1923 for broadest invocation as a preventive of misunderstandings between the United States and Canada,[17] still offers a potent means of safeguarding American-Canadian interests from unnecessary injury.

CHARLES CHENEY HYDE

THE UNITED STATES SENATE AND THE WORLD COURT

For twelve years, proposals for the support of the Permanent Court of International Justice have been before the Senate and people of the United States. On February 24, 1923, President Harding requested the Senate's advice and consent for adherence by the United States to the Protocol of Signature of December 16, 1920, subject to four reservations. By a resolution of January 27, 1926, the Senate gave its advice and consent, subject to five reservations.[1] On September 14, 1929, a Protocol on the Accession of the United States was opened to signature at Geneva; and on December 9, 1929, the 1920 Protocol of Signature, the 1929 Protocol of Accession by the United States, and the 1929 Revision Protocol were signed on behalf of the United States.[2] On December 10, 1930, President Hoover requested the advice and consent of the Senate for the ratification of these protocols. No action was taken in the Senate until its Committee on Foreign Relations made a report on June 1, 1932;[3] but this report was never considered on the floor of the Senate. Public hearings on the matter were held by the Committee on Foreign Relations on March 23 and May 16, 1934,[4] and in the early months of 1934 announcement was made that it would be considered in the Senate early in the first session of the Seventy-fourth Congress.

On January 10, 1935, the Senate Committee on Foreign Relations made a report[5] recommending the Senate's adoption of the following resolution:

> Whereas the President, under date of December 10, 1930, transmitted to the Senate a communication, accompanied by a letter from the Secretary of State dated November 18, 1929, asking the favorable advice and consent of the Senate to adherence by the United States to the protocol of date December 16, 1920, of signature of the Statute for the Permanent Court of International Justice, the protocol of revision of the Statute of the Permanent Court of International Justice of date September 14, 1929, and the protocol of accession of the United States of America to the protocol of signature of the Statute of the Permanent Court of International Justice of date September 14, 1929, all of which are set out in the said message of the President dated December 10, 1930: Therefore be it

[17] Charles E. Hughes, The Pathway of Peace, Representative Addresses, 1921–1925, New York, 1925, 3, 16.

[1] See the writer's analysis of the reservations, in this JOURNAL, Vol. 22 (1928), pp. 776–796.

[2] For the texts, see 1 Hudson, World Court Reports (1934), pp. 16, 95, 102.

[3] 72d Congress, 1st Session, Senate Report No. 758. See the writer's comment in this JOURNAL, Vol. 26 (1932), pp. 569–572.

[4] Records of these hearings were published at the time.

[5] 74th Congress, 1st Session, Senate Executive Report No. 1.

> *Resolved (two-thirds of the Senators present concurring)*, That the Senate advise and consent to the adherence by the United States to the said three protocols, the one of date December 16, 1920, and the other two each of date September 14, 1929 (without accepting or agreeing to the optional clause for compulsory jurisdiction), with the clear understanding of the United States that the Permanent Court of International Justice shall not, over an objection by 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.

This resolution was debated in the Senate from January 14 to January 29. On January 16, 1935, in a special message [6] to the Senate President Roosevelt urged that "consent be given in such form as not to defeat or delay the objective of adherence."

During the course of the debate, two additions were voted to the pending resolution, the texts of both of which were borrowed from the resolution adopted by the Senate in 1926. On January 24, 1935, the Senate adopted the following addition,[7] proposed by Senator Vandenberg (Michigan):

> *Resolved further*, That adherence to the said protocols and statute hereby approved shall not be so construed as to require the United States to depart from its traditional policy of not intruding upon, interfering with, or entangling itself in the political questions of policy or internal administration of any foreign state; nor shall adherence to the said protocols and statute be construed to imply a relinquishment by the United States of its traditional attitude toward purely American questions.

On January 25, 1935, the Senate refused to add to the resolution the following proposal by Senator Norris (Nebraska):[8]

> *Resolved further*, That the adherence of the Government of the United States to said protocols and statute is upon the express condition and understanding that no dispute or question in which the United States Government is a party shall be submitted to said Permanent Court of International Justice unless such submission has been approved by the United States Senate by a two-thirds vote.

On January 29, 1935, the Senate adopted a second addition which had been printed as "intended to be proposed" by Senator Johnson (California), but which upon his declining the sponsorship was proposed by Senator Thomas (Utah):[9]

> *Resolved further*, as a part of this act of ratification, That the United States approve the protocol and statute hereinabove mentioned with the understanding that recourse to the Permanent Court of International Justice for the settlement of differences between the United States and

[6] 74th Congress, 1st Session, Senate Document No. 11.

[7] 79 Congressional Record, pp. 425, 916.

[8] *Id.*, p. 989. A list of forty references to arbitration made by the President without action by the Senate, is given in *idem*, pp. 980–982.

[9] *Idem*, pp. 1196, 1205.

any other state or states can be had only by agreement thereto through general or special treaties concluded between the parties in dispute.

Various reservations were proposed, some of which did not come to a vote. The usual procedure was followed, by which Senators intending and announcing that they intended to vote against the resolution in its final form voted for reservations which would make its final form objectionable to the largest number possible. Senator Nye (North Dakota) proposed that the resolution should include a reservation "that the code of law to be administered by the World Court shall not contain inequalities based on sex."[10] A reservation, printed as "intended to be proposed" by Senator Gore (Oklahoma), would have stipulated that the United States' action "shall not become or remain effective and shall not be or become binding while or when any nation which is an adherent of said protocols and which is indebted to the Government of the United States shall be in arrears for a period of more than six months in respect of any payment due upon such indebtedness." A reservation, printed as "intended to be proposed" by Senator Johnson (California), provided that the United States should reserve "to itself exclusively the right to decide what questions are within its domestic jurisdiction" and declared "that all questions relating wholly or in part to its internal affairs, including immigration, labor, coastwise traffic, the tariff, debts, and all other domestic questions which Congress shall have the right to define further, are wholly within the jurisdiction of the United States, and are not, under the act of adherence, to be construed as being submissible for advisory opinions, judgments, or decisions either to the Council under Article 17 of the Covenant, or to the said Court or to any agency thereof, or to the decision or recommendation of any foreign power whatsoever." Another reservation, similarly in the name of Senator Johnson, provided that the United States should assume "no obligation to be bound by an election, decision, act, report or finding of the Council or Assembly of the League of Nations," and that any national of the United States sitting as a judge might "withdraw (as provided for in Article 24 of the Statute) in any matter wherein the Court undertakes to perform any duties under the peace treaties other than the determination of suits between States or whenever the Court sustains any non-judicial relation to the League of Nations." Reservations were also proposed relating to the Monroe Doctrine.

The debate on the floor of the Senate brought out few points which have not been made over and over again during these twelve years, on one or the other side. Senator Borah (Idaho) repeated his attack on the court's advisory jurisdiction, and joined various Senators in assailing the court's opinion in 1931 on the proposed Austro-German Customs Régime. The opposition to the court was based chiefly on its connection with the League of Nations, on a fear of ratification as a step toward joining the League, on ap-

[10] *Idem*, p. 916.

prehension of loss of independence by the United States and of loss by the Senate of its share of control of our foreign relations. It was argued, also, that it was unnecessary for any action to be taken because the United States can now use the court, because the Permanent Court of Arbitration is available for use, and because our arbitration treaties are adequate.

As the date for a vote approached, the opposition grew in intensity, both in the Senate and over the country. The legislatures of Delaware, Nebraska and Wisconsin and the House of Representatives of the Georgia legislature adopted hostile resolutions, and a majority of the members of the Massachusetts legislature expressed their opposition.[11] Significant also were the persistent attacks on the court made by the Hearst newspapers, and the radio addresses of Father Coughlin of Detroit. If the vote had been taken during the week of January 20, possibly the resolution might have been carried; but a vote during the latter part of that week was prevented by the unanimous agreement of January 24.[12] The following week-end saw the Senate inundated by a flood of telegrams in opposition to the court, many of which were due to radio appeals. The character of much of the opposing radio campaign is perhaps indicated by the following statement of Senator Reynolds (North Carolina) in a radio address on January 27, 1935:[13]

> The World Court is nothing but a court of babble, ballyhoo and bunk—a court of intrigue—the League of Nations is nothing but a league of notions designed to deceive and camouflage. If we affiliate with the World Court it perhaps means the ultimate cancellation of the war debts—the breaking down of our immigration barriers, and injection of Old World ideas of conquest into the New World's idea of peace.

It was in the atmosphere created by this campaign that the resolution came to a vote in the Senate on January 29, 1935. Whereas in 1926 the court resolution had been passed by 76 votes to 17, the 1935 resolution was defeated (two-thirds of the votes being required) by 52 to 36. Nineteen of the Senators who voted in 1935 had participated in the vote in 1926, and seven Senators who voted for the 1926 resolution voted against the 1935 resolution. Of the 36 votes against the 1935 resolution, ten were cast by Senators from Delaware, Montana, North Dakota, Rhode Island and South Dakota, which five States have a combined population of about 2,877,000, which is only 2.2% of the population of the United States.

[11] The Delaware resolution was not adopted by the two houses of the state legislature until Jan. 30, 1935; but the Georgia House of Representatives acted on Jan. 17, 1935, the two houses of the Nebraska legislature on Jan. 24 and 28, 1935, and the two houses of the Wisconsin legislature on Jan. 24 and 25, 1935. The telegrams sent by members of the Massachusetts legislature were dated Jan. 26, 28 and 29, 1935.

Senator Reynolds stated on Jan. 27 that opposing resolutions had been adopted also by the legislatures of Georgia, Illinois and Washington. 79 Congressional Record, p. 1222. The writer is unable to confirm this statement.

[12] 79 Congressional Record, p. 917.

[13] The address is published in 79 Congressional Record, pp. 1221, 1222. See also his address in the Senate, in similar strain, on Jan. 24. *Id.*, p. 909.

A minority of the Senate thus frustrated the adoption of a measure supported by Presidents Harding, Coolidge, Hoover, and Roosevelt; by Secretaries of State Hughes, Kellogg, Stimson and Hull; and by the three leading political parties in their 1932 platforms. This measure had also been approved, in the words of Attorney General Cummings,[14] "wherever and whenever associations of members of the bar have had occasion to give expression to their opinions" over a period of thirteen years.

Why has the Senate thus receded from the position which it took in 1926?

The explanation is not to be found in arguments on the merits of the court itself. In some quarters there was opposition to a court mainly composed "of foreign judges," whose names some Senators could not pronounce,[15] and "only two of whom understand English," a court which has no code of law to apply. In some quarters, also, the advisory function of the court was attacked as a non-judicial function, with little regard for the rôle which advisory opinions have played and still play in Anglo-American jurisprudence. In some quarters, opposition was based upon the court's connection with the League of Nations, in almost complete disregard of the facts that in these twelve years the United States has found it impossible to refrain from extensive coöperation at Geneva, that the United States has recently become a member of the International Labor Organization, and that a considerable part of the American public would even favor membership in the League of Nations.[16] Some Senators wished to tie the hands of the President so that he could not agree to a reference to the court without the Senate's consent; Senator Norris (Nebraska) wished to tie the hands of the Senate so that it could not consent to a general treaty providing for references to the court.

The explanation of the Senate's shift is to be sought in events which are not related, or are not closely related, to the court. Chief of these is the default by various European governments in the payment of their debts to the United States. It is idle to argue this question with American taxpayers who are feeling the burden of taxes in this period of depression; and any sympathetic consideration of arguments which may be advanced by defaulting governments is precluded by the fact that many of these same governments are maintaining large armed forces which the Disarmament Conference has failed to reduce. Moreover, the defaults have intensified a feeling in some quarters that the United States was used as a cat's paw in the World War. In consequence, coöperation by the United States with European governments in the maintenance of international institutions is rendered more difficult. During the Senate debate, one Senator expressed a feeling

[14] In a brochure entitled *In re the World Court*, published by the American Bar Association (1934).

[15] 79 Congressional Record, pp. 910, 1203, 1204.

[16] As indicated by a vote on a "question of public policy" in 36 representative districts in Massachusetts, on Nov. 6, 1934, in which 62.3% of the votes cast were favorable to United States membership in the League. See the writer's account in New York Times, Nov. 25, 1934.

which was probably shared by others when he exclaimed, "To hell with Europe." [17] The defeat of the court resolution gave satisfaction in some quarters as a slap back at Europe.

It must also be noted that in the course of twelve years the statement of the action proposed to be taken by the United States has become cumbersome and complicated, with the result that many people in the United States have found difficulty in understanding or explaining it. This was expressed in a preamble to the resolution adopted by the Wisconsin Legislature on January 25, 1935, as follows:

> Whereas the whole League-Court controversy is so involved with reservations, amendments, conditions, and protocols that the average citizen is completely muddled as to just how far the internationalists now hope to commit this country; and that no qualification can be so drawn as to retain complete freedom of action, and accordingly the wisest thing is to keep clear of European political jealousies and entanglements altogether.

In 1923, Secretary Hughes proposed four reservations, two of which were wholly unnecessary and served no practical purpose. The Senate resolution adopted in 1926 contained five reservations which could have been greatly simplified; they included a reservation on advisory opinions which Secretary Hughes had not thought to be necessary and the wisdom of which many people have been disposed to question. The 1929 Accession Protocol added new provisions which have not been uniformly interpreted; on the basis of the Senate's fifth reservation it erected a superstructure which some people have persisted in refusing to comprehend. The resolution voted on by the Senate in 1935 contained three further "understandings." The whole pyramid of conditions, reservations and understandings has confused many minds, and the confusion was reflected in the Senate debate.[18] Somehow, the issue ought to be simplified, and perhaps at some future time a statement of the action to be taken by the United States can be made anew.

In some quarters, the Senate's vote has led to a renewed insistence on an amendment to the Constitution of the United States, abolishing the requirement of a two-thirds vote in the Senate when it advises and consents to treaties. Little prospect of success would now be open to a movement to that end. For some time attention has been given to the possibility of support of the court by the United States in consequence of action by the two Houses of Congress by majority vote. On May 2, 1932, a resolution was introduced in the House of Representatives by Mr. Linthicum (Maryland), which would have authorized an appropriation to enable the United States to pay a share of the court's expenses.[19] On January 24, 1935, Mr. David J.

[17] The exclamation was excised from the printed record.

[18] See the remarks by Senator Bulow (South Dakota), Jan. 29, 1935. 79 Congressional Record, p. 1215.

[19] 72d Congress, 1st Session, H. J. Res. 378. A favorable report on this resolution was

Lewis (Maryland) introduced in the House of Representatives a bill providing for authority to be given by Congress for the President's ratification of the three Court Protocols including the "optional clause";[20] if the authority recently given to the President to accept an invitation to the United States to become a member of the International Labor Organization[21] would serve as a legal precedent for such action, the proposal presents a question of political expediency rather than of legal power.

In no country other than the United States has an issue been made of supporting the existing court. It is being maintained at the present time (April 1, 1935) by the 49 parties to the 1920 Protocol of Signature, and by twelve additional States which as members of the League of Nations contribute to meeting its expenses. The court's annual reports list 475 international instruments which relate in some way to its jurisdiction, and 41 States or members of the League are now bound by the "optional clause" which gives the court jurisdiction over certain classes of disputes. The "permanence" of the court seems assured. It is now engaged in holding its 34th session, having before it a request for an advisory opinion relating to minority schools in Albania. Clearly, the vote in the United States Senate will not undo the great progress achieved in the establishment of the court and in its successful functioning over a period of more than thirteen years. It seems inevitable that the United States will yet find a way of sharing the responsibility for the contributions which the court will continue to make.

MANLEY O. HUDSON

TREATIES AND CHANGING CONDITIONS

It would seem self-evident that it is better to revise or to put an end to a treaty in accordance with law rather than to risk friction on account of breaking a treaty. Yet straining the treaty to the breaking-point or breaking the treaty itself has been common in international readjustments in recent years. The doctrine of *rebus sic stantibus* has been advanced as a basis of setting aside treaty obligations. Some liberal constructionists of this doctrine find even in slight changes of conditions in one of the states parties to the treaty, or even in neighboring states, sufficient ground for considering inoperative the whole or certain provisions of a treaty. Those following a stricter doctrine maintain that the only ground upon which the treaty may be set aside is such a change in conditions as makes the action acceptable to all parties to

made by the House of Representatives Committee on Foreign Affairs on June 15, 1932. 72d Congress, 1st Session, House of Representatives Report No. 1628. See also the writer's comment in this JOURNAL, Vol. 26 (1932), pp. 794–796.

[20] 74th Congress, 1st Session, H. R. 4668. See also the letter of Professor James W. Garner, of the University of Illinois, in the New York Times of Feb. 10, 1935.

[21] The Constitution of the International Labor Organization was proclaimed by the President on Sept. 10, 1934, and is published in U. S. Treaty Series, No. 874. On the effect of this action, see the writer's comment in this JOURNAL, Vol. 28 (1934), pp. 669–684.