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# ON A PERMANENT ARBITRATION TREATY

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In the latest message of the President to Congress, in addition to the information that a definite and final settlement of the controversy over the Venezuelan boundary has been reached, the fact has been made public that "negotiations for a treaty of general arbitration for all differences between Great Britain and the United States are far advanced, and promise to reach a successful consummation at an early date." It still remains unknown to the public what are the details of the proposed treaty, or whether it is in contemplation to establish a permanent arbitration tribunal, or merely to agree to arbitrate in all cases of disagreement. Probably in either case, in spite of the fact that the President speaks of "all differences," the treaty will be found to contain certain reservations, as there is a substantial consensus of opinion that cases do sometimes arise in which arbitration between independent nations is inadmissible.

If it shall prove that the governments of President Cleveland and Lord Salisbury have actually succeeded in forming between the two peoples a durable alliance which shall assure that for the future all questions arising between them shall be settled peaceably and honorably, without derogation from the independence or dignity of either nation, they will surely achieve a fame which the greatest of the world's conquerors might envy, but in view of the evident and apparently insuperable obstacles, it is as well not to be too confident, at least until the treaty is before us, that such a desirable consummation is actually within reach.

Perhaps the anticipated treaty will be found to be no more than a mutual agreement that the two nations will hereafter settle by arbitration all differences which have failed of solution by diplomatic methods, presumably with reservations of questions affecting the sovereignty, independence or honor of either, but with no attempt to provide beforehand for any permanent court of arbitration or any invariable method to be followed in the selection of arbitrators. It would not be easy to pass any criticism upon such a treaty, except that it would be a disappointment to those who are expecting something more. It would be of value as an expression of the present mutual good will of the two powers, and would probably have some tendency to perpet-

uate that good will, but it would after all amount to little more in fact than the assurances of lasting peace and amity contained in many an existing treaty, and would be but a feeble bulwark of peace in any future clash of real or supposed interests.

It may be that the attempt is to be made to provide in advance for the manner in which future differences are to be laid before the arbitrators, for the mode of selecting these and of giving effect to their decision. This would be going a little farther, but only to encounter difficulties without compensating advantages. It is not the constitution or procedure of the tribunal that is the critical matter when any international question threatens a rupture of friendly relations, for such points are comparatively easy of settlement when once the governments have agreed that arbitration and not war shall end the dispute, and such an agreement could not be helped and might be hindered by an already existing treaty regulating the subsequent procedure. Should it happen on any future occasion that one of the governments considered the provisions of the general arbitration treaty likely to prove prejudicial to its interests in the particular case it would form a temptation to refuse arbitration rather than a reason for consenting to it.

General expectation, however, goes far beyond this, and looks for the establishment of a permanent High Court, to be at once the means of reconciliation of all disputes and a visible evidence to all mankind that two great nations have forever repudiated the savagery of war as the *ultima ratio gentium* and have substituted for it, as between themselves, the peaceful rule of international justice. It is at least a beautiful dream, and until we know better we may hope that it is to prove something more than a dream, but the difficulties to be overcome are disheartening. For, in the first place, how could such a court be satisfactorily constituted? If it were to be composed of an equal number of members from each nation there would be little probability of agreement. Absolute impartiality is too rare a quality to permit of reasonable expectation that the judges could wholly divest themselves of national bias where their national interests were involved. It must be remembered that in most disputed questions there is much to be said for both sides, and that it is seldom that either party to a controversy is so clearly in the right that upright and intelligent men cannot differ in their judgment. If impartiality could be expected from any body of men in the world it could surely be from the Judges of the Supreme Court of the United States, yet we all remember how

they divided as members of the Electoral Commission of 1876. If, in order to secure a majority decision, one or more members of the court are to be foreigners, then he or they will in reality give the decision and the American and English judges will be only the more relieved from any duty to be impartial, as the presence of foreigners would in effect be an admission that the others were expected to be partisans and in the guise of judges to be in fact advocates. It is perhaps theoretically possible, though it would certainly be somewhat anomalous, that a permanent Anglo-American court should be composed entirely of foreigners.

But the obstacles in the way of devising and organizing a court are insignificant in comparison with those which would impede its successful working. How is it to be determined when and how an issue is to be submitted to its adjudication? If this is to be left to the agreement of the governments in each case, if they are to be as free as now to arbitrate or not to arbitrate, then there is no gain whatever; there is positive disadvantage in the existence of a permanent court. As already said, the agreement to arbitrate is the critical matter which when settled leaves subsequent details relatively easy. But the existence of a court would in no case tend to promote such agreement, while it might often hinder it, should either nation suspect, with or without reason, that the court as constituted was likely to decide adversely to its claims in any particular case. If, on the other hand, the court itself is to be clothed with power, either on its own motion or on application of one of the governments concerned, to take jurisdiction in case of disputes without the consent of both parties, then it is more than likely that the first attempt to exercise this authority would also be the last, for the only possible power to compel obedience would lie in the armed force of the other nation. It is almost uniformly admitted that certain questions must be exceptions to any scheme of permanent arbitration; who shall decide whether any question in dispute is within these exceptions? Each nation for itself, always and necessarily, unless they have surrendered their status as independent states, and a refusal to agree upon arbitration would almost surely be based upon such a claim, which would equally be made the ground for refusal to submit to the nominal authority of the court to take jurisdiction on demand of the other party. Suppose such a court to have been in existence one year ago, when the President's message about the Venezuelan boundary dispute suddenly brought us to contemplate the possibility

of war over a matter which few of us had ever thought of as one in which we had any interest whatever. It is precisely that threat of war which has stirred up the demand that some means shall be found whereby lasting peace shall be assured, at least between ourselves and England, but what could the court have done in that case? Nothing whatever; there was no question between England and America upon which it could have claimed jurisdiction or which could be decided by arbitration in any form. The boundary question was between England and Venezuela, the question of our right to intervene and to demand of England a certain course of conduct in relation to that dispute was no question of right in the legal sense at all; there was no law, international or otherwise, to give to, or withhold from, the United States such a right. It was a matter of national interest alone, a political question pure and simple, which only the supreme government of the nation could decide. What was true of the Venezuelan question is true of nearly all questions which could possibly need the intervention of arbitration to prevent war. The questions about which nations will fight are generally questions of their own national or dynastic interests or antipathies; they will rarely fight over disputed facts or claims for damages unless they are in a temper to reject all settlement and to fight because they prefer war to peace. It is, perhaps, conceivable that England and America might set up some common authority which, by the consent of both, should be endowed with power to consider and determine not only issues submitted by agreement in each case, but as well all questions where the interests or policy of the two peoples were opposed. If that were done, however, it would not be a court that was established but a supreme government over a confederacy of the English-speaking peoples; but a confederacy the most fragile that it ever entered the mind of man to establish, with a government destitute of the most essential attribute of government, the power to enforce its authority. If such a confederacy proved durable it would prove that we were ready in fact for a far closer union, for the reunion of the severed branches in one vast Anglo-Saxon empire. There are some who dream of such a union, and possibly the future may bring it forth, but it certainly is not yet desired by the mass of the people on either side of the ocean.

Most men who have given the subject careful thought have found themselves forced to the conclusion that a permanent court of arbitration between two nations alone is impracticable, but many have believed that such a court might be established

by several nations, and have hoped that the principal states of Europe and America may be brought to enter into such a plan. It would seem that the difficulty of constituting an impartial court might be lessened if the parties to the agreement were numerous, and it also appears, at least at first sight, as if the problem of how to secure obedience to its decrees might be solved by the pledge of every state to unite to execute them, by force of arms if need be, against a recalcitrant member. But in truth this project is more hopeless than the other. Such a combination would be as truly the formation of a new confederacy as if only two nations were included, and the greater the number of the members and the greater the diversity of their interests the more certainly would it be fore-doomed to failure. The different states would be no less jealous of each other, no less determined to decide for themselves wherein their interests lay and to further that interest by hook or crook, than before; it might even be that their jealousy would only be increased by the claim of alien states to an increased right of interference. Faith in the prospect of any such league of peace would seem to indicate either an ignorance of modern European history, or an unquenchable hopefulness that what human nature has been in the past it will not be in the future if only it can be shown a better way. If we can be assured that the rulers of mankind will hereafter prefer the general welfare to the satisfaction of their own ambitions, the peace of the world to the aggrandizement of their own states; if we can be sure that no treaties are made with the secret intention that they shall be broken when it is safe and profitable to break them; that no alliance which is proclaimed to the world shall be undermined by other treaties kept secret from the partners in the alliance; in short, when we may be sure that statesmen have adopted the Golden Rule as the actual rule of politics; then we can confidently hope for the brilliant success of a permanent international agreement for arbitration—only, it will be wholly superfluous.

*Edward V. Reynolds.*