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Sketch of the History of International Arbitration

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A Sketch of the History of International Arbitration

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I. ARBITRATION IN THEORY

Before beginning a survey of the history of cases of international arbitration, it will be of interest to study the early growth of the idea and theory of arbitration as set forth in a number of schemes outlined by political thinkers of the past.[1] An apology for first turning to theory is hardly necessary in the field of international law, because here publicists play such an important rôle, indirectly formulating to a considerable extent the law of the future by means of their writings.

The first evidence of an outlined plan for the arbitration of international disputes dates from the early fourteenth century, about 1306, when Pierre Dubois, a royal advocate of Normandy, wrote a pamphlet in which was developed an elaborate plan for the recovery of the Holy Land.[2] As the success of a Crusade depended on a general peace in Europe, Dubois advocated arbitration to settle outstanding quarrels. The court was to consist of three ecclesiastical

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[1]See Dr. Jacob ter Meulen, *Der Gedanke der Internationalen Organisation in seiner Entwicklung, 1300–1800, passim.* Antonio S. de Bustamante, *The World Court,* Chaps. I–II.

[2]The title of the book was *De recuperatione Terre Sancte.* It was edited by C. V. Langlois in 1891 in the *Collection de textes pour servir à l'étude et à l'enseignement de l'histoire,* No. 9. Some modern writers give the credit for the first scheme to a German ecclesiastic of the twelfth century, Gerohus by name. Dr. W. Evans Darby, for example, states (*International Tribunals,* p. 22, 4th ed., 1904) that "as early as the beginning of the twelfth century Gerohus had propounded his idea for International Arbitration, and this, it would appear, was really the commencement of the movement." But I find it impossible to concur in this opinion. Dr. Darby, although giving no references, undoubtedly takes his data from a treatise by Gerohus, entitled *Expositio in psalmum LXIV, sive liber de corrupto Ecclesiae statu,* which may be found in the *Miscellanea* of Etienne Baluze, II, 197–235, 2nd ed., Lucca, 1761. The core of Gerohus' remarks on the subject of peace consists of the following passage: "Denique in omni militum vel civium guerra & discordia vel pars altera justa, & altera injusta, vel utraque invenitur injusta. Cujus rei veritatem patefacere debet sacerdotalis doctrina, sine cujus censura nulla bella sunt movenda. Sic ergo manifestata justitia, pars justa sacerdotalibus tubis animanda & etiam communione dominici corporis ante bellum & ad bellum roboranda est: quia panis iste cor hominis confirmat, quando pro defensione justitiae vel Ecclesiae aliquid ad pugnam se praeparat; cui pars iniqua resistens, & pacto justae pacis acquiescere nolens, anathematizanda & etiam negata sibi sepultura Christiana humilianda est."

But that this is not the langnage of international arbitration scarcely needs demonstration. It is not the abolition but the sanctification of wars that Gerohus preaches. For a sketch of this interesting priest, see O. J. Thatcher, *Studies concerning Adrian IV.* Decennial Publieations of the University of Chicago, 1903.

judges and six "others," three from each of the two parties to the dispute. From the decision of these men, whose character should be above reproach, there was to be but one appeal,—to the Pope.[3]

About two hundred years after the pamphlet by Dubois, another European raised his voice for arbitration and world peace. Desiderius Erasmus begged the nations to lay down their weapons and turn to Jesus Christ. In his *Querela Pacis* and again in his *Adagia*, under the caption "dulce bellum inexpertis," he called on all true Christians to awake to the folly of war. Speaking of the spoils of battle, he asked whether it was always necessary to rush immediately to arms, merely because ambitious princes craved glory and gain. "The world," he pleaded, "has so many grave and learned bishops, so many venerable abbots, so many grey-haired grandees wise by long experience, so many councils, so many senates instituted not in vain by our ancestors. Why should not the childish quarrels of princes be settled through the arbitration of these learned men?"[4]

Erasmus found a spritual descendant in Émeric Crucé, a little-known French theorist of the early seventeenth century. His book, *Le Nouveau Cynée*, published in 1623, fifteen years before Sully's memoirs, may be regarded as the first modern expression of a genuine plan for international arbitration. Crucé, echoing Erasmus who refused even to sanction war against the Turks,[5] placed his plea upon a

[3]Two opposite conclusions on the merits of Dubois' project have been reached by a Frenchman and a German. His editor, Langlois, in the Introduction to the *De recuperatione Terre Sancte*, p. xx, says, "Il ne faut pas se laisser tromper à son zèle extérieur pour la croisade;' les projets de croisade, comme on l'a très bien dit, n'étaient sous sa plume que des occasions pour développer ses plans de réforme' nationale et internationale." But Ernst Zeck in his essay *Der Publizist Pierre Dubois*, p. 120, declares that "Aus der Beurteilung der Friedensidee des Publizisten sowie seiner Gedanken über das Schiedsgericht muss jeder modern gerichtete Ausdeutung ausscheiden. Beide Projekte werden nur im Zusammenhang mit der Idee einer französischen Weltherrschaft richtig aufgefasst." See also, M. R. Vesnitch, "Deux précurseurs français du pacifisme et de l'arbitrage international," *Revue d'histoire diplomatique*, 25:23–50. E.H.Meyer, "Die staats— und völkerrechtlichen Ideen von Peter Dubois," *Arbeiten aus dem juristisch-staatswissenschaftlichen Seminar der königlichen Universität Marburg*. 7 Heft, 1908. C. L. Lange, *Histoire de l'Internationalisme*, I, 90–108. W. S. M. Knight, "A Mediaeval Pacifist—Pierre DuBois," Transactions of the Grotius Society, Vol. 9, pp. 1–16.

[4]*Adagia*, Chil. IV, Centur. I, Prov. I.

[5]Few would be those of to-day who would take such a liberal stand as Erasmus in the following excerpt from the *Adagia*. "Mihi sane ne hoc quidem adeo probandum videtur, quod subinde bellum molimur in Turcas. Male profecto agitur cum religione Christiana, si illius incolumitas a talibus pendet praesidiis. Neque consentaneum est, his initiis bonos gigni Christianos. Quod ferro paratum est, ferro vicissim amittitur. Vis Turcas ad Christum adducere? Ne ostentemus opes, ne militum manum, ne vires. Videant in nobis non titulum tantum, sed certas illas hominis Christiani notas, vitam innoxiam, studium benemerendi etiam de hostibus, invictam omnium injuriarum tolerantiam, pecuniae contemptum, gloriae neglectum, vitam vilem: audiant coelestem illam doctrinam, cum hujusmodi vita congruentem. His armis optime subiguntur Turcae." *Adagia*, Chil. IV, Centur. I, Prov. I.

lofty ground. "Why should I," he questions, "a Frenchman, wish harm to an Englishman, a Spaniard, or a Hindoo? I cannot do it, when I consider that they are men like me, that I am subject like them to error and to sin, and that all nations are united by a natural, and consequently indissoluble bond."[6] He advocated the establishment of a permanent assembly of ambassadors representing all the nations of the known world from China to Poland, England, and the West Indies. This congress was to sit in Venice, a natural center of affairs at the time. Any differences arising between states should be settled by the judgment of the whole assembly, and if anyone rebelled against the decision of so notable a body, he would thereby incur the disapprobation of all the other princes, who would take means of bringing him to reason. Oaths should be administered to hold as inviolable law the decisions of the congress, and pledges made to pursue with arms any who opposed these laws. The striking similarity of Crucé's project with more recent proposals to the same effect is at once evident, but in its day little came of it beyond a few passing references in other writers.[7]

Fifteen years after the work by Crucé, namely in 1638, a plan for peace was promulgated by Sully, the former minister of Henry IV of France. This was the well-known "political romance," or *Grand Dessein*, set forth in Sully's *Oeconomies Royales*.[8] Briefly, it proposed to establish a general council consisting of sixty-six representatives from the fifteen foremost powers of Europe. These representatives were to deliberate on affairs as they arose, to discuss the different interests, to pacify quarrels, and to clarify and adjust the civil, political, and religious affairs of Europe, whether domestic or foreign. This plan for international peace has won much attention in the past both because of its alleged originality and the high rank of its author. It has lately been proved, however, that the details of the plan were interpolated by Sully after the completion of his manuscript some time before the *editio princeps* in 1638.[9] The scheme was not a policy of state but rather the expression of Sully's farthest flung hopes. As a step toward perpetual peace, the plan could hardly be regarded seriously, since Sully himself said that the political part of the project was "to deprive the imperial house of

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[6] *The New Cyneas of Emeric Crucé*, pp. 83–85. Edited by T. W. Balch.

[7] *E. g.*, Gabriel Naudé, Charles Sorel, Leibnitz. See E. Nys, *Etudes de droit international et de droit politique*, p. 305. See further, M. R. Vesnitch, article cited, pp. 51–78; C. L. Lange., *op. cit.*, I, 398–433.

[8] Edition by Petitot.

[9] Sir Geoffrey Butler, "Sully's 'Grand Design'," *The Edinburgh Review*, 230: 262–278. Reprinted in his *Studies in Statecraft*, pp. 65–90.

Austria of all that it possessed in Germany, Italy, and the Low Countries."

While Sully was engaged in writing his memoirs, Hugo Grotius, the "father of international law," published his greatest work, *De Jure Belli et Pacis*, in 1625. In the second and third books he wrote at some length on the history and value of international arbitration. Selecting historical instances of successful arbitration, he showed the antiquity and demonstrated the reasonableness of this method of settling disputes. "Moreover," he writes, "Christian states and kings especially are enjoined to take this method of avoiding wars. For if, in order to avoid trials by judges who were not of the true religion, both Jews and Christians appointed arbitrators of their own, and it was recommended by St. Paul, how much more ought it to be employed to avoid war, which is far more injurious?.... And for this reason as well as for others, it would be profitable, nay rather in a certain manner it would be necessary, that there be certain assemblages of the Christian powers, where controversies might be settled by disinterested parties: and that steps even be taken for compelling the disputants to accept peace in accordance with just laws."[10] Thus Grotius pleaded three hundred years ago.

Toward the close of the same century, the famous Quaker, William Penn,[11] published an essay on the peace of Europe, that described an arbitral international court *par excellence*.[12] His essay boldly proposed an Imperial Diet including all European nations and based on proportional representation. Meeting regularly, this Diet was to decide on the rules of justice for sovereign princes to observe one to another, and was to settle all questions too difficult for the customary embassies. If any king refused to abide by the judgment, all the other kings, "united as one strength," should compel his submission. Sublimely simple was the conclusion of Penn's essay, where he declared that "by the same rules of justice and prudence, by which parents and masters govern their families, and magistrates their cities, and estates their republics, and princes and kings their principalities and kingdoms, Europe may obtain and preserve peace among her sovereignties."

Taking leave of Penn and recrossing the Channel, we come to a

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[10]Lib. II, c. 23, § 8. 2nd ed., Amsterdam, 1631.

[11]The reader may remark the omission of Samuel von Pufendorf (1632–1694); but his views on arbitration added almost nothing to the theories of Grotius, and hence I have not included them.

[12]"An Essay toward the *Present* and *Future* Peace of *Europe*, etc.," in *A Collection of the Works of William Penn*, II, 838–848. London, 1726.

French economist and moralist, the Abbé Saint-Pierre.[13] Saint-Pierre believed he would actually live to behold universal peace in Europe. To settle international difficulties by reconciliation or arbitration, he proposed a congress or senate in which would sit representatives appointed by the crowned heads of Europe. Like William Penn, he advocated the use of a joint army at the common expense to compel any dissenting sovereign to submit to the arbitral judgment of the senate. An important defect in Saint-Pierre's project lay in its disregard of political evolution: rulers were guaranteed assistance against seditious subjects, and the royal succession, whether hereditary or elective, was also guaranteed according to the fundamental laws of each country.

The eighteenth century was the glorious era of political philosophers. Many were the theories presented for securing international peace. In this century we encounter such celebrated names as Rousseau, Jeremy Bentham, and Immanuel Kant. Let us first see what Rousseau had to offer.

In his essay on Saint-Pierre, Rousseau whole-heartedly endorsed the general doctrines of his predecessor.[14] Recognizing the complex social connections among the various European peoples, and believing that these primary bonds could be improved for the benefit of all concerned, Rousseau set forth the manifold blessings of peace that could be achieved by Saint-Pierre's plan. The closing sentence of Rousseau's pamphlet is incidentally rather interesting. He says: "If, in spite of all that, this project remains unexecuted, it is not therefore because it is chimerical; it is because men are insane, and it is a kind of folly to be wise in the midst of fools." Thus he satisfied his own soul at least.

Jeremy Bentham likewise recognized the desirability of a common court of judicature in Europe for the maintenance of peace.[15] He favored force if a state proved refractory, but hastened to add that, in all probability, public opinion could be made an adequate restraint on wilful governments.

The name of Immanuel Kant looms large in the history of peace. His plan *Zum ewigen Frieden*, published in 1795, contained, however,

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[13]His work was entitled *Projet de traité pour rendre la paix perpétuelle entre les souverains chrétiens*. Utrecht, 1717. M. de Beaufort has set forth some interesting views on Saint-Pierre in his article, "Quelques projets d'arbitrage international et de paix perpétuelle aux XVII^e^ et XVIII^e^ siècles," *Revue d'histoire diplomatique*, 16: 351–367. See also, Paul Janet, *Histoire de la science politique dans ses rapports avec la morale*, II, 313–315.

[14]*Oeuvres Complettes de J. J. Rousseau*, 32: 3–128. Nouvelle édition, Paris, 1793.

[15]*The Works of Jeremy Bentham*, II, 546–560. Edited by John Bowring, Edinburgh, 1843.

no paragraphs on an international tribunal. His philosophy transcended that method of peacemaking. Kant urged a federation of republican states, which was feasible on the same plan and analogy as the social contract. But to attain this dream of perfection, he declared that a moral regeneration must take place in the hearts of men.

When we enter upon the nineteenth century we find ourselves confronted with scores of schemes for world peace. The conditions immediately following the Napoleonic era were surprisingly similar to present world conditions. The same period of upheaval had been experienced, the same weariness of strife prevailed, and the same dreams of perpetual peace were in the air. But kings were strong and diplomats busy as ever. The Era of Metternich could hardly be regarded as the mother of arbitration.

On the whole, political thinkers of the last century favored some form of federation as the best means of securing the hoped-for peace.[16] As there is a decided similarity in these projects, it seems well to limit ourselves to one or two which are fairly typical of many others.

In 1871, the brilliant Cambridge professor, Sir John R. Seeley, delivered a lecture in which he stated that a desirable international system could not be evolved out of the existing system of congresses of great powers.[17] He maintained that such a congress was quite unlike a law court, because those who shared in the former were interested parties,—the litigants themselves were their own judges. Furthermore, "a good court is, not where both parties are represented on the bench, but where neither is." In the second place since the existence of a state was implied in an ordinary court of law, an international court implied the existence of an international state. Some kind of federation was necessary; and it could not be upon such a model as the *Deutsches Bund*, but must be like that of the United States of America, with full legislative, executive, and judicial powers.

Seeley's argument was carried further by the great Heidelberg professor, Dr. Johann K. Bluntschli. In 1878 this writer set forth a thoughtful plan for the organization and functions of a European Union.[18] Although an arbitral court, as such, occupies a secondary place in his project, his proposals merit inclusion here, as they partake of the true spirit of international justice. He proposed a small

[16]Ernest Nys, "L'Arbitrage, quelques notes," *Revue de droit international et de législation comparée*, 38:5–23, at pp. 10–11.

[17]See extracts in W. Evans Darby, *International Tribunals*, pp. 184–187. 4th ed., London, 1904.

[18]Reprinted in J. C. Bluntschli, *Gesammelte Kleine Schriften*, II, 302–312.

united Council made up of certain representatives of the collective governments of Europe. This Council should co-operate with a Senate composed of representatives of the various European peoples, elected by the national parliaments and assemblies. One function of the Senate would be as a check on the Council, but the main business of the two bodies would be to enact a code of international law. Those questions of high politics, such as related to the existence, independence, and freedom of states, should be laid before the Council, the decisions of which body would be subject to review by the Senate. On the other hand, the questions of less importance, regarding international commercial relations, the fixing of boundaries, interpretation of treaties concerning trade and tariffs, rules in respect to telegraph lines, railroads, harbors, etc., should be handled by administrative bureaus under the Council's direction. Courts of arbitration were included under the head of bureaus. As to provisions for the execution of the decisions of the Council, Senate, and Bureaus, including the arbitral courts, Bluntschli pointed out that ordinarily the execution could be left to the individual states concerned, but in exceptional instances other methods might have to be employed. If compulsion were required, then neither the Council nor the Senate would be the proper body to take steps. In such cases the co-operation of the Great Powers was necessary, and thence appeared the need for a *Kollegium der Grossmächte* to guarantee and support the decisions of their representatives. To insure justice at all times, Bluntschli suggested that the Senate, Council, and *Kollegium der Grossmächte* should all agree on a given policy,—the first body by a majority of votes, and the other two by a two-thirds majority respectively. The striking similarity between this plan and the present League of Nations is at once evident.

II. GREECE AND ROME

On the rule that an ounce of fact is worth a pound of theory, let us leave the philosophers for the makers of history, and investigate the actual development of arbitration in the past.

The study of arbitration properly begins with the ancient Greeks,[19] for it was in Greece that the peaceful adjudication of international disputes had its true origin and earliest development.[20] The first

[19]The following paragraphs on Greek arbitration owe much to M. N. Tod, *International Arbitration amongst the Greeks*; A. Raeder, *L'Arbitrage international chez les Hellènes*; V. Bérard, *De arbitrio inter liberas Graecorum civitates*; W. L. Westermann, "Interstate Arbitration in Antiquity," *The Classical Journal*, II, 197–211.

[20]Mr. Tod has gone to some pains in an attempt to refute Mr. Westermann's statement that "the honor of first formulating the principle of interstate arbitration and of first putting it into practice lies with the Greeks." Mr. Tod cites the

account we possess of the application of international arbitration in Greek history comes from Pausanias,[21] but it has been shown that this story is probably a fabrication of the writer and served to illustrate the author's sentiments rather than the actual practices of the eighth century B. C.[22] The first authentic case dates from about 650, when Andros and Chalcis disputed the possession of the deserted city of Acanthus and left the decision to the Parians, the Samians, and the Erythraeans.[23]

The limits of this article forbid a consideration of a great variety of cases of Greek arbitration, and I shall therefore proceed at once to the generalizations reached by Raeder. Interstate arbitration became frequent after the middle of the seventh century B. C. By that time the great migrations had come to an end and separate states had been organized. A certain equilibrium obtained among the Greek states of this epoch, and it was perhaps due to this balance of power that the growth of arbitration was favored. The states were beginning to emerge from their isolation and come into economic relations, thus paving the way for disputes. On the other hand, no state was yet sufficiently strong to defy its neighbors, and consequently arbitration was called into play.[24]

With the fifth century we enter upon a new period, the period of national hegemonies. The smaller states have grouped themselves under the leadership of Athens or of Sparta. Although the practical result of arbitration was discouraging during this period,[25] we nevertheless witness the innovation of pledges for the peaceful settlement of *future* disputes. Such a pledge was inserted in the thirty years' truce entered upon by Sparta and Athens in 445, and again in the peace of Nicias in 421. Although the treaties were broken and the Peloponnesian War was fought to the bitter end, the idea of arbitration, rendered obligatory through treaty, had been given to the world.[26]

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case of Shirpurla v. Gishku, two early Sumerian cities, which had recourse to arbitration to settle a boundary quarrel after war had proved indecisive. But this would seem a rather labored example. Is it not more likely that these cities, exhausted by war, were driven into a treaty according to the terms of which the line of demarcation was to be fixed? See Tod, pp. 169–173; Westermann, p. 198.

[21] IV, 5, 2.

[22] Raeder, pp. 14–16, 144; Tod, p. 174.

[23] Raeder, pp. 16–17.

[24] *Ibid.*, pp. 144–147.

[25] Westermann (p. 200) gives seven instances of suggested arbitration in the latter half of the century, in each of which cases the proposal was rejected.

[26] Westermann, pp. 200–201; Tod, pp. 65–69; Raeder, pp. 147–152; 179–189. Tod points out (p. 69) that the Greeks "do not seem to have felt it necessary to exclude any specific category of disputes from the number of those which they regarded as susceptible of peaceful decision by an arbitral tribunal." This is interesting in view of the modern theories of "national honor" and "vital interests."

During the decades after the close of the Peloponnesian War and preceding the battle of Chaeronea (338 B. C.), conditions again became favorable for the practice of international arbitration. Athens and Sparta, having been reduced in resources by the protracted conflict, stood more on a plane with the other states of Hellas. To be sure, Sparta held the leadership for a time, followed by Thebes; yet, relatively speaking, a sort of equilibrium prevailed. States now faced each other on a more equal footing than in the heyday of the empire. Hence, in this period we have several instances of successful arbitration, especially famous being that between Athens and Delos over the right of administering the sanctuary of Apollo at Delos.[27] On the other hand, arbitration was frequently refused. Sparta rejected Thebes' offer after the battle of Leuctra (371 B. C.), and Athens refused to listen to Philip of Macedon's demand to determine by arbitration the ownership of Halonnesus (*ca.* 340 B. C.).[28]

Numerous examples of arbitration are to be found in the Macedonian and Hellenistic periods. Particularly well-known was the case of Melos and Cimolos for the possession of three small islands, in which dispute Cimolos was awarded the territory by the popular assembly of Argos.[29] But there is not space to describe in detail, or even to mention, the many arbitrations of which we have epigraphic evidence in this long period after the conquests of Philip. Westermann counts forty-six cases of interstate arbitration between 300 B. C. and 100 B. C. Almost always, he adds, the disputes related to boundaries.[30]

Arbitration was very prominent in the Greek world of the third century.[31] Under Alexander and his successors the communities of the eastern Mediterranean world had frequent recourse to this method of terminating quarrels. On several occasions the monarchs themselves acted as arbitrators, while the Achaean, Aetolian, Thessalian, and Boeotian leagues regularly employed arbitration to preserve the peace.

Arbitration was given an additional impetus when Rome entered upon the stage of Greek history. The Romans took over the policy of the Hellenistic princes of employing arbitration to adjudicate differences between states that lay within the growing sphere of

[27]Raeder, pp. 54–55, 154.
[28]Raeder, pp. 153, 155; Westermann, p. 201.
[29]Raeder, pp. 63–65, 156; Tod, p. 31.
[30]Westermann, p. 201.
[31]For the Hellenistic period generally, see Tod, pp. 180–184. *Cf.* Raeder, pp. 156–164, 199–236.

Roman influence. It is far from easy always to determine the voluntary or non-voluntary nature of arbitrations where Rome was interested. The Senate, following the precedent of Philip of Macedon, at times compelled the settlement of disputes in the interests of good government. But such cases can hardly be classified as examples of arbitration. The form may exist but not the spirit. But as Mr. Tod has observed, these facts do not abolish the reality of senatorial arbitration.[32] On occasion the Senate was appealed to by Greek communities in much the same manner as the latter had previously invited decisions from Seleucid or Lagid rulers. A case might be heard at Rome before the assembled *patres*, but this procedure was rare. More often a *legatus*, or a commission of several *legati*, would be appointed to investigate and decide the point at issue. Still a third way was open to the Senate; namely, the appointment of a disinterested Greek state to render an award in accordance with certain general specifications laid down by a *senatus consultum*.[33]

Omitting the interesting subjects of the appointment and procedure of the Greek arbitral tribunals, it remains to deal with the extent and success of such arbitration. We possess to-day the records of some eighty cases, but of these only about three-fourths resulted in genuine arbitration, and of the three-fourths, several decisions were rendered in regard to the same dispute. It is entirely a matter of conjecture to estimate the actual extent of arbitration, but that it was the daily bread of international life, we learn from Victor Bérard.[34] We know of relatively few cases through the extant writings of the classical authors, almost all our data consisting of epigraphic records accidentally discovered, many in very recent years. It therefore stands to reason that we know but a small percentage of the total number of interstate arbitrations. After all, one can say little more than that arbitration was used throughout the Hellenic world for five hundred years.[35]

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[32]P. 182.

[33]Tod, pp. 182–183.

[34]"L'arbitrage était en Grèce le pain quotidien de la vie internationale." "L'Arbitrage," *La Revue de Paris*, Vol. IV for 1907, pp. 428–448, at p. 431.

[35]Raeder (p. 240) sums up the facts most adequately: "Avec les éléments qui sont maintenant à notre disposition, il est plus prudent d'énoncer seulement, que l'arbitrage fut fréquemment utilisé dans les différends entre états grecs, depuis le milieu du VII^e^ siècle jusqu'au milieu du second, par conséquent pendant cinq cents ans. Nous voyons l'arbitrage utilisé aussi bien dans l'Hellade que dans les îles de la mer Egée et de la mer Ionienne ainsi que sur la côte de l'Asie Mineure; nous le retrouvons aussi chez les Hellènes de Sicile. Les grands et les petits Etats y ont recours: Athènes, Sparte, Corinthe, et Thèbes, les Ligues achéenne et étolienne, à côté de villes tout à fait petites, comme la ville laconienne de Géronthrée et la ville thessalienne de Mondaia. Il en est de même à toutes les époques: Athènes est partie dans les affaires d'arbitrage à tous les siècles, du VII^e^ au II^e^."

I think it fair to say that Greece made a success of arbitration. There are only two instances known where it was reported that the states did not abide by the tribunal's award.[36] Indeed, fines were to be imposed on any party that might lapse in living up to the decision. In the last resort, public opinion, then as now, constituted the strongest guarantee for the faithful performance of international duties.[37]

Contrary to the experience of Greece, interstate arbitration did not make its appearance very early in the annals of Rome.[38] Arbitration was probably quite unused in Rome until she came in contact with Greece and the Levant generally. This was due, among other causes, to the greater ethnological differences among the peoples of the Italian peninsula. Moreover, the topography of Italy did not facilitate commercial relations by land or by sea.[39] In the third place, there were no socially unifying forces in Italy, as there had been in Greece, such as national festivals, commercial treaties, or popular confederations similar to the amphictionies.[40]

Even if the Italian environment had been more conducive to the growth of international arbitration, we should hardly expect an abundant harvest of such cases from Rome, a power with essentially military aspirations. Rome herself is never a party to an arbitration, however much the Senate at certain times concerned itself with that procedure. The provinces, satisfied in their enjoyment of the *pax Romana*, never dreamed of approaching an arbitral bar on an equal footing with their imperial mistress,—the one indispensable condition of any worthy arbitration.[41] True, Rome desired peace, but it was the peace of domination,—"incedunt victae longo ordine gentes."

I have already mentioned the policy of the Roman Senate in dealing with the East, and it is perhaps unnecessary to pursue the subject much further. In early times the Senate occasionally had been

[36]Tod, pp. 165–166. Of course this does not take into account the numerous examples of a series of arbitrations over the same difficulty.

[37]In regard to the success of Greek arbitration, compare Raeder, pp. 315–322, and Tod, pp. 184–190. Westermann has gone to some trouble to prove the falsity of Bérard's strictures on the success of arbitration among the Greeks. See Westermann's arguments and statistics, pp. 208–209.

[38]The most elaborate work on Roman arbitration is by Ettore de Ruggiero, *L'Arbitrato pubblico in relazione col privato presso i Romani.*

[39]Ruggiero, p. 55.

[40]*Ibid.*, pp. 56–57. For the factors making for unity in Greece, see Victor Bérard, "L'Arbitrage," *La Revue de Paris*, Vol. IV for 1907, pp. 428–448, at pp. 436–437.

[41]Ruggiero, p. 61. See also, Ferdinand Dreyfus, *L'Arbitrage international*, pp. 13–15; A. Mérignhac, *Traité théorique et pratique de l'arbitrage international*, pp. 22–24; Michel Revon, *L'Arbitrage international, son passé—son présent—son avenir*, pp. 89–90.

requested to play the rôle of arbiter in behalf of independent states already fascinated by the splendor of the name of Rome;[42] and by steady degrees the tide of arbitration rose until by the second century B. C. it reached its high-water mark around eastern Mediterranean shores. The Senate, with a prestige enhanced in the East after the victory of Flamininus at Cynoscephalae, was more and more frequently invited to act as an arbiter. As a rule, as was stated above, Rome either placed the controversy in the hands of a special commission, or she left it to a third city, usually some neighbor of the litigant communities.

In concluding these few words on Rome, it may fairly be said that she did not transmit the principles of arbitration in unadulterated form, and one can not regard her actions as heroic in the long struggle for the pacific settlement of international disputes. But we must always hold in mind that her very nature as a militant republic and later a world empire, precluded the existence of arbitral courts in the ordinary sense of the word. The republic lost what Greece had gained, and the empire lost the little the republic had won.[43]

III. THE MIDDLE AGES

The study of arbitration in the Middle Ages is beset with difficulties. In the first place, no adequate investigation of the subject has been published in any language; and in the second place, the sources for such a study are scattered throughout Europe. Two writers have published more than others on the subject, one, Baron M. de Taube, writing in Russian, and the other, M. Novacovitch, writing in French. The work by Taube, however, is not exclusively devoted to arbitration, being a study of the origins of international law, while the volume by Novacovitch leaves much to be desired. A thorough research into this field is quite beyond the scope of the present article, but the little space here devoted to it may possibly serve as an introduction to a very complicated subject.[44]

The opinion is sometimes voiced that in the Middle Ages international arbitration was non-existent because individual nations had not then come into being. But this is an erroneous opinion; to all intents and purposes international arbitration did exist, and

[42]Mérignhac, p. 24.

[43]Revon (p. 101) has attempted to discover sources of the international arbitrations of later days in the private law of Rome. He holds that in the classical epoch, the civil theory of arbitration was almost perfect, and that one must look there for the germ of arbitration between peoples.

[44]Something is in process of being done for the history of arbitration in the Middle Ages in a series of books, *Gesta Pacis*, under the editorship of V^te^ J. de Romanet. See also, Ch. de Mougins de Roquefort, *De la solution juridique des conflits internationaux*, pp. 109–119.

existed on a widespread scale. Many local princes and nobles ruled over extensive districts often equal in extent to some of the smaller states of modern times. The constant disputes that arose in those warlike days were very frequently terminated by some kind of arbitration. In truth, it is surprising to learn of the great number of arbitral decisions, of their importance, and of the prevalence of the "clause compromissoire." Previous to the twelfth century, arbitrations worthy of attention were rare, for in those early days war was the rule rather than the exception, due to the weakness of the central authority and the parcelling out of the dominion among numerous rival feudal princes. True to the ancient German law, the lords preferred their swords to an uncertain and distant court of justice.[45] But during the thirteenth century and up to the beginning of the sixteenth, the idea of war yielded more and more to the idea of arbitration.[46]

In considering arbitration in the Middle Ages, the profound influence of the Church must be kept constantly in mind. Time and again the Church, directly or indirectly, set the wheels of arbitration moving. The religion of Christ was essentially an argument for peace. To the classical heritage it added the theory and ideal of universality, being a civilizing and pacific belief, including all human beings who were yearning for salvation, as was so eloquently stated by Nicholas of Cusa.[47] As a unifying force it was unsurpassed; its visible head, seated on the throne of St. Peter in the Eternal City, presided in sovereign fashion over the kings of the earth. Throughout western Europe the Pope was regarded and respected as the vicar of Christ, heaven's delegate on earth. As the wielder of the spiritual sword, the papacy did its utmost to keep the temporal sword in its scabbard. Certain things, such as the property of the clergy, the Church had caused to be held inviolable at all times, while her sanctuary lay open perpetually to all the faithful. Furthermore, she prohibited war on certain days and in certain seasons, and refused sacraments to those who opposed her laws.[48] But it was an uphill fight; her prayer, *Agnus Dei qui tollis peccata mundi, da nobis pacem*, generally went unheeded.

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[45]Frédéric Duval, *De la Paix de Dieu à la Paix de Fer*, p. 3.

[46]"Ils furent fréquents surtout en Italie, où on n'en compte pas moins de cent au XIII^e^ siècle, entre les princes et les communes de ce pays." Mérignhac, p. 38. See also, Mileta Novacovitch, *Les compromis et les arbitrages internationaux du XII^e^ au XV^e^ siècle*, pp. 5–23.

[47]See G. L. Burr, "Anent the Middle Ages," *The American Historical Review*, 18: 710–726.

[48]For the efficacy of the Peace of God and the Truce of God, see August C. Krey, "The International State of the Middle Ages: Some Reasons for its Failure," *The American Historical Review*, 28: 1–12. *Cf.* Duval, *op. cit.*, pp. 10–29.

Arbitration, although used in most parts of Europe, did not everywhere present the same aspect. It was very frequent among the German principalities, where the numerous petty states made innumerable alliances with each other, thus paving the way to arbitrations to settle disputes incapable of being informally composed.

The Baltic provinces during the Middle Ages were the scene of constant conflict. Occasionally, however, the small independent states of this region submitted their quarrels to arbitration; but it must be admitted that, on the whole, arbitration in the far north was imperfect and often confused with mediation.

Arbitration reached a high degree of development among the Italian states. Here the arbitrators formed themselves into regular tribunals, the procedure was strict, and notaries were much in evidence during the hearing. The numerous arbitrations in Italy, however, were, for the most part, merely interludes in the ceaseless intestine struggle among the rival cities; that is to say, arbitration was often invoked when the parties were too exhausted to continue the war.[49]

As was pointed out in the section dealing with Greek interstate arbitration, treaties for the adjudication of future disputes are no recent phenomenon in international history. One sees such "clauses compromissoires" again in Europe during the Middle Ages, inserted in treaties of alliance or treaties of peace and friendship.

The greatest number of such clauses providing for future arbitrations are to be found in the German treaties. Whenever a group of nobles or cities entered into alliance, they would agree to settle by arbitration any future difficulties arising among them. As such federations were frequent, such clauses were numerous. The arbitral board was first to strive for an informal adjustment, the give and take of a modern diplomatic conference, but if unsuccessful in this, it was to proceed to arbitral means.[50] Such arbitrations customarily took place between allies.[51]

But exactly what was the extent and importance of mediaeval attempts at permanent arbitration? In answering this question, one must be careful not to read into that distant period the theories of the present day. The wars of the Middle Ages were not so universal in

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[49]Novacovitch, Ch. I. *Cf.* E. Nys, "L'Arbitrage, quelques notes," *Revue de droit international et de législation comparée*, 38: 5–23, at p. 6.

[50]"... obe sie mögen mit Mynne oder mit Freundshafft mit beyder Teyle Willen und Wissen oder obe das mit der Mynne nicht gesin möchte mit eime freundlichen Rechten...". J. Dumont, *Corps universel diplomatique du droit des gens*, II, 2, p. 294.

[51]Novacovitch, pp. 48–50. He adds (p. 53) that we have but two examples of treaties where this was not the case.

extent nor so deadly as modern struggles. Although more frequent, they were not so grave in their consequences; the fabric of commercial and economic relations was not so delicately woven as to-day. When two parties concluded a treaty of peace and inserted a clause for the arbitration of future disputes, they were often actuated more by temporary interests than by larger motives. As one writer has pointed out,[52] we possess no example of an arbitral tribunal set up by virtue of such a clause, and, although that does not prove that such clauses received no application, it indicates that they played a modest part. But it would be unjust if we refused the Middle Ages their due share of praise for keeping alive the conception of permanent arbitration. In 1343, Magnus, King of Sweden, and Woldemarus, King of Denmark, negotiated a treaty in which they pledged themselves to arbitrate future differences of an important character.[53] The Swiss cantons, like the German states, in their treaties of alliance with each other, and with neighboring powers, had recourse to the "clause compromissoire."[54] Likewise in Italy the arbitral clause was included in several treaties of peace.[55]

It remains to deal with the choice of arbitrators and the procedure followed by them. The Popes occasionally acted as arbitrators, but their activities in this capacity have been somewhat exaggerated.[56] True we have several instances of cases submitted to papal

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[52]Novacovitch, p. 62.

[53]"Item si ardua nimis & difficultate plena inter eundem Dominum Woldemarum Regem & Nos, ac utriusque nostrorum Successores vel Haeredes, emerserint negotia statum Regnorum nostrorum, aut Successorum vel Haeredum nostrorum honorem seu commodum summè tangentia, crimen, ut puta, laesae Majestatis, Castrorum aut Terrarum proditionem, vel eorum consimilia, ex tunc tres assumantur Episcopi & totidem Milites & Militares prudentiores ex quolibet Regno Sueciae & Daciae, qui infra duodecim septimanas à tempore quo Principi vel ejus locum tenenti, seu tenentibus, per duos Consiliarios Partis adversae, querimoniae fuerint intimatae Helsingborg convenientes, praedictas causas & ardua negotia Regum & Regnorum diligenter examinent, fideliter tractent, & finaliter terminent." Dumont, I, 2, p. 223.

[54]Vattel praised his countrymen highly for this custom. "Cette sage précaution," he declared, "n'a pas peu contribué à maintenir la République Helvétique dans cet état florissant qui assure sa Liberté, & qui la rend respectable dans l'Europe." Vattel, *Le droit des gens*, Liv. II, Ch. 18, § 329. *Cf.* Mérignhac, pp. 40–41.

[55]*E. g.*, the treaty between the lords of Milan and Verona in 1379 (Dumont, II, 1, pp. 128–134); and the treaty of 1435 between Eugenius IV, Venice, and Florence, on the one side, and Philippus Maria Anglus, the Duke of Milan, on the other (*Ibid.*, II, 2, pp. 300–303). The opening words of this document are rather interesting: "Cum dulce sit verbum Pacis, & res in se ipsa salutaris, quod sola in humanis rebus bona simul & jucunda nominatur, teste Ambrosio super *Beati immaculati* sic interpretante verba illa, *Ecce quam bonum, & quam jucundum est habitare Fratres in unum.*"

[56]One should clearly distinguish between papal arbitrations and papal mediations. Duval (*op. cit.*) makes the distinction, but does not adhere to it in his text. Mediations were more common than arbitrations.

arbitrament: Boniface VIII,[57] John XXII,[58] and Clement XI[59] gave arbitral judgments of which we have the records, but the appeal to the Pope was not the rule. The most famous case of so-called papal arbitration, that in which Alexander VI divided the discoveries of the New World, was not an arbitration at all.[60]

More common than arbitration by the Popes was arbitration by the doctors of some famous school of law. The faculty of the university at Bologna was repeatedly called upon to supply arbiters in the differences among the various Italian republics.[61] In like manner the doctors of Perugia and Padua were sometimes impressed into this service.[62]

The parlement of Paris frequently was selected by foreign princes and potentates to settle their differences. In 1244, for example, the parlement of Paris was chosen by Frederick II to judge of his differences with Innocent IV.[63] Under Francis I the parliament of Grenoble was chosen to pass upon the claims of two princes to certain Milanese territory.[64] The same parliament in 1613 and 1614 rendered

[57]Edward I of England and Philip the Fair of France submitted in 1298 to the arbitrament of Boniface VIII, "tamquam in privatam personem, & Dominum Benedictum Gaytanum tamquam in arbitrum." Dumont, I, 1, p. 308.

[58]In 1319 John XXII arbitrated between the Flemings and Philip V. *Ibid.*, 1, 2, pp. 45–46. See also, Kervyn de Lettenhove, *Histoire de Flandre*, III, 85.

[59]In 1701 Clement XI gave a super-arbitral decision according to the provisions of Article VIII of the Treaty of Ryswick. Dumont, VIII, 1, pp. 98–99.

[60]Several authorities on our subject have erred in treating as a papal arbitration the famous line of demarcation drawn by Alexander VI in 1493, dividing the discoveries in the New World between Spain and Portugal. See, among others, Mérignhac, p. 33; Revon, p. 126; Calvo, *Le droit international*, II, 548. But this act of Alexander VI was in no sense an instance of international arbitration. The two bulls (May 3rd and 4th, 1493), which gave rise to the fiction of an arbitration, were even promulgated without the knowledge of John II, King of Portugal, one of the interested parties! The first was issued at the solicitation of Ferdinand and Isabella, and guaranteed to Spain certain general rights in respect to the new discoveries. Much mystery surrounds the genesis of the second bull, coming so fast on the heels of the first, but it is thought probable that representatives of the Spanish rulers brought it about. This document, superseding that of the previous day, drew a line of demarcation at a distance of one hundred leagues from the Azores and Cape Verde Islands, which at that time were supposed to lie in the same longitude. John II was so dissatisfied with this arrangement that the Treaty of Tordesillas (1494) was finally negotiated to pacify him. This treaty between Spain and Portugal extended Alexander's line to three hundred and seventy leagues west of the aforementioned islands, and thus gave Portugal, as later evolved, a large slice of South America. For detailed studies, see John Fiske, *The Discovery of America*, I, 453–460; E. G. Bourne, *Essays in Historical Criticism*, Ch. VII, "The Demareation Line of Pope Alexander VI"; E. Nys, "La ligne de démarcation d'Alexandre VI", *Revue de droit international et de législation comparée*, 27: 474–491.

[61]Sir Travers Twiss, *On the Rights and Duties of Nations in Time of War*, 2nd ed., p. 10.

[62]Dreyfus, *op. cit.*, p. 27; Calvo, II, 547; Mérignhac, p. 37.

[63]Dreyfus, p. 26; Calvo, II, 548. See also, E. Nys, *Etudes de droit international et de droit politique*, pp. 54–55.

[64]Calvo, II, 548; Nys, p. 55.

two decisions between the Archdukes of Austria and Würtemberg.[65] In 1678 the States-General of Holland at Nimeguen was appointed by France and Spain to decide on territory in dispute.[66] In 1570, a single councillor of the parliament of Dijon, by name Jean Bégat, was designated by the King of Spain and by the Swiss to deal with the question of Franche-Comté.[67]

Bishops, archbishops, and cardinals were often made umpires in international litigations.[68] Neutral and disinterested cities were likewise endowed with arbitral powers on several occasions, a practice reminiscent of Grecian days.[69]

One of the most common and interesting types of mediaeval arbitration was that in which some king gave the award. It is not easy to distinguish clearly, when kings are concerned, cases of mediation from those of genuine arbitration. The expressions used in the Middle Ages were equivocal, no distinction being made before the seventeenth century between "juge," "amiable compositeur," or "arbitre;" often the same king was called by all three titles.[70] Hence it is often doubtful whether a king has been voluntarily approached by the parties, or whether he is imposing his will upon them through prestige or force. On the other hand, there were numerous instances of monarchs acting as genuine arbitrators between disputants.

The most picturesque of royal arbitrators was Saint Louis of France. Joinville in his *Histoire de Saint Louis* has drawn several pretty pictures of this immortal ruler dispensing justice. He relates how Louis sent his delegates about France to mediate in wars and restore peace.[71] So great did his fame become that his biographer

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[65]Dreyfus, pp. 26–27; Calvo, II, 548; Nys, p. 55.

[66]Dreyfus, p. 44.

[67]Nys, p. 55; Mérignhac, pp. 37–38.

[68]The Treaty of Nonancourt (1177) stated that the difficulties between Henry II and Louis VII regarding Auvergne, Châteauroux, and other fiefs, should be regulated by the arbitration of three bishops. (De Flassan, I, 104). In 1276, two bishops and a warrior were appointed judges between the kings of Hungary and Bohemia. (Mérignhac, p. 34). Archbishops figured in the arbitration in 1475 between Louis XI and Edward IV. (Dumont, III, 1, pp. 500–502). Cardinal Nicolaus appeared in an Italian case in 1427. (*Ibid.*, II, 2, pp. 203–207). These examples are but a few taken from many. See Le Comte L. Kamarowsky, *Le Tribunal International*, pp. 130–133. Tr. by Serge de Westman.

[69]The Treaty of Westminster (1655) named the free Hanseatic city of Hamburg as a court of last appeal in case of a deadlock over the amount of damages suffered through naval captures since the year 1640. De Flassan, III, 200. See further, Novacovitch, p. 73.

[70]Mérignhac, pp. 41–42. *Cf.* Novacovitch, pp. 82–84.

[71]Louis IX established peace between the Count of Chalon and his son, the Count of Burgundy; reconciled King Thibaut II of Champagne, Count Jean of Chalon, and the Count of Burgundy; and restored peace between Count Thibaut of Bar and Count Henri of Luxemburg. Of course, these were mediations and not arbitrations. Joinville, *Histoire de Saint Louis*, pp. 374–377, 2nd ed. Natalis de Wailly, editor and translator.

recorded that he himself had seen the Burgundians and Lorrainers, to whom Louis had brought peace, come in a loving and obedient spirit to plead their cases before the king, wherever he might be holding his court.[72]

The most important case adjudged by Saint Louis was brought up in 1263. In that year, through the efforts of the prelates of England and France, the quarrel between Henry III and his barons was submitted to Louis IX. A great concourse of people, including the royal pair of England, the Archbishop of Canterbury, and others, assembled at Amiens to hear the award of the French monarch. Louis decided in favor of Henry, but the award was not respected by the barons.[73]

Other kings also, both in France and elsewhere, were frequently invited to act as arbiters.[74]

It remains to examine the procedure followed by the arbitrators. Novacovitch has erred in his statement that the procedure was more summary and less formal in the north than in Italy.[75] He quotes (pp. 84–85) from the award given in the arbitration between Leopold, bishop of Bamberg, and the two Ruperts, "comites Palatinos Rheni," in 1353, to show that the procedure was summary in the north.[76] They commenced, he says, by hearing the arguments of both parties, and receiving such testimony as there was. Then the litigation was inquired into, the question examined by competent men, and finally, invoking the aid of heaven, the arbitrators handed down their award.[77]

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[72]"Dont il avint ainsi, que li Bourgoignon et li Loorein que il avoit apaisiés, l'amoient tant et obéissoient, que je les vi venir plaidier par devant le roy, des descors que il avoient entre aus, à la court le roy à Rains, à Paris et à Orliens." Joinville, pp. 376–378.

[73]Willelmus Rishanger, *Chronica et Annales*, p. 11. Edited by H. T. Riley in the Rolls Series, London, 1865.

[74]A few of the more notable and typical cases are as follows: the award of Henry II between the kings of Castile and Navarre in 1177, (*Gesta Regis Henrici Secundi*, I, 138–154. Edited by William Stubbs in the Rolls Series, London, 1867. See also, Dumont, I, 1, pp. 96–97); of Philip VI of Valois between the Duke of Brabant and his enemies in 1334, (Dumont, I, 2, pp. 142–147); of Charles VII of France between René of Anjou and Antoine of Vaudemont in 1444/5, (*Ibid.*, III, 1, pp. 144–146); of William III of Great Britain between Arnold Willem, Count of Benthem, and Ernst and Statius Philip, also Counts of Benthem, in 1701, (*Ibid.*, VIII, 1, pp. 93–96).

[75]"La procédure est plus sommaire, et exempte des formalités dans les pays du Nord de l'Europe; en Italie, au contraire, on a l'impression d'un procès privé, qui se plaide devant un tribunal." Novacovitch, p. 82.

[76]The quoted excerpt follows:—". . . informatione sufficienti recepta & de sano consilio peritorum & fide dignorum, qui talis negotii ab experientia plenam & familiarem habebant notitiam, causae ipsius meritis diligenter inspectis, & in examen providae discussionis adductis, Dei nomine invocato, dicti etiam Coarbitri pleno & libero accedente consensu, arbitramur, pronunciamus, dicimus, & sententialiter diffinimus. . . ." Dumont, I, 2, p. 291.

[77]Novacovitch, p. 85.

But this was no summary procedure; it contained all the essential elements of any arbitral trial.

Novacovitch then goes on to say that only one case of mediaeval arbitration is known to us in all the detail of its procedure, namely that in 1392 between the Viscount Galeazzo of Milan and his allies on the one side, and the League of Florence with several cities on the other.[78] And from this case Novacovitch concludes that the Italian procedure was far superior to that in the north of Europe.[79] But he has overlooked certain data relating to an important case in 1177 between the kings of Castile and Navarre, which was given into the hands of Henry II of England, and which may be found in all the detail of procedure in one of the volumes of the Rolls Series.[80] If we follow the procedure of this case, heard in London, we shall see that it scarcely differed from the above case in Italy more than two hundred years later.

Henry II summoned the archbishops, bishops, counts, and barons of all England to come to London on March 13, 1177, for he had need of their counsel in the approaching arbitration between Castile and Navarre. At the appointed time those summoned gathered in the capital, where the representatives of both parties were present to hear and report back the award.[81] All these had been sent to exhibit the rights that their respective lords sought to enforce, the one against the other.[82] Then the King as arbitrator commanded them to write down their claims and give the written allegations to him; thus he might know through their own expositions their separate demands. Three days were to be allowed for this, after which period the meeting should again convene.[83]

On the 16th of March, then, the claim of the King of Castile was first presented to Henry. "And when the Bishop of Palencia and Count Gumes, and other delegates of the Castilian King had put forth these arguments and others like them both in writing and orally, they made an end of speech."[84] This was followed by the

[78] Dumont, Supplément, II, 2, pp. 229–276.

[79] "La procédure, en Italie, est plus rigoureuse et moins simple, soumise à des formalités compliquées." Novacovitch, p. 87.

[80] *Gesta Regis Henrici Secundi*, I, 138–154. Edited by William Stubbs.

[81] Two champions were also on hand, in case the award should entail the wager of battle.

[82] "Hi omnes missi erant ad ostendendum jus quod domini eorum petebant, alter adversus alterum." *Gesta Regis Henrici Secundi*, I, 145.

[83] "Tunc quia comites et barones Angliae minime intellexerant sermonem illorum; praecepit eis rex ut scriberent hinc inde petitiones et calumnias et allegationes suas, et postea ei offerrent scriptum illud, ut saltem sic per expositionem suorum, scire posset eorum petitiones et calumnias et allegationes; et dedit eis ad hoc perficiendum, triduanas inducias." *Ibid.*, I, 145–146.

[84] "Et cum episcopus Palentinae et comes Gumes, et alii nuncii regis Castellae haec et his similia scripto et verbo protulissent, finem dicendi fecerunt." *Ibid.*, I, 148.

claims of the King of Navarre, delivered in the same manner. King Henry thereupon ordered the Holy Scriptures to be produced and made the ambassadors swear that their masters would abide by his award. The award in writing then concludes the history of this notable case.[85]

IV. MODERN TIMES

The modern era of international arbitration properly dates from the Jay Treaty of 1794. We are compelled to pass over the sixteenth, seventeenth, and most of the eighteenth centuries, because arbitration in this long period suffered an eclipse. The sixteenth century, to be sure, was not altogether barren of international arbitrations,[86] but it would hardly be profitable to describe the details of the few cases in this century. The principle of arbitration, on the other hand, was not lost sight of during these three hundred years; arbitrations were occasionally provided for in treaties of peace, and jurists like Grotius and Pufendorf made space in their works for a few paragraphs on the subject. Philosophers and moralists also expressed themselves on international peace, especially in the eighteenth century when ideas of universal brotherhood and social perfectibility began to assume shape.[87] But the rising tide of nationalism in the sixteenth and seventeenth centuries was by no means conducive to amicable relations among states. Popes do not allow an armistice to heretics, nor is arbitration the immediate jewel of Tudor souls. Europe was in the throes of transition, the old giving way to the new; strange theories of the balance of power and the value of trade were mingled in the air with the clash of doctrines and the cries of the persecuted.

The discovery of the Americas inspired young men and old with dreams and visions theretofore unseen. Only too soon the nations settled down to a long struggle for power across the seas. Here was arbitration not at home! But by the eighteenth century the curtain rose on the world's stage set with the furniture of modernity.

Ever since the year 1794, when Jay negotiated his treaty, arbi-

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[85]Novacovitch is further proved in the wrong in asserting (pp. 91–92) that the chief differentiating characteristic of the Italian arbitrations was the fact that the notaries played so large a part. As is shown above, notaries were not peculiar to Italian arbitrations.

[86]For cases of arbitration in this period, see Juan de Mariana, *Historia General de España*, t. IX, Lib. 29, Cap. 23. Mérignhac, pp. 37–38. De Flassan, I, 313–314.

[87]But philosophers and moralists were not the only men to favor arbitration in this century. When the treaty of commerce with France in 1786 was laid before the British parliament, one member expressed his regret that no article had to do with the settlement of differences through arbitration. Louise Fargo Brown, *The Freedom of the Seas*, p. 127.

tration has been a regular feature of enlarging importance in international diplomacy. But its progress has not been uniform; the last century was a period when war made equal strides with peace.

The close of the Napoleonic era turned men's minds once more to old unsettled questions, and as the Congress of 1815 met, the eyes of the world were intent upon Vienna. A halo of sublimity and mysticism was cast about the Quadruple Alliance by Alexander of Russia, who was dreaming of universal peace on a monarchical basis. Kings were shepherds who should watch over their flocks. All men were playmates in the garden of brotherhood. Alexander did his utmost to write his ideals into political fact, and although voicing the yearnings of millions of Europeans, he failed to observe the rising force of popular government, which refused to brook the exercise of despotic prerogatives.

In the middle decades of the nineteenth century, arbitration became more common than ever before. Great and small powers alike had constant recourse to it. As the Industrial Revolution gradually rendered the life of nations more complex through the improvement of the means of communication and the exploitation of untouched tracts of territory, minor differences between governments became everyday matters. Now it was a question of a sulphur monopoly in Naples,[88] now a question of the Sardinian salt trade,[89] or the American slave commerce,[90] or a fisheries question,[91] or the ownership of an island rich in natural resources,[92] or an important canal,[93] or the seizure of bullion,[94] etc. Great Britain and the United States headed the list in the number of arbitrations, but it is to be observed that South and Central American governments followed close behind.[95]

At the close of the Mexican War in 1848 a notable article on arbitration was included in the Treaty of Guadalupe Hidalgo. This

[88]Hertslet, *A Complete Collection of the Treaties and Conventions, and Reciprocal Regulations, at present subsisting between Great Britain and Foreign Powers*, etc., VI, 796–805.

[89]Dreyfus, *op. cit.*, pp. 161–162.

[90]John Bassett Moore, *History and Digest of the International Arbitrations to which the United States has been a Party*, etc., I, 410–412, 417. (The case of the *Creole.*)

[91]*Ibid.*, I, 426–494; H. La Fontaine, *Pasicrisie internationale*, pp. 437–449.

[92]La Fontaine, pp. 151–153. (Holland v. Venezuela *in re* Island of Aves in the province of Barcelona, Venezuela.)

[93]*British and Foreign State Papers*, 55: 1004–1021. (The arbitral decision of Napoleon III in regard to the Suez Canal, July 6, 1864.)

[94]Moore, II, 1449–1468; La Fontaine, pp. 35–37. (The case of the *Macedonian.*)

[95]For lists of arbitrations with dates, see Darby, pp. 919–927. See also, William R. Manning, *Ed., Arbitration Treaties among the American Nations to the Close of the Year 1910.* (Publications of the Carnegie Endowment for International Peace.)

article amounted to nothing less than a permanent arbitration clause, the first of its kind in recent history. It stated that in the event of future differences, which could not be settled by the two governments, "a resort shall not, on this account, be had to reprisals, aggression, or hostility of any kind, by the one republic against the other, until the government of that which deems itself aggrieved shall have maturely considered, in the spirit of peace and good neighborship, whether it would not be better that such difference should be settled by the arbitration of commissioners appointed on each side, or by that of a friendly nation. And should such course be proposed by either party, it shall be acceded to by the other, unless deemed by it altogether incompatible with the nature of the difference, or the circumstances of the case."[96] This is truly noble language.

In 1871, the Treaty of Washington was signed by the United States and Great Britain. This famous treaty, which John Morley declared "the most notable victory in the nineteenth century of the noble art of preventive diplomacy," was negotiated for the purpose of preparing the way for four important arbitrations. The first was concerned with the *Alabama* claims; the second, with the adjudication of personal claims arising out of the American Civil War; the third, with the settlement of the San Juan water boundary in the extreme northwest of the United States; and the fourth, with the northeastern fisheries.

The *Alabama* arbitration, which alone will concern us here, enjoys the distinction of being one of the most important of all history, forming a landmark in the evolution of international peace. The *Alabama* was a Confederate privateer fitted out in England during the Civil War. After the war, the United States claimed damages both for direct losses due to the depredations of the *Alabama*, and for indirect losses due to the unnecessary prolongation of the war. Only the direct losses, however, were later allowed. The dispute was referred to a High Commission of five members, nominated by the United States, Great Britain, Italy, Switzerland, and Brazil. The Commission met in Geneva, Switzerland, and rendered its decision in 1872, the award amounting to fifteen and one-half million dollars in gold to be paid to the United States by Great Britain. The transfer took place the following year.[97]

Of particular interest to Americans must be that famous arbitration, bizarre and in some respects almost farcical, which took place in 1893. I refer to the fur seal controversy with Great Britain.

[96] *The Statutes at Large and Treaties of the United States of America*, IX, 938–939.

[97] There are dozens of books dealing with the Geneva arbitration; all the necessary facts, however, may be found in Moore, I, 495–682.

Six years previously, American revenue cutters had captured some Canadian sealers in Bering Sea, but had been compelled by the United States government to release them. Seizures, however, continued, until the whole matter of killing seals in and around Bering Sea was laid before a commission that met in Paris, February 23, 1893. The United States endeavored to place its case partly on a moral ground, which was strongly attacked by the English representatives. The award was mostly in favor of Great Britain, but the necessity of regulating pelagic sealing was recognized, and the American proposals for doing so were adopted.[98]

This same decade also witnessed a remarkable diplomatic situation between the United States and England concerning the boundary line between British Guiana and Venezuela.[99] There is not space to go into the interesting details of this case, which was finally settled by arbitration. Suffice it to say that the United States forced arbitration upon England and Venezuela; but, in so doing, war was seriously threatened. The settlement was highly significant as showing how far the original Monroe Doctrine could be stretched even to mean, in the words of Mr. Olney, that "to-day the United States is practically sovereign on this continent, and its fiat is law upon the subjects to which it confines its interposition."[100] The entire affair, from the viewpoint of international arbitration, could almost be classed under the head of compulsory arbitration; but the successful issue can hardly be ascribed to Olney's tact—it was due, perhaps, rather to a genuine antipathy to war on the part of the great masses of people in both nations.[101]

It would give a view of only one side of the shield if we failed to state that arbitration in the nineteenth century often fell short of its ideals. Some nations do not care to lay their hands face up on the table. Such an instance of refusal to arbitrate occurred when Chile and Peru failed to come to terms previous to the bitter War of the Pacific.[102] Again, arbitral boards sometimes act slowly, causing more expense and trouble than they are worth. In such cases, a treaty, negotiated over the heads of the arbitrators, will often simul-

[98]Moore, I, 755–961; II, 2123–2131; V, 4759–4767; La Fontaine, pp. 422–437; L. F. Brown, *The Freedom of the Seas*, pp. 213–215.

[99]Moore, V, 5017–5018; La Fontaine, pp. 554–558; *British and Foreign State Papers*, 89: 57–65; 92: 160–162, 466–469. James Ford Rhodes, *History of the United States from Hayes to McKinley, 1877–1896*, pp. 443–456.

[100]Secretary Olney to Mr. Bayard, July 20, 1895. House Documents, 54th Congress, 1st Session, No. 1, Part 1, p. 558.

[101]For the labors of President Cleveland's Boundary Commission, see the articles by G. L. Burr, one of its members, in *The American Historical Review*, IV, 470–477; VI, 49–64.

[102]Henry Richard, *Papers on the Reasonableness of International Arbitration, its Recent Progress, and the Codification of the Law of Nations*, pp. 28–29.

taneously terminate the questions at issue and the sessions of the board.[103] On occasion, boards of arbitrators do not succeed in reaching any agreement, and their meetings are ingloriously suspended: for example, the attempt at a boundary arbitration between Great Britain and Liberia in 1878.[104]

As the last century neared a close, the forces of peace were able to present a stronger front than ever before in the history of the world. Essays had been written by the hundred, and innumerable poems composed by hopeful dreamers. Whittier had echoed the sentiment of thousands when he wrote: "Peace hath higher tests of manhood than battle ever knew,"[105] while ex-President Grant had announced during a sojourn in the Far East that "an arbitration between two nations may not satisfy either party at the time, but it satisfies the conscience of mankind."[106] Books on international law were on the shelves of every statesman's and professor's library, not only in Europe and America, but also in China and Japan.[107] Societies were formed and conferences held for the promotion of peace. The *Corda Fratres* was founded that students throughout the world might be made familiar with the Peace Movement, and so that "little by little, in spite of the sterility and apathy of the times, should bloom on a vigorous stem the beautiful flower of Peace and Universal Brotherhood."[108] Certain peace magazines and reviews existed solely for purposes of propaganda. The first Pan-American Conference had fired the imagination of the Americas and indicated the road to permanent peace. The national legislative bodies in the United States, England, Italy, France, and Sweden, early in the 70's, had passed general motions in favor of arbitration.[109] And by 1898 all was ripe for the great message of Nicholas II, Tsar of all the Russias, namely the summons to the nations to limit their armaments and turn their attention to international peace.

On the 24th of August 1898,[110] the Russian Minister for Foreign

[103] *E. g.*, the case of France and Great Britain in 1815. Darby, p. 774, No. 10.
[104] *Ibid.*, p. 801, No. 100.
[105] In his poem entitled "The Hero."
[106] Henry Richard, *op. cit.*, pp. 26–27.
[107] Prince Kung of China told ex-President Grant that the Chinese had made a study of international law as written by English and American authors. Richard, pp. 26–27.
[108] G. de Grassi, "The Founding of Corda Fratres," *The Cosmopolitan Student*, IV, 41–42.
[109] Richard, pp. 35–36. See also, James Brown Scott, *Instructions to the American Delegates to the Hague Peace Conferences and their Official Reports*, p. 10. John Bassett Moore, "The United States and International Arbitration," *Annual Report of the American Historical Association for the Year 1891*, pp. 80–85. Féraud-Giraud, "Des traités d'arbitrage général et permanent," *Revue de droit international et de législation comparée*, 29: 344–353.
[110] Aug. 12, 1898, Russian style.

Affairs, Count Muravieff, was authorized by the Tsar to present a certain rescript to all the official foreign representatives accredited to the imperial court of St. Petersburg. This historic document declared that the goal of modern governments was the maintenance of peace through the reduction of armaments. Therefore, the Emperor urged the holding of a conference to consider the problem.[111]

Looking back from the year 1926, just how much can we say the First Hague Conference of 1899 did for the cause of international arbitration? Above all, it succeeded in founding, in what had once been the cockpit of Europe, a permanent arbitral court. This court was intended to be accessible at all times in the future for such cases as the Powers chose to submit to it. It was to be composed of a number of the leading jurisconsults of the world, each of the Signatory Powers appointing not more than four for a term of six years. These appointees, according to the wording of the Convention, must be "of recognized competence in questions of international law, enjoying the highest moral reputation, and willing to accept the duties of arbitrators."

The title of "permanent court" is somewhat misleading, since its members were not to sit as a collective body, but be available severally as need should arise. Whenever application should be made to the Hague Court for the arbitration of a specific case, the litigant governments were to choose arbiters from the panel as above constituted. But if a tribunal could not be made up from this panel by direct agreement, each party was to name two arbitrators who together would choose an umpire. In case there were an equality of votes in the selection of an umpire, the choice was to be intrusted to a neutral government, designated by both parties. And finally, if the parties could not agree on any one neutral Power, each should choose one disinterested nation, and those two nations would then select an umpire.

It is readily apparent that the Hague Convention did not institute compulsory arbitration, and this has always been regarded by many friends of peace as its principal defect.[112] But we should not thereby

[111]Works, large and small, on the Hague Conferences are available in profusion. The following have proved especially useful: William I. Hull, *The Two Hague Conferences and their Contributions to International Law*; Alexander P. Higgins, *The Hague Peace Conferences and other International Conferences concerning the Laws and Usages of War*; James Brown Scott, *The Proceedings of the Hague Peace Conferences*, 4 vols.

[112]For example, some criticism was bestowed on the United States delegation for insisting on safeguarding the Monroe Doctrine. The American signers, headed by Andrew D. White, caused the following declaration to be passed by the Conference before the Final Act was accepted:—"Nothing contained in this Convention shall be so construed as to require the United States of America to depart from its traditional policy of not intruding upon, interfering with, or

lose sight of the fact that in 1899 it was absolutely impossible to include this feature in the treaty.

In the years immediately following the First Conference, the Permanent Court was not attended with the success so ardently anticipated. In fact it was dying of neglect when Roosevelt placed the Pious Fund case before it in 1902. In all, only four cases were carried to The Hague during the eight years following the adjournment of the delegates, and by 1907, the need was felt for a Second Conference.[113]

The chief defect in the arrangement of 1899, in the eyes of the American delegates to the Second Conference, was that "there was nothing permanent or continuous or connected in the sessions of the court or in the adjudication of the cases submitted to it."[114] As Mr. Choate explained, each of the four arbitrations held at the Court up to that time had been entirely independent of each other, and the utterances of the Court had consequently failed to make for the building up of a coherent body of international law and precedent.

M. Asser, a Dutch jurisconsult, eloquently described the old Hague Court in the following terms: "Instead of a permanent court, the Convention of 1899 gave but the phantom of a court, an impalpable specter, or to be more precise yet, it gave us a recorder with a list."[115] Therefore the more progressive delegates, led by Mr. Choate, drew up a plan to strengthen the power of the Court. The enterprise found an inspired champion in M. de Martens, the able Russian delegate, who exhorted the representatives to follow the star of progress. "There have always been in history," he said, "epochs when grand ideals have dominated and enthralled the souls of men; sometimes it was religion, sometimes a system of philosophy, sometimes a political theory. The most shining example of this kind was

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entangling itself in the political questions or policy or internal administration of any foreign State; nor shall anything contained in the said Convention be construed to imply a relinquishment by the United States of America of its traditional attitude toward purely American questions." This reservation was renewed at the Second Conference in 1907. See J. B. Scott, *The Hague Court Reports*, Introduction, pp. civ, cvi. Andrew D. White, in his *Autobiography*, II, 341, thus vividly described the passage of the reservation in 1899: "There was a pause of about a minute, which seemed to me about an hour. Not a word was said,—in fact, there was dead silence,—and so our declaration embodying a reservation in favor of the Monroe Doctrine was duly recorded and became part of the proceedings. Rarely in my life have I had such a feeling of deep relief; for, during some days past, it has looked as if the arbitration project, so far as the United States is concerned, would be wrecked on that wretched little article 27."

[113]For details of the cases carried to The Hague, previous to the World War, see George Grafton Wilson, *The Hague Arbitration Cases*, and James Brown Scott, *The Hague Court Cases*.

[114]See Scott, *The Proceedings of the Hague Peace Conferences*, II, 312–316.

[115]Asser's speech, *Ibid.*, II, 232–235.

the crusades. From all countries arose the cry, 'To Jerusalem! God wills it.' To-day the great ideal which dominates our time is that of arbitration. Whenever a dispute arises between the nations, even though it be not amenable to arbitration, we hear the unanimous cry, ever since the year 1899, 'To The Hague!' "[116]

But these were so many high-sounding words. The true tongue of the Old World spoke through M. Beernaert, the earnest opponent of the new plan. "Never," he contended, "has the national sentiment been at a higher pitch, and old nations and old languages that we had thought of as having passed to oblivion, are again calling for their place in the sun,—no one of us would renounce his own land, his own and cherished fatherland, and no one would certainly consent to being governed from afar, and hence ill governed. Therefore, in my judgment, we must regard as a fearful Utopia, the dream of a world state or of a universal federation, of one sole parliament, of one court of justice supreme over all the nations."[117]

When the question of a court of arbitral justice finally came up before the conference in plenary session, the friends of arbitration were bitterly disappointed. Although the principle of obligatory arbitration was approved in the abstract, it was not made the keystone of the arch. Thus any future court was materially weakened in advance. All that was accomplished was the unanimous passage of a declaration to the effect that "certain disputes, in particular those relating to the interpretation and application of the provisions of international agreements, may be submitted to obligatory arbitration without any restriction."[118]

As to the other features of the proposed court, it has been aptly said that they constitute a "building without foundations, a locked door without a key, a machine without power."[119] The delegates could never agree on the exact method of appointing the judges. Everything else was done that could be done relative to the qualifications, term of office, privileges, and salary of the judges. The procedure of such a court was carefully outlined; articles were included setting up a special judicial committee to attend to the smaller cases submitted; and a provision made for an aunual extraordinary session of the full court for the adjudication of larger questions. In the words of Dr. James Brown Scott, who reported to the plenary Conference the work of the commission on the Court of Arbitral Justice, the committee's aim had been "not merely to build the

[116]Scott, *The Proceedings of the Hague Peace Conference*, II, 325–328.
[117]*Ibid.*, II, 332–336.
[118]*Ibid.*, I, 689.
[119]Hull, *op. cit.*, p. 422.

beautiful façade for the palace of international justice; we have erected, indeed furnished the structure, so that the judges have only to take their places upon the bench."[120] But who were to be the judges and how chosen—that was the insurmountable obstacle.

The period immediately before the outbreak of the World War was marked by an ever-increasing agitation for some means of settling amicably international disputes of every sort and kind without exception. The United States now worked almost alone. In 1910, at a meeting of the National Arbitration and Peace League in New York, President Taft took an inspiring stand for the cause of peace. "I have noticed," he declared, "exceptions in our arbitration treaties, as to reference of questions of national honor to courts of arbitration. Personally, I do not see any more reason why matters of national honor should not be referred to a court of arbitration than matters of property or matters of national proprietorship."[121]

It was not long after this memorable speech that practical steps were taken toward treaties of obligatory arbitration between this country and Great Britain and France. In the summer of 1911, it was announced that such treaties had been signed, eliminating the old exceptions of vital interests and national honor. But it will not be necessary to explain the details of these documents, for the Senate killed the whole program with conservative amendments. Mr. Taft, bitterly disappointed, could only say that, "this relegates the United States to the rear rank of those nations which are to help the cause of universal peace."[122]

Yet the apparent failure of Mr. Taft was turned into temporary success by President Wilson and Secretary Bryan in 1913. The Bryan plan for peace proposed the compulsory investigation of disputes between nations by means of permanent commissions of inquiry. The old commissions of inquiry provided for at the First Hague Conference were temporary and voluntary in character, and Bryan hoped to strengthen them by the addition of permanency. The new committees, consisting of five members, were to be authorized to act at the request of either party and in some of the treaties were empowered to act on their own initiative. During the period of investigation, which was limited to a year, the nations could not declare war or open hostilities. The real purpose of the plan was to afford time for an impartial investigation. The commissions were to possess no executive powers and their reports were not binding, the

[120]Scott, *The Proceedings of the Hague Peace Conferences*, I, 387–388.
[121]*The American Year Book*, (1910), p. 107.
[122]*Ibid.*, (1913), p. 11.

contracting parties reserving the right to act independently on the subject matter of the dispute after the commission had presented its report. There were some minor qualifications which made the project immediately practicable, and a number of treaties were negotiated and ratified by the Senate on the basis of Bryan's proposals.[123]

But Taft dreamed in vain, and Bryan worked in vain,—in August 1914, the World War enveloped Europe in a shroud of flame. All hope of a third conference at The Hague vanished into thin air; peace meetings at Stockholm, Munich, The Hague, and Vienna were indefinitely postponed. The peoples of Europe set their teeth for a bitter combat, while all the energies and resources of every Power were directed into the mad maelstrom. Let us pass over those years of carnage, and come to what was once the hope of the world, the League of Nations.

It is Article XIV of the Covenant that most concerns us. This brief but highly important paragraph states that, "the Council shall formulate and submit to the Members of the League for adoption plans for the establishment of a Permanent Court of International Justice. The Court shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it. The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly."

One of the first acts of the new League was to appoint a commission to take up the matter of a Permanent Court of International Justice along the lines indicated in the Covenant. This commission began its deliberations at The Hague, June 16, 1920, and made a report to the Council at San Sebastian, August 5th of the same year. The draft scheme thus drawn up by the commission was then sent to the governments of the states that were members of the League. In the covering letter which accompanied the draft scheme, the following appeal was made:—

"The scheme has been arrived at after prolonged discussion by a most competent tribunal: its members represented widely different national points of view. They all signed the report. Its fate has therefore been very different from that of the plans for a Court of Arbitral Justice which were discussed without result in 1907. Doubtless the agreement was not arrived at without difficulty. Variety of opinions, even among the most competent experts, is inevitable on a

[123] *The American Year Book*, (1913), pp. 113–114; (1914), p. 109. For a useful essay on the Bryan peace plan, and a collection of all the treaties negotiated on its basis, see J. B. Scott, *Treaties for the Advancement of Peace*, etc.

subject so perplexing and complicated. Some mutual concessions are therefore necessary if the failure of thirteen years ago is not to be repeated. The Council would regard an irreconcilable difference of opinion on the merits of the scheme as an international misfortune of the gravest kind. It would mean that the League was publicly compelled to admit its incapacity to carry out one of the most important of the tasks which it was invited to perform. The failure would be great and probably irreparable; for if agreement proves impossible under circumstances apparently so favourable, it is hard to see how and when the task of securing it will be successfully resumed."[124]

The appeal met with response. To-day at The Hague sits the Permanent Court of International Justice.

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[124]*League of Nations Official Journal*, Sept., 1920, p. 3. Special Supplement No. 2.