitrations.[59] The Executive also endeavored to initiate a new series of arbitration treaties. Once again this effort ran into the obstacle of

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[55] The memorandum is reproduced in the *Congressional Record*, Vol. 67, p. 1427 (Jan. 4, 1926).

[56] *New York Times*, January 28, 1926, p. 1.

[57] *Congressional Record*, Vol. 67, p. 2293, Fleming, *supra*, p. 61 says: "Though some sense of propriety prevented Moore from signing the document and denied Borah permission to say who wrote it, no one could think of any other 'well known jurist . . . in official life.' " Without saying so in so many words, Judge Manley O. Hudson seems to concur that the jurist in question was Moore. See footnote at the bottom of page 212 of Manley O. Hudson, *The Permanent Court of International Justice*, 1934. Quincy Wright also refers to the influence of the unknown jurist in his article "The United States and the Permanent Court of International Justice," 21 AJIL 1 (1927), p. 6.

[58] A good short chronological account of the final defeat of the Court proposal may be found in *The United States in World Affairs. An Account of American Foreign Relations 1934-1935* (1935), pp. 220-224.

It should be noted that during this entire time there was never any question of the acceptance of the compulsory jurisdiction of the Court.

[59] The various inter-war arbitrations in which the United States participated are summarized by Stuyt, *Survey of International Arbitration 1794-1938* (1939), on pp. 346, 351, 352, 365, 372, 374, 376, 377, 387, 388, 397, 404, 405, 408, 411, 413, 418, 419, 426, 427, 430. Included among the arbitrations summarized, are the famous *I'm Alone* case with Canada, the arbitrations with Mexico, Guatemala and Panama, and several arbitrations with European nations such as Sweden and the Netherlands.

Senate reluctance to forego the last word in determining whether a dispute should be submitted to arbitration. History repeated itself—a large number of treaties were negotiated, including a general Pan-American Treaty, but they remained largely meaningless since each *compromis* had to be approved by the Senate.[60]

The cautious attitude of the Senate can probably be explained at this time by the current isolationism, the natural reluctance of the Senate to surrender an authority it had asserted twenty years earlier, and its continued disinclination to assume a broad commitment to arbitrate any and all questions which might arise in the future.

Arbitration and Adjudication in the Post-World War II Period

Once more war intervened to relegate to post-war planning, any general effort to promote the rule of law in international affairs.[61] In the immediate post-war years, hopes were centered on the International Court of Justice which the United States helped to create on the foundation of the former Permanent Court of International Justice. The adjudication, rather than the arbitration, of disputes seemed to be the preferred solution.

There were some arbitrations, but they were significantly few in number. In the more than twenty years which have elapsed since the end of hostilities, there have been only five arbitrations concluded, or in process, to which the United States has been a party—one each under the Treaties of Peace with Italy and Japan, one each interpreting the Air Transport Services Agreements with France and Italy respectively, and the Gut Dam arbitration with Canada.[62] The latter three are of recent vintage, so that for about twenty years the United States was not a party to any arbitral procedures other than the rather *sui generis* circumstances of the Treaties of Peace.

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[60] Julius W. Pratt, *A History of United States Foreign Policy*, 1955, pp. 533-535; J. W. Garner, *The New Arbitration Treaties of the United States*, editorial comment in 23 AJIL 395 et seq. (1919). Included among the arbitration treaties indicated in the text, was the General Treaty of International American Arbitration signed on January 5, 1929. (4 Trenwith, *Treaties, Conventions, International Acts, Protocols and Agreements between the United States and other Powers 1923-1937*, continuing Malloy as Vol. IV.)

[61] The United States did participate in the Arbitration Agreement of December 29, 1944, concerning Italian warships detained in Spanish ports. (United Nations, *Reports of International Arbitral Awards*, Vol. XII, pp. 1 et seq.)

[62] The first was the arbitration with Italy which lasted for many years. It concerned property losses suffered by American nationals as the result of the war. The arbitration was based on Articles 78 and 83 of the Treaty of Peace, and the several agreements supplemental thereto. (61 Stat. 1245: at 1403 and 1410 respectively; 61 Stat. 3962; 63 Stat. 2416; 8 U.S.T., 1725; and 11 U.S.T. 904.) For citations to the work of the Italian-United States Conciliation

One might suppose that an important reason for the relatively meager number of arbitrations, is that the judicial process had been substituted for the arbitral process. While it is probably true that the very existence of the International Court of Justice has acted to discourage any general effort to promote arbitration, on the ground that adjudication by an established court is preferable to arbitration by an *ad hoc* body, the United States has shown little active interest in the actual use of the International Court of Justice. The only times it has appeared as plaintiff have been to press claims against Communist nations based on various aerial incidents. It was a foregone conclusion, in most cases at least, that the defendant state would deny the jurisdiction of the court. This arouses the natural suspicion that the suits were brought essentially as gambits in the cold war, rather than in the serious expectation of obtaining judgments. In two cases, the United States has been defendant.[63]

Commission and its sister commissions see Bishop, *International Law; Cases and Materials,* 1962, p. 703. The corresponding arbitration with Japan was held under the provisions of Articles 15 and 22 of the Treaty of Peace with Japan (3 U.S.T. Part 4 3183 and 3188 respectively) and the Agreement of June 19, 1952 (3 U.S.T. Part 4, 4054.) For citations to material on the commission see Lionel M. Summers and Arnold Fraleigh, "The United States-Japanese Property Commission" 56 AJIL 407 (1962) and Kumao Nishimura, "On Decisions of the United States-Japanese, the Anglo-Japanese and the Netherlands-Japanese Property Commissions," *The Japanese Annual of International Law.* 1962, p. 39. Some of the decisions of the two commissions, as well as certain pertinent documents, are reproduced in United Nations, *Reports of International Arbitral Awards,* Vol. XIV.

The arbitration with France involved the interpretation of the Air Transport Services Agreement in accordance with Article X of the Agreement of March 27, 1946 (61 Stat. 3445), as extended and amended, and was based on the *Compromis* of Jan. 22, 1963 (14 U.S.T. 120). The decision is summarized in 58 AJIL 1016 (1964).

The arbitration with Italy also involved the interpretation of an Air Services Transport Agreement. There is, however, some question whether this is a real arbitration, since the decision was not binding. In fact, Italy refused to abide by it. See Paul B. Larsen, "The United States-Italy Air Transport Arbitration; Problems of Treaty Interpretation and Enforcement." 61 AJIL 496 (1967).

The pending arbitration with Canada (see note 20) is discussed by Richard B. Lillich, "The Gut Dam Claim Agreement with Canada," 59 AJIL 892 (1965). See also "Case Commentaries," *The International Lawyer,* Vol. I, p. 489 (1967).

Possibly the relatively recent decision of the Arbitral Commission on Property, Rights and Interests in Germany holding that American nationals had a right to make claims before the Commission, offers a new forum for arbitration to American interests. 60 AJIL 329 (1966).

The United States tried unsuccessfully to arbitrate the property damage claims resulting from the war, against Bulgaria, Hungary and Romania. The claims against Bulgaria and Romania were finally settled by lump-sum agreements. 14 U.S.T. 969 and 11 U.S.T. 317, respectively.

[63] The record indicates that the United States has been plaintiff in six cases, all against communist adversaries. In two cases it was the defendant. The documents relating to the various cases are of course available in the I.C.J. publications. For a quick survey, it is much simpler, however, to consult the little pamphlet published by the United Nations Office of

The picture, although discouraging, is not altogether bleak. Even though arbitration and adjudication have certainly not been pressed, the principle that disputes should be settled by legal means has not been forgotten completely. Quite frequently, treaties and other international disputes have included clauses which provide for the adjudication or arbitration of disputes arising under such agreements. Sometimes the agreements give the parties a choice between arbitration and adjudication.[64]

The Connally Amendment

It would be an exaggeration to say that the meager use of arbitration and adjudication has escaped comment. Nevertheless, the bulk of the post-war discussion on the legal settlement of disputes has centered on the Connally Amendment, which limits the submission of the United States to the compulsory jurisdiction of the International Court of Justice. Specifically, the Amendment, which is a proviso to the acceptance by the United States of the "optional clause," stipulates

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Public Information, 6th ed., entitled *The International Court of Justice.* See, in particular, cases 6, 13-14, 15, 18, 24, 28, 31. One other case, that of the monetary gold removed from Rome, peripherally involved the United States, *supra* case 11.

[64] In a letter dated November 5, 1964 from the Department of State, the author was advised that: "For a multilateral treaty the United States usually strongly supports the inclusion of a provision calling for referral of disputes to the International Court of Justice at the request of any party to the dispute. This Government has become a party to 18 multilateral treaties and 20 bilateral treaties containing provisions for submission of disputes to the International Court." The list of treaties accompanying the above-quoted letter is too extensive to quote even in a footnote. Suffice it to say, that the first multilateral treaty referred to in that list is the Protocol on military obligations in certain cases of double nationality, of April 12, 1930, 50 Stat. 1317, and the last is the Antarctic Treaty, 12 U.S.T. 794.

In 1967, a similar list was published on page 50 of the Hearings Before a Subcommittee on Foreign Relations, United States Senate, 90th Congress, 1st Session, on certain Human Rights Conventions. The agreements in question were discussed by Ambassador Goldberg and Senator Hickenlooper.

See also Wm. W. Bishop and D. P. Myers, *Unwarranted Extension of Connally-Amendment Thinking,* 55 AJIL (1961), pp. 135-145, which gives references to many of the treaties in question. A list of "Treaties and other International Agreements containing Provisions for Submission of Disputes to the International Court of Justice," was also included in the Congressional Record of May 26, 1960, Vol. 106, Part 9, p. 11194.

As indicated in the text, some agreements provide for alternative procedures. For example, Article XIII of the International Convention for the Prevention of Pollution of the Sea by Oil, 1954, provides: "Any dispute between Contracting Governments relating to the interpretation or application of the present Convention which cannot be settled by negotiation shall be referred at the request of either party to the International Court of Justice for decision unless the parties in dispute agree to submit it to arbitration. 12 U.S.T., pp. 2998-3000. 61 Stat. 1218.

Somewhat similar is Article 64 of the Proposed Convention on the Settlement of Investment Disputes Between States and Nationals of other States. (See Ex. A, 89th Cong., 2nd Session.)

that the declaration accepting the compulsory jurisdiction of the Court shall not apply to: ". . . disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America *as determined by the United States of America.*"[65] (Italics supplied.)

The International Court of Justice has ruled in the Norwegian Loans case (France and Norway) that if a plaintiff state has conditioned its acceptance of the compulsory jurisdiction of the Court by a Connally-type amendment, the defendant state may also, on a basis of reciprocity, determine that the question is a domestic one and therefore exempt itself from the competence of the court.[66] As a consequence, the optional clause has been limited in its operation.

Three Presidents of the United States, the Secretary of State, the American Bar Association, several committees of the White House Conference on International Cooperation, and many jurists and political scientists have deplored the Connally Amendment and have expressed the wish to see it abolished or at least restricted. There seem to be four ways of attaining that objective in whole or in part, namely:

1. To annul the amendment completely and accept the jurisdiction of the Court without equivocation;

2. To change the statute of the Court to make it more difficult

[65] 61 Stat. 1218. The literature on the Connally Amendment has reached formidable proportions. Citations to many of the articles on the subject are given in William W. Bishop, *International Law–Cases and Materials, 2nd ed., 1962, pp. 64-65, and by Gerhard Von Glahn Law Among Nations,* 1965, p. 473. It is interesting that Morton A. Kaplan and Nicholas DeB. Katzenbach have said, in reference to the American submission to the jurisdiction of the International Court of Justice: "Obviously this submission, as qualified above, is a fraud and on that ground alone, should be withdrawn. The United States should be the more embarrassed that this form of submission has been widely copied by others." *The Institutions of International Decision-Making in Legal and Political Problems of World Order,* compiled and edited by Saul H. Mendlovitz, 1962, p. 322. For accounts contemporary to the adoption of the Connally Amendment see Francis O. Wilcox, *The United States Accepts Compulsory Jurisdiction,* 40 AJIL, pp. 699-719 (1946); and Lawrence Preuss, *The International Court of Justice, the Senate, and Matters of Domestic Jurisdiction,* 40 AJIL, 720-736 (1946).

[66] The Norwegian Loans Case before the I. C. J. involved the espousal by the French Government of the claims of French bondholders against the Norwegian Government. France had conditioned its acceptance of the compulsory jurisdiction of the Court by a Connally type amendment. As summarized in the little pamphlet issued by the United Nations, entitled *The International Court of Justice,* referred to *supra,* note 64, "the Norwegian Government was therefore entitled, by virtue of the condition of reciprocity, to invoke in its own favor the amendment contained in the French declaration which excluded from the jurisdiction of the Court differences relating to matters which were essentially within the national jurisdiction as understood by the Government of the French Republic." (6th edition, p. 25.) For the actual report, see Case of Certain Norwegian Loans, 1953, I. C. J. Rep. 9. Following the Norwegian Loans Case, the French, obviously seeing the disadvantage of their position, replaced "its original reservation in July, 1959, by a somewhat more circumscribed reservation." Von Glahn, *supra,* p. 474.

for a nation to assert that a question before the Court is one of purely domestic concern;

3. To refrain from determining unilaterally that a question is of domestic concern, and seek to have other nations exercise similar restraint; and

4. To include clauses in current treaties, providing for compulsory submission to the Court of disputes arising under such treaties. Such clauses would prevail *pro tanto* over the amendment.

The first solution has the support of Secretary of State Rusk and many advocates of internationalism. On Nov. 14, 1964, Secretary Rusk said:

> The United States would like to see more nations submit to the compulsory jurisdiction of the Court. In this connection, I should add that the present administration, like its predecessors, would like also to see the Connally Amendment repealed. Finally, we regret the reluctance of U.N. members to accord the International Court of Justice compulsory jurisdiction to settle disputes arising from treaties concluded under the auspices of the United Nations.[67]

The principal obstacle to the direct and simple approach of outright repeal is that it may be difficult to persuade the Senate to reverse its course. There is an appreciable segment of public opinion which regards the Connally Amendment as a safeguard against the Court, which is pictured as a devouring dragon supposedly dominated by sinister foreigners and scheming communists.[68] The fact that no one nation has more than one judge on the Court and that the Communist bloc is meagerly represented on the Court is not given any weight. Myths are more important than realities.

The second approach is epitomized and illustrated by the efforts of Mr. Eberhard Deutsch, Editor of this Journal and a prominent and influential member of the American Bar Association. He has suggested a number of reforms in the Statute of the Court. He would give the Court

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[67] The Department of State Bulletin, Vol. LI, p. 803 (Dec. 7, 1964). Previously, in his State of the Union Message of Jan. 7, 1960, President Eisenhower had urged repeal of what he termed "our present self-judging reservation." *Congressional Record,* Vol. 196, Part 1, p. 144.

Strangely enough, despite the views expressed by the executive, no formal request for repeal has been made to the Congress by either the President or the Secretary of State (from Committee of Foreign Relations, United States Senate, *Memorandum—Status of the Connally Amendment,* Feb. 17, 1965, which is a brief memorandum kindly supplied to the author by Senator Fulbright.)

[68] At the "Hearings Before the Committee on Foreign Relations, United States Senate . . . on S. Res. 94." 86th Congress, Second Session (Compulsory Jurisdiction, International Court of Justice), Mrs. Wilson King Barnes, Chairman, National Defense Committee,

compulsory jurisdiction over all international disputes. A nation would nevertheless be permitted to raise the defense that the Court lacked jurisdiction on the ground that the controversy was within the domestic jurisdiction of that nation; but in such an event the plea could be overruled only by a concurrence of ten judges, that is, by two-thirds of the existing membership of the Court.[69] The plan has won unanimous endorsement of the House of Delegates of the American Bar Association. It has great merit in that it provides a certain assurance to those persons who are fearful of foreign domination by requiring a weighted majority to overrule a plea of domestic concern. Moreover, while trying to enlarge the compulsory jurisdiction of the Court, it also strives to remedy some of its other shortcomings. The main difficulty in pursuing this course is that an amendment of the Statute under Article 69 has to be agreed by some eighty-odd nations, including the five permanent members of the Security Council. Such agreement is, needless to say, extremely difficult to obtain, particularly when the world is torn apart by ideological differences.

The Connally Amendment stipulates (Supra, text, note 15) that the United States of America will determine for itself which questions are of domestic concern. Obviously, however, there must be a spokesman for the United States, that is, some organ of the government must make the determination that the compulsory jurisdiction clause does not apply to a particular dispute because of its domestic connotations. Clearly the Department of State is that organ. It is *not* under an obligation to refer each *compromis* to the Senate, as it is under the 1907 Hague convention.

National Society Daughters of the American Revolution, testified (page 156): "Sitting with the International Court of Justice are judges from communist-dominated countries. Everything that serves the interest of the Communist Party is legal. Therefore, a non-communist state which is a party to a case before this court cannot expect an unbiased judgment. Communist judges in accordance with party policy directives could be counted on to propagate Communist isms and purposes in reaching decisions of the Court."

The author has before him a copy of Manion Forum–Weekly Broadcast No. 566, August 8, 1965, whose title is self-explanatory. It is "The World Court–A Potential Giant that Could Smother American Freedom."

It is hard to say how widely the feelings epitomized above are held. Certainly, they reflect the feelings of an important segment of the electorate.

The committee voted to postpone action on S. Res. 94–the repeal resolution–on March 29, 1966.

[69] The proposed plan had the support of Senator Long of Louisiana, who inserted in the Congressional Record the text of the suggested revision of the Statute, together with a copy of an article by Mr. Deutsch on the subject which had appeared in the June 1963 issue of the *American Bar Association Journal. (Congressional Record,* Vol. 109, Part 9, pp. 11255 et seq., June 20, 1963.) See also his article entitled "A Judicial Path to World Peace" in December 1967 issue of the *American Bar Association Journal* (53 ABAJ 1115).

It would seem that the Department could take some of the unnecessary sting out of the amendment by interpreting it in a reasonable manner, and not claiming that every issue presented is one of domestic concern. Actually, if reasonable interpretations were given, there would be little quarrel with the clause, which, if not abused, is consistent with Paragraph 7 of Article 2 of the "United Nations Charter" providing:

> Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the members to submit such matters to settlement under the present Charter."

Since several other nations have also adopted clauses like the Connally Amendment,[70] and since any nation sued by the United States can invoke the "Reverse Connally Amendment," the decision of the United States to adopt a reasonable approach might not be the answer in every instance. It would, however, be persuasive. Moreover, in a proper case it might be permissible to argue the issue before the International Court of Justice, and to maintain that a nation does not have the right to give an exaggereated scope to the concept of domestic jurisdiction. That tactic was in effect adopted at the beginning of the case initiated by the United States against Bulgaria for the destruction on July 27, 1955, of an Israeli airline carrying American nationals. Later, the American position changed, and the Bulgarian contention was admitted.[71] It is difficult to foresee what decision the Court would make, if such an argument were raised, but taking into consideration the dislike with which the clause has been regarded by some members

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[70] The nations having a Connally type amendment appear to be Liberia, Mexico, Pakistan, Sudan and South Africa. Other nations, however, have reservations on a somewhat similar order. See Von Glahn, cited *supra* note 66, pp. 473 and 474, and "Hearings" cited *supra* No. 69, pp. 304 et seq. See also Ibrahim F. I. Shihata, *The Power of the International Court to Determine its Own Jurisdiction*, 1965, p. 272.

[71] The request of the Agent of the United States for the withdrawal of the case reads:

"In accordance with Article 69 of the Rules of Court, I ask that you advise the Court that the Government of the United States requests the discontinuance of the proceedings and the removal of the case from the Court's List.

This request is made as a result of further consideration of questions of jurisdiction raised by the foregoing Statement of Preliminary Objections and the Written Observations filed in response thereto. In that part of the Written Observations which relates to the second preliminary objection of Bulgaria, a contention was advanced on behalf of the United States with respect to reservation (b) attached to the acceptance by the United States of the jurisdiction of the Court. That contention was to the effect that reservation (b) did not authorize or empower Bulgaria to make an arbitrary determination that a particular matter was essentially within its domestic jurisdiction. The necessary premise of the argument was that the Court must have jurisdiction for the limited purpose of deciding whether a determination under reservation (b) is arbitrary and without foundation. On the basis of further study and

of the Court,[72] it is at least possible that an argument contending for a reasonable interpretation of the concept of domestic jurisdiction would be sustained.

The position taken by the Department of State in the Bulgarian case furnishes some indication that its own indecisiveness may have contributed to prevent a better and more prolific use of the media of legal settlement, and demonstrates that not all of the blame should be cast on the Connally Amendment.

A more promising path to mitigating some of the severity of the Connally Amendment may lie in the insertion of clauses in contemporary treaties agreeing that disputes arising thereunder are to be

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consideration of the history and background of reservation (b) and the position heretofore taken by the United States with respect to reservation (b) in litigation before the Court, it has been concluded that the premise of the argument is not valid and that the argument must therefore be withdrawn. As it was declared by the United States to this Court in the Interhandel Case (Switzerland vs. United States), when the United States has made a determination under reservation (b) that a particular matter is essentially within its domestic jurisdiction, that determination is not subject to review or approval by any tribunal, and it operates to remove definitely from the jurisdiction of the Court the matter which it determines. A determination under reservation (b) that a matter is essentially domestic constitutes an absolute bar to jurisdiction irrespective of the propriety or arbitrariness of the determination. Although the United States has adhered to the policy of not making any arbitrary determination under reservation (b), the pursuit of that policy does not affect the legal scope of the reservation. Under the rule of reciprocity applied by the Court in the case concerning Certain Norwegian Loans (France vs. Norway), Bulgaria is accorded the same rights and powers with respect to reservation (b) as the United States. Accordingly, the Government of the United States withdraws that part of its Written Observations and Submissions which relates to the second preliminary objection of Bulgaria.

Very truly yours,
(Signed) Eric H. Hager"

I. C. J. Pleadings Aerial Incident of 27 July 1955 (Israel v. Bulgaria; United States of America v. Bulgaria; United Kingdom v. Bulgaria). p. 677.

An interesting discussion of the Bulgarian case is contained in Herbert W. Briggs, "United States v. Bulgaria; Domestic Jurisdiction and Sovereign Determinations of Legal Irresponsibility" in *Melanges Offerts a Henri Rolin*, 1964, p. 13.

In the case involving Rights of American Nationals in Morocco, the United States did not invoke the Connally Amendment. According to Judge Manley O. Hudson, "it was stated by the Department that 'the United States is committed to submit to the compulsory jurisdiction of the Court in cases of this type.' " "The Twenty-Ninth Year of the World Court." 45 AJIL at page 28 (1951).

In the Interhandel Case, 1959 ICJ, Rep. 6, the United States did raise the defense of the Connally Amendment as noted in the above quotation from the record of the Bulgarian case. The United States also objected to arbitration of the dispute under the United States-Swiss Treaty of Arbitration and Conciliation. Herbert W. Briggs, "Towards the Rule of Law?" 15 AJIL 517 (1957). But see Sidney B. Jacoby, "Towards the Rule of Law?" 52 AJIL 107 (1958).

[72] References to the decided views of Judge Lauterpacht are contained in Leo Gross, "Bulgaria Invokes the Connally Amendment," 56 AJIL 356 at pages 358-360 (1962).

subject to the jurisdiction of the Court. There are by now a number of such treaties, both bilateral and multilateral.[73] One of the more recent of the former is the consular convention with Korea.[74] It is quite evident from the hearings on that convention held by the Senate Foreign Relations Committee, that the Senate was fully aware that it and similar treaties constitute, as one Senator described it, an erosion of the Connally Amendment.[75] Yet the Senate approved the treaty. Given time and perseverance on the part of the Department of State, there may be enough clauses included in various treaties to vest considerable compulsory jurisdiction in the Court.

Admittedly, Senate approval of a treaty containing a compulsory jurisdiction clause may not be indicative of the true attitude of the Senate. A treaty might be approved despite the clause, under the belief that its elimination would necessitate the re-negotiation and possible loss of a treaty which has many desirable features.[76]

The same reasoning would not apply when the compulsory-jurisdiction language is to be found in an optional protocol accompanying a treaty rather than in the body of the treaty itself. In fact, the Senate in 1960 disapproved the optional protocol on the compulsory settlement of disputes which accompanied the Conventions on the Law of the Sea.[77] More recently, however, it approved the

[73] See note 64, *supra*

[74] Consular Convention between the United States of America and the Republic of Korea, 14 UST 1639 part 2, 11963. See in particular Article 16. See also the Senate Committee on Foreign Relations Report on the earlier Treaty of Friendship, Commerce and Navigation with China, May 26, 1948 (80th Congress, 2nd Session, Senate Ex. Report No. 8). The Committee stated "that article XXVIII, limited in scope as it is to questions relating to the interpretation or application of this particular treaty, is not inconsistent with the provisions of Senate resolution 196 [the Connally Amendment]. In fact, questions likely to arise under the treaty are matters which the United States would normally want to have submitted to the Court."

The most recent expression of the views of the Senate is contained in the Report on the Supplementary Slavery Convention, 90th Congress, 1st Session, Executive Report No. 17, October 31, 1967 on pp. 4-5.

[75] Senate, 88th Congress, 1st Session, Report No. 6, pp. 11 and 12.

[76] For example, the compromissory clause of Article XIII of the International Convention for the Prevention of Pollution of the Sea by Oil, quoted in note 64 *supra* was embodied in the convention itself.

[77] The discussion of the optional protocol on the floor of the Senate is very interesting. It is carried on pages 11172 to 11196 of Vol. 106, Part 9 of *The Congressional Record* of May 26, 1960. In the first instance, the protocol was approved. The Senators from South Carolina and Virginia asked for reconsideration. On reconsideration, the votes were yeas–49; nays–30; not voting–21. From the debate, it is quite clear that some of the Senators were opposed to a relaxation of the Connally Amendment in a broad context. Senator Cooper, however, said: "I voted against the ratification of this treaty because it was not brought before the Senate for debate." It is conceivable that the protocol would have been adopted if the record had been less confused.

optional clause on the compulsory jurisdiction of the International Court of Justice accompanying the Vienna Convention on Diplomatic Privileges and Immunities.[78] A possible explanation for the apparent contradiction is that the "Conventions on the Law of the Sea" are much broader in scope and relate more to matters of traditional concern than the "Convention on Diplomatic Privileges and Immunities," and that the Senate was influenced once more by its distaste for agreements having a comprehensive impact. It does seem, nevertheless, that the Senate is by no means adamant in insisting on adherence to the strict letter and spirit of the Connally Amendment.

The discussion of the Connally Amendment and its consequences could be carried on almost indefinitely. The time has come, however, to see whether any consistent pattern can be detected in the relations between the executive and the Senate in the field of international arbitration and adjudication. Needless to say, the stresses and strains of international life and domestic politics render any pattern far from exact. Nevertheless, generally speaking and subject to many exceptions, it is believed that the following tentative conclusions may be drawn:

1. The Executive, despite its protestations of fealty to the rule of law, has not in recent years been particularly vigorous in promoting arbitration or adjudication in individual cases, and could probably exert more of an effort in the future without incurring Senatorial censure.

2. The Senate is, in principle, favorable to the settlement of disputes through international arbitration and adjudication, and is prepared to cooperate with the executive in reaching the desired ends.

3. The Senate is, nevertheless, suspicious of general agreements that might permit international tribunals to assume jurisdiction and render decisions on such broad and sensitive subjects as the interoceanic canal, immigration, or tariffs, and is anxious to preserve the United States from controls that might prove to be embarrassing.

4. The Senate may be particularly loath to relinquish its authority over the arbitration and adjudication of disputes in periods when a strong President is in power, or when isolationist sentiment is running high.

[78] The Senate approved the Vienna Convention including the optional protocol on September 14, 1965 by the following vote: yeas–85; nays–0; not voting–15. *Congressional Record*, Vol. 111, Pt. 18, p. 23783. It would seem that virtually every one of the absentees would have voted yea. The vote was taken even though the executive report specifically stated "the protocol has the effect of eliminating application of the Connally Amendment to a narrow group of cases which might arise only out of disputes as to the meaning or application of this particular convention." *Id.*, p. 23781.

There is a corresponding protocol attached to the pending Vienna Convention on Consular Relations.

5. The Senate, on the other hand, is unlikely to object to an agreement to submit disputes arising under a particular treaty to arbitration or adjudication, especially if the treaty is essentially non-political.

When the situation is examined soberly and without emotionalism, the prospects of cooperation between the Executive and the Senate in promoting the adjudication or arbitration of international disputes is by no means negligible. One has to eat an artichoke leaf by leaf. By analogy, some international problems have to be approached on a leaf-by-leaf basis. International adjudication and arbitration may be one of them. And who will say that this is necessarily a bad approach?