The "World Court" and the United States

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THE United States Senate on January 27, 1926, by a majority of 76 to 17, voted for a Resolution agreeing to the adherence of the United States to the Permanent Court of International Justice. To the Resolution there were attached 5 Reservations, and 2 incidental Resolutions. The Statute of the Court was prepared by a Committee of Experts in 1920, and was adopted with certain modifications by the Assembly and Council of the League of Nations. The protocol signifying adherence to the Statute has been signed by the representatives of some 50 states. Secretary of State Kellogg communicated the action of the Senate to every state which had signed the Court protocol, and each state was asked whether it accepted the Senate Reservations as a "part and condition" of American adherence.

Five countries answered in the affirmative, Cuba, Greece, Liberia, Albania, and Luxemburg, and two states, San Domingo and Uruguay, indicated that their Governments would take favorable action. At the meeting of the Council of the League of Nations on March 18, 1926, Sir Austen Chamberlain, the British representative, suggested that there were technical difficulties in the way of accepting the American Reservations through an exchange of notes. Beyond saying that it was "not usual" to adopt this method, he did not explain what these difficulties were. He added that the Fifth Reservation, which forbade, without the consent of the United States, a request upon the Court by the Council or Assembly for an advisory opinion in a dispute or question in which the United States "has or claims an interest," was capable of an interpretation which would hamper the work of the Council and prejudice the rights of members of the League. In what respect this was so, Mr. Chamberlain did not say. He said that "It is not clear that it was intended to bear any such meaning," and suggested that the correct interpretation should be the subject of discussion and agreement by the member states with the United States. He suggested the framing of a new agreement with the United States after opportunity for discussing with an American representative the questions raised by the Senate Resolution. After March, 1926, no further replies were received from any other country until February, 1927, when the British Government and two others sent replies embodying the terms of the Geneva counter-reservations, presently to be discussed.

The Council, upon Mr. Chamberlain's motion, decided to call a conference of the member nations of the Court and of the United States, to be held in Geneva September 1, 1926, to study "the way in which the Governments of the signatories might accept the 5 reservations and conditions proposed" by the United States. Secretary Kellogg declined an invitation to send a representative to the Conference, with the statement that the Reservations were "plain and unequivocal," and had to be accepted by an exchange of notes between the United States and each of the signatory states.

The representatives of 40 states met in Geneva, and a Report issued from the Conference September 23. Contrary to Secretary Kellogg's view, they concluded that more than an exchange of notes was necessary, as they said, to alter an international treaty like the Statute of the Court. They therefore drew up a new draft protocol, embodying certain declarations, which was to be signed by the United States and the member nations,

and was to supplement the Court Statute. It was agreed that all the member nations would reply to the United States individually but in identical form. The Conference adopted, in answer to the Senate Reservations, certain conclusions by way of counter-reservations, so to speak. These deserve more extended comment.

The Conference accepted the first three Reservations of the Senate unconditionally; namely, (1) that adherence to the Court would involve no legal relations on the part of the United States with the League or the assumption of any obligation under the Treaty of Versailles; (2) the United States was to be permitted to take part in the election of judges in the Council and Assembly on a basis of equality with any member of the League; and (3) the United States would pay a fair share of the expenses of the Court as determined by Congress. The fourth and fifth Reservations were accepted only conditionally. The fourth Reservation provides (1) that the United States may at any time withdraw its adherence to the Court, and (2) the Statute of the Court may not be amended without the consent of the United States. Both as to this and the fifth Reservation, the members seemed to fear that the United States would by these Reservations obtain a privileged position. It was argued that it was not known whether any member could withdraw adherence and the question as to how the Statute was to be amended had never been considered; hence it was not known whether unanimity was required or not. They then conceded the American privilege of withdrawing. In agreeing, however, to the second part of the fourth Reservation, by which the Statute could not be changed without American consent, they added a counter-reservation to the effect that the signatory states, acting together and by a two-thirds majority, should possess the corresponding right to withdraw their acceptance of the American conditions to this part of the fourth and to the entire fifth Reservation, if it were found that the arrangement agreed upon did not yield "satisfactory results." The Conference apparently decided that unanimity was required for a change in the Statute, for in the proposed draft protocol which was to be signed by the member nations and by the United States it is provided that no amendment of the Statute shall be made "without the consent of all the contracting parties." Thus the United States secures a position of equality and not of privilege.

The most serious difficulty was caused by the fifth Senate Reservation which reads:

"That the Court shall not render any advisory opinion except publicly after due notice to all states adhering to the Court and to all interested states, and after public hearing or opportunity for hearing given to any state concerned; nor shall it, without the consent of the United States, entertain any request for an advisory opinion touching any dispute or question in which the United States has or claims an interest."

It must be remembered that the Court has two functions: the actual decision of litigated cases between two or more states, and the rendering of advisory opinions to the Council or Assembly of the League. The latter function has been sharply criticised by leading authorities, including Elihu Root and John Bassett Moore, as not involving a strictly judicial function, for the Court merely advises and does not decide and the decision is not binding on any one. Only by the most careful safeguards, approximating the advisory opinion procedure to that prevailing in ordinary contested disputes, has that procedure been prevented from turning the Court into a function analogous to that of an Attorney-General to the League. Thirteen such advisory opinions have been rendered to the Council, against seven decisions in litigated cases.

The Conference appears to have found the fifth Reservation inexact and puzzling, and expressed regret at the unwillingness of the United States to explain or interpret it; they declared that it was not known whether a request for an advisory opinion requires unanimity on the part of the Council or not, and thus whether the United States' demand involved merely equality with the other members, or a veto power, assuming majority vote suffices. They answered the first part of the fifth Reservation by pointing out that by an amendment in the

Rules of the Court, effected by the Court itself, it was now provided that advisory opinions shall be given after deliberation by the full Court, and after public hearing and notice to all the member states, and the opinion was to be read in open Court. The Reservation by the Senate was induced by the fact that there was known to be some support, both in the Council and the Court, for secret opinions and private hearings. These dangers the Conference believed the Rules of the Court averted, but as these Rules could be changed, the Conference was willing to include in the proposed additional protocol an article to the effect that "the Court shall render advisory opinions in public session."

The second part of the fifth Reservation to the effect that the Court shall not "without the consent of the United States entertain any request for an advisory opinion touching any dispute in which the United States has or claims an interest," proved the most serious stumbling-block to the Conference. So far as concerns disputes in which the United States is a party, it was asserted that no advisory opinion could be asked without the consent of the United States. The Conference cited as authority for this conclusion the decision of the Court in the Eastern Carelia case, in which the Council had asked for an advisory opinion in a case involving Finland and Russia. Russia refused to appear, and the Court by a majority of 7 to 4 refused to render an advisory opinion on that ground. The majority also were supported by the fact that Russia had refused to furnish to the Court any information in the matter, and such information had been suggested by the Council as necessary to enable the Court to reach a conclusion. Had the question submitted by the Council been framed differently, it might have been less easy for the majority to prevail. The fact is, however, that the Council censured the Court, in a printed Report, for its refusal to give the opinion (*Official Journal*, November, 1923, pp. 1335–1337, 1501–1502), and Judge Bustamante, one of the dissenting judges, still maintains in a recent book that the opinion should have been rendered. Had it been given, it would have seriously impaired the position of judicial independence and detachment which the Court must maintain to assure its continued existence. A single decision, reached by a majority of 7 to 4, with a strong dissent, was not deemed by the Senate sufficient assurance for so important and fundamental a principle, in the present state of international relations, that a decision should not be made in a case affecting the United States, without its express consent. The Conference speaks of this as a case in which the United States is a party; possibly they deemed this the equivalent of "has an interest."

But where the United States only *claims* an interest, the Conference objected to the American Reservation, at least, in the absence of more definite knowledge on their part of the procedure necessary in Council or Assembly in the matter of requesting advisory opinions. Advisory opinions can only be requested by the Council or Assembly. Although such opinions had always been requested by the Council (never by the Assembly) by unanimous vote, the Conference maintained that this was not definitely established by any formal act, and while they were willing to grant the United States equality with the states represented in the Council or Assembly, they felt that, if only a majority were required to institute a request for an advisory opinion, the veto power thus demanded by the United States over the submission of a question in which the United States claims an interest would be more than equality, but rather a privileged position not possessed by any other member. The suggestion that the Council ask the Court for an opinion whether unanimity or merely majority was necessary for a request was voted down. The Conference were thus willing to concede equality to the United States, a veto if unanimity was required, but a vote only and no veto if mere majority was required. The Conference proposed the following paragraph in the suggested protocol to cover this point:

"Should the United States offer objection to an advisory opinion being given by the Court, at the request of the Council or the Assembly, concerning a dispute

to which the United States is not a party, or concerning a question other than a dispute between states, the Court will attribute to such objection the same force and effect as attaches to a vote against asking for an opinion given by a member of the League of Nations either in the Assembly or the Council."

This seems reasonable, but in fact it is probable that it will not satisfy the United States Senate. The fact is that it had never been suspected in the Senate or elsewhere that anything but unanimity was required, and inasmuch as this gave every member of the Council an opportunity to prevent the submission of a question for opinion, it was deemed a sufficient protection for the United States. Had it been supposed that questions could be submitted by mere majority vote, it is quite probable that neither President Harding nor President Coolidge would have submitted the World Court protocol to the Senate for consideration, or else that even stronger reservations would have been attached to the Senate Resolution. The fact seems to be that the Senate regards the advisory opinion procedure with considerable suspicion, indeed as a political link between the Court and the Council. The Conference expressed the view that, if majority were sufficient to institute a request for an opinion, the veto power demanded by the United States would hamper the functions of the League, and the rights and duties of the member nations—this by a nation not having the responsibilities of League membership. It is conceivable that Mr. Chamberlain's suggestion that the Reservation might hamper the work of the Council was induced by the thought that other states, not members of the Council but only of the Assembly, like Rumania, might claim the same privilege. But it might well be said that these members of the League had by the Covenant constituted the Council their agent for the purpose of requesting advisory opinions. This the United States, as a non-member, has not done.

The Conference also expressed doubt as to the procedure by which the United States would indicate its claim of interest, whether this would be Executive notification or whether Senate "advice and consent" was necessary. They believed that in the latter event great delay would ensue, to the injury of the advisory opinion function of the Court, which often had to act rapidly. To this suggestion it has been said that inasmuch as the Council or Assembly only reach their unanimous decisions to request an opinion after considerable deliberation and discussion, it would not consume much more time to ask the United States for its assent to the submission of a question in which the United States claimed an interest. Time might be saved, if it was believed that the United States might claim such interest, if the United States were consulted before the Council completed its deliberations. It had been quite usual to except from the arbitration treaties of the twentieth century, including the Franco-British Treaty of 1903, the seven arbitration treaties submitted by President Roosevelt in 1905, and the unratified Taft-Knox Treaties of 1911, the submission of questions involving the "interests of third parties." It had never been determined how such interest was to be established, and it was assumed, it may be inferred, that such third states would claim an interest if they had it. The inclusion of the term "claims an interest" was to make it certain that the United States was the sole judge of the question whether it had an interest. It is also a fact that in the Taft-Knox Treaties of 1911 the British Government had reserved the consent of any dominion Government for the submission of any question involving such Government. The Senate Reservation did not extend the requirement of Senate consent to litigated cases before the Permanent Court, but only to requests by the Council or Assembly for advisory opinions.

The fact seems to be that the United States Senate was reluctant to accept the advisory opinion procedure at all. As it had served the League well, however, it was apparently felt that it should not be hampered, but that it should not be employed by the Council in a matter involving United States interests without United States consent. The original Coolidge reservation that the United States would not be "bound" by any advisory opinion was deemed insufficient

protection, for while no advisory opinion binds anybody, neither Council nor Court nor any State, the opinion has an important effect in moulding public judgment, and often has the effect of a decision. The Senate had observed that Turkey had refused to appear before the Court in the Mosul case, which was converted from a litigated issue between England (Iraq) and Turkey into a request by the Council for an advisory opinion as to its own powers under Article 3 of the Treaty of Lausanne. The opinion rendered nullified the effect of Lord Curzon's express promise to Turkey that no decision would be made by the Council without Turkey's representation on the Council, necessarily unanimous, on which condition Turkey had signed Article 3. The Senate had also been informed that the German minorities in Advisory Opinion No. 6 had been denied by the Council and by Poland the rights which the Opinion of the Court had conceded them. On the whole, therefore, the Senate had looked upon the provision for advisory opinions with some apprehension and was determined to hedge it about so that it could not be used against American interests without American consent. The Reservations, it may be recalled, were written by friends of the Court and not by opponents. The Senate does not apparently insist upon actual hearing for a State unwilling to appear or consent to the submission by the Council of a request for advisory opinion, for it provides that *opportunity* for a hearing may suffice to give the Court jurisdiction.

It was also observed by a number of the Senators that the Council and Assembly had the entire power of initiating opinions, and the United States could be consulted only after it had been decided to request an advisory opinion. The states represented in the Council and Assembly had full opportunity to protect their interests, it was felt, by the deliberations and discussions in those bodies, of which the United States was not a member. The United States wished as nearly similar an opportunity in connection with matters in which it claimed an interest. A member of the Council was not required, in support of a negative vote against a request for advisory opinion, to explain the vote or claim an interest. The United States, on the other hand, would have to explain the nature of its interest and the reasons for its objection, if any, though it was by no means certain that the United States would refuse its consent, temporarily or permanently, to the submission of questions in which it had or claimed an interest. It might indeed help to settle the terms of reference, as France and Great Britain did before the submission of the request for an opinion in the Tunisian Nationality case (Advisory Opinion No. 4). Thus, what the United States sought by the Reservation was not merely equality with any other member of the Council but, as a non-member, equality with the Council itself.

It is not without interest to observe that the Report of the Inter-Imperial Conference at London, published November 20, 1926, makes reservations on behalf of the Dominions of the British Empire not unlike those made by the Senate in the Reservations now under discussion. Throughout the Report of the Imperial Conference it is made clear that neither the British Government nor any Dominion Government shall deal with or decide or submit for decision any question involving the interests of any Dominion without the consent of that Dominion. These constitutional limitations, if they may be so called, relate to Dominion Legislation (IV, C), Appeals to the Judicial Committee of the Privy Council (IV, E), the Conclusion of Treaties (V, A, B), the Signature of Treaties (VI, B), the General Conduct of Foreign Policy (VI, C). With respect to the signature and ratification of the Optional Clause of Article 36 in the Statute of the Permanent Court, providing for the obligatory submission of cases if states so desire, it was deemed "premature to accept the obligation" in question (VIII, A), and each Dominion "was in accord with the conclusions reached," by the Geneva Conference with respect to the conditions upon which the United States desired to become a party to the Court protocol (VIII, B). It is interesting to observe that Sir George Foster, the Canadian delegate to the Geneva Conference, denied to the United States in a world organization

privileges which are claimed for Canada in the British Empire.

President Coolidge has been criticised for his speech at Kansas City on Armistice Day, 1926, in which he indicated that the Senate Reservations would have to be accepted as they stand by the members signatory of the Court protocol, and that he would make no effort to bring about Senate approval of the Geneva counter-reservations. It is not believed that the criticism is altogether justified. President Coolidge had in fact made considerable sacrifices for the Court when he consented to cloture preceding the vote of January, 1926. In the Senate elections of November and in the primaries an affirmative vote on the Senate Resolution had not proved in some sections of the country to be a political asset, and, in fact, some Senators had apparently been defeated on the issue or had recanted. Indeed, there is some opinion to the effect that if the President resubmits the question, it will result in a Senate resolution of withdrawal from the Court. Although the Trammell Resolution of withdrawal was tabled in February, 1927, with the concurrence of opponents of American adherence, this was due to the circumstance that the British reply, just then received, had, instead of accepting the Senate Reservations, embodied the Geneva counter-reservations, and this was regarded as foreclosing American membership.

If the United States is then to become a signatory of the Court protocol, it would seem that the next step must be initiated abroad in a withdrawal of the Geneva counter-reservations. If United States' membership is seriously desired, this could easily be done by an agreement among the member nations upon the necessity for unanimity on the part of the Council or Assembly in requesting advisory opinions. Four words amending Article 14 of the Covenant would effect this. This would but confirm the existing practice, and there seems little reason not to make it a formal rule. The conference agreed to the necessity for such unanimity in the matter of amending the Court Statute; even less change would be required to extend the agreement to cover the existing practice of requesting advisory opinions. Such a formal rule would make practically unnecessary the Geneva counter-reservations. There ought to be no serious objections to the United States withdrawing from the Court if it desires. None of the Great Powers has consented to the obligatory jurisdiction of the Court under Article 36, even in the limited classes of legal issues therein contemplated, and is free to submit or refuse to submit a litigated case. By its presence on the Council it may prevent the submission of a request for advisory opinions. The United States, under the Reservations, would be in the same position. It seems useless to seek to prevent a nation from withdrawing from the Court protocol, if it sees fit.

The only alternative to such a step by the member nations would be the now impractical ones of the United States joining the League of Nations, an acceptance by the Senate of the Geneva counter-reservations, or the withdrawal of the Senate Reservations. None of these measures seems within the realm of practical possibilities. It would thus seem that the only hope of the United States becoming a signatory of the Court protocol lies in a further accommodation by the present signatories to the views expressed by the Senate.

College by Correspondence

THE ADVENTURES OF A PIONEER

BY ANNIE MARION MACLEAN

DUE to the unfriendly offices of that gay dog, Time, I find myself almost a pioneer in a movement recently grown popular. A generation ago an institution of higher learning offering correspondence courses of university grade for credit was looked at askance by those who clung to hoary traditions in education; now the university that does not offer such courses is trying to establish a reasonable excuse. In the meantime, adult education has stepped into the limelight, and here have I been in the midst of it for over twenty years, with never a laurel wreath thrown my way until some months ago when a questionnaire came from a great foundation, suddenly aware of a significant movement, asking, "How do you do it?" or words to that effect. Since then a desire to tell about my own work has been growing rapidly, and now I feel that I have been "repressed" long enough and am going to do it.

My own teaching by correspondence has been done through a great university having now upward of ten thousand students registered in home-study courses. Owing to certain circumstances my work has shifted in the last few years from an avocation to a vocation. The number in my courses seldom falls below one hundred and twenty-five and, on account of the nature of my subject, the students are more or less mature. Many are teachers in important positions, but practically all are men and women working, for one reason or another, for university credit. So much for personnel. As to location, it is everywhere. This is not a story of methods, because it goes without saying that a great university maintains high standards in all its lines of endeavor. On the part of the instructor, courses are prepared and outlined, probably with greater exactness than for classroom instruction, where the give-and-take of spoken language may be depended upon to clear up obscure points. On the part of the student, there is little opportunity to bluff his way through. He must prepare the entire lesson and write his answers to each question. Opportunities for dishonesty are reduced to a minimum. And why, in the name of common sense, should any one undertake anything as laborious as correspondence study to cheat at it? Parents do not send children to school along the inky way; children at considerable sacrifice send themselves. Such work, praise God, has not yet become fashionable. If, and when it does, we may expect to see a full quota of frivolous documents cluttering up the United States mails. Then, of course, we shall need social, athletic, intelligence tests, and what-not to keep them out.

I am free to confess that what may be called the human side of teaching has always interested me most. I am really writing about the by-products of home-study instruction rather than the isms and ologies with which my work deals. My mind is full of the subject I teach, but it is also full of the men and women who operate fountain-pens and typewriters in quest of higher learning.

Twenty-three years ago when I began work by correspondence as a side-line of viva-voce teaching, my subject was considered hardly a suitable one for women. In consequence of this attitude of earlier years, my first student, a foreign gentleman, with more or less uncomplimentary language, sidestepped the course when he found it had been taken over by a mere female. That was at the time a hard pill for me to swallow, now it is a toothsome morsel. Then, as now, my work was ever present. Never a vacation could I take without being accompanied by a trunk full of papers or explaining to students all over creation that their lessons would be delayed for a time. Urgent cases had to