

single high contracting party, if a stop is contemplated in a territory of another Power, even a non-contracting Power (Article 1, paragraph 2).

The fact that the interpretation of the term "High Contracting Parties" has caused such a widespread difference of opinion among the judges of the high courts of England, should serve as a warning that in the drafting of treaties particular care must be exercised to indicate whether the term is intended to be restricted to the ultimate ratifying Powers or is intended to embrace also all the signatories.

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AMERICAN MEMBERS OF THE PERMANENT COURT OF ARBITRATION
DURING FORTY YEARS

Forty years have passed since the establishment of the Permanent Court of Arbitration. The Hague Convention for the Pacific Settlement of International Disputes of July 29, 1899, which first made provision for the Court, may be said to have entered into force on September 4, 1900, when ratifications were deposited at The Hague by seventeen of the twenty-six signatory states.¹ Even before that date, however, states began to appoint members of the Permanent Court of Arbitration, each of the contracting states being entitled to appoint four members. The convention provided (Article 28) that the Administrative Council of the Court should notify the contracting states of the constitution of the Court; this formality was not accomplished until April 9, 1901, on which date fifty-four members of the Permanent Court of Arbitration had been appointed by sixteen states. The existence of the Court may therefore be said to date either from the later months of 1900 or from the earlier months of 1901. Its continued maintenance was provided for in the Hague Convention for the Pacific Settlement of International Disputes of October 18, 1907. Some forty-seven states, parties to one or both of the Hague Conventions, have participated in the support of the Court during some or all of the intervening years.

Continuously during these forty years the Government of the United States has coöperated in the maintenance of the Permanent Court of Arbitration. The United States promptly ratified both the Hague Convention of 1899 and that of 1907; it has regularly appointed members of the Court, its diplomatic representatives at The Hague have participated in the work of the Administrative Council of the Court, and it has made annual contributions for meeting the expenses of the Court. On five occasions the United States has been a party to arbitrations which may properly be said to have been before tribunals of the Court.

In recent years the Permanent Court of Arbitration usually has about 150

¹The convention contained no provision concerning the date of its entry into force; one of the signatories, Turkey, did not deposit its ratification until June 12, 1907. The convention was ratified by the President of the United States on April 7, 1900, and the ratification was deposited at The Hague on Sept. 4, 1900; but the convention was not proclaimed by the President of the United States until Nov. 1, 1901. 32 U. S. Stat., p. 1779.

members. In the course of forty years some 500 men have been members of it. The number includes twenty Americans, of whom fifteen were appointed as members by the President of the United States, and five were appointed as members by the King of Siam. Each appointment is for a six-year term, but the mandate may be renewed. In most cases where this was possible, the President has renewed the appointment on the expiration of the six-year term, and most of the appointees have continued to be members until their death. Four of the fifteen appointees have continued their membership for about a quarter of a century. Only one of the President's appointees has resigned. Two Americans have declined to accept appointment as members of the Court—Grover Cleveland in 1900,² and Benjamin N. Cardozo in 1927.³ The appointments made by the President of the United States are not submitted for confirmation by the Senate.

The following Americans were appointed as members of the Permanent Court of Arbitration by the President of the United States:⁴

1. Benjamin Harrison, President of the United States from 1889 to 1893, was appointed on August 24, 1900;⁵ he continued as a member less than seven months, until his death on March 13, 1901.

2. Melville W. Fuller, Chief Justice of the Supreme Court of the United

² Holls, *The Peace Conference at The Hague* (1900), p. 305.

³ Judge Cardozo, then Chief Judge of the New York Court of Appeals, wrote to Charles Evans Hughes on Sept. 8, 1927, as follows:

"After many inward struggles I have come to the conclusion that a Judge of the Court of Appeals best serves the people of the State by refusing to assume an obligation that in indeterminate, if improbable, contingencies might take precedence of the obligations attached to his judicial office.

"The Constitution of the State excludes a Judge of the Court of Appeals or a Justice of the Supreme Court from holding any other office or public trust. In my opinion, membership in the Court of Arbitration is not an office or a public trust within that prohibition. Analysis of the Hague Tribunal is necessary, however, before this conclusion becomes obvious. To the minds of many, I might seem, in accepting membership, to be violating the command of the Constitution, or to be making nice distinctions to win an honor for myself. Even if I were to make it clear that membership does not violate the letter of the mandate there might be many who would feel that there had been an offense against the spirit. I think I shall best maintain the dignity and fair fame of the great office that I hold if I avoid the occasion and the possibility of debate or misconstruction. None more fully than you will feel an understanding sympathy for this attitude of mind.

"I am grateful to the President for his generous confidence. Though I put the honor aside, it is with many a pang of regret and in obedience to a sense of duty. Every impulse of personal desire would move me to another choice." *New York Times*, Sept. 13, 1927, p. 16. See also, Hellman, Benjamin N. Cardozo, *American Judge* (1940), pp. 155-157, in which some inaccurate statements are attributed to Cardozo. Fortunately, his over-meticulous attitude was not taken by Chief Justice Fuller and Judge Gray in 1900.

⁴ Most of the dates of appointments are taken from the published reports of the Administrative Council of the Court. Some confusion seems to prevail as to the dates when the six-year terms begin to run.

⁵ The appointments made in 1900 seem to have been notified to the International Bureau on or soon after November 24, 1900. *U. S. Foreign Relations*, 1900, p. 792.

States from 1888 to 1910, was appointed on August 24, 1900,⁵ and re-appointed on November 27, 1906; he continued as a member until his death on July 4, 1910.

Chief Justice Fuller was selected by the British Government to serve as a member of a tribunal of the Permanent Court of Arbitration in the Muscat Dhows Arbitration between France and Great Britain; this tribunal gave its award on August 8, 1905.

3. John W. Griggs, Attorney General of the United States from 1898 to 1901, was appointed on August 24, 1900,⁵ and re-appointed on November 27, 1906; he continued as a member until the expiration of a second six-year term in 1912.

4. George Gray, Judge of the Circuit Court of the United States from 1899 to 1914, was appointed on October 11, 1900,⁵ and re-appointed on November 27, 1906, and November 27, 1912. His third term expired in 1918, but he continued to be listed as a member by the Administrative Council of the Court in 1919, and he was re-appointed on January 12, 1920; he continued as a member until his death on August 7, 1925. His membership thus covered almost a quarter of a century.

Judge Gray was selected by the American and British Governments to serve as a member of a tribunal of the Permanent Court of Arbitration in the North Atlantic Coast Fisheries Arbitration between the United States of America and Great Britain; this tribunal gave its award on September 7, 1910.

5. Oscar S. Straus, Secretary of Commerce and Labor of the United States from 1906 to 1909, was appointed on January 9, 1902, and re-appointed on January 29, 1908, January 10, 1914, January 12, 1920, and January 12, 1926; he continued as a member until his death on May 3, 1926. His membership thus covered a period of almost twenty-five years.

6. Elihu Root, Secretary of State of the United States from 1905 to 1909, was appointed on December 15, 1910; his six-year term expired in 1916, but he continued to be listed as a member by the Administrative Council of the Court in 1917, 1918, and 1919. He was re-appointed on January 12, 1920, January 12, 1926, and January 12, 1932; and he continued as a member until his death on February 7, 1937. His membership thus covered a period of more than twenty-six years.

Mr. Root served as a member and president of a tribunal of the Permanent Court of Arbitration in the case relating to Religious Properties in Portugal, being named in the *compromis* to which France, Great Britain, Portugal and Spain were parties; this tribunal handed down twenty-one awards on September 2 and 4, 1920. In 1910 he was one of the counsel of the United States before a tribunal of the Permanent Court of Arbitration in the North Atlantic Coast Fisheries Arbitration.⁶

⁵ See footnote 5 on preceding page.

⁶ In the Venezuelan Claims Arbitration in 1904, a strong objection was made to the appearance by a member of the Permanent Court of Arbitration as counsel before a tribunal of

7. John Bassett Moore, Judge of the Permanent Court of International Justice from 1921 to 1928, was appointed on November 27, 1912; his six-year term expired in 1918, but he continued to be listed as a member by the Administrative Council of the Court in 1919. He was re-appointed on January 12, 1920, January 12, 1926, and January 12, 1932; and he continued as a member until the expiration of his fourth term in 1938. His membership thus covered a period of more than twenty-five years.

8. Charles Evans Hughes, Judge of the Permanent Court of International Justice from 1928 to 1930, was appointed on October 1, 1926. He resigned on February 14, 1930, upon his appointment as Chief Justice of the Supreme Court of the United States. It is not to be thought that the two offices are incompatible, however, for Melville W. Fuller accepted appointment to the Permanent Court of Arbitration and continued his membership for almost ten years while he was Chief Justice of the Supreme Court of the United States.

9. Newton D. Baker, Secretary of War of the United States from 1916 to 1921, was appointed on June 4, 1928, and re-appointed on June 4, 1934; he continued as a member until his death on December 25, 1937.

10. Roland W. Boyden, a member of the Boston Bar, was appointed on April 16, 1930; he continued as a member until his death on October 25, 1931.

11. Robert E. Olds, Under Secretary of State of the United States from 1927 to 1928, was appointed on December 18, 1931; he continued as a member less than one year, until his death on November 14, 1932.

12. Manley O. Hudson, Judge of the Permanent Court of International Justice since 1936, was appointed on May 5, 1933, and re-appointed on May 6, 1939.

13. Green H. Hackworth, Legal Adviser to the Department of State of the United States since 1925, was appointed on March 9, 1937.

14. Henry L. Stimson, Secretary of State of the United States from 1929 to 1933, was appointed on February 7, 1938.

15. Michael Francis Doyle, a member of the Philadelphia Bar, was appointed on February 7, 1938.

The following Americans were appointed as members of the Permanent Court of Arbitration by the King of Siam:

1. Frederick W. Holls, Secretary of the United States delegation at the Peace Conference at The Hague in 1899, was appointed by the King of Siam in 1901 or 1902; he continued as a member until his death on July 23, 1903.

2. Edward H. Strobel, general adviser to the Government of Siam from 1903 to 1908, was appointed by the King of Siam on July 29, 1903, and continued as a member until his death on January 15, 1908.

3. Jens I. Westengard, general adviser to the Government of Siam from 1908 to 1915, was appointed by the King of Siam on March 6, 1911, and re-

the Court; the Convention of 1907 provides (Art. 62) that a member of the Court may not act as counsel before an arbitral tribunal created within the framework of the Court, except on behalf of the state which appointed him.

appointed on March 6, 1917; he continued as a member until his death on September 17, 1918.

4. Eldon R. James, adviser in foreign affairs to the Government of Siam from 1918 to 1924, was appointed by the King of Siam on December 31, 1918, and re-appointed on December 31, 1924, and January 1, 1931. He resigned on July 2, 1935.

5. Francis B. Sayre, adviser in foreign affairs to the Government of Siam from 1923 to 1925, was appointed by the King of Siam on January 1, 1925, and re-appointed on January 1, 1931; he continued his membership until his resignation in 1935.

The duties connected with membership in the Permanent Court of Arbitration are not onerous, at any rate for most of the members. There has never been a meeting of the members of the Court as such. Of the twenty American members, only three—Fuller, Gray, and Root—have served as members of tribunals created out of the panel of members of the Permanent Court of Arbitration and charged with the arbitration of particular cases.

One function is served by the members of the Permanent Court of Arbitration which is not provided for by the Hague Conventions of 1899 and 1907. Since 1921, the American members appointed by the President have regularly been invited, as a national group, to nominate candidates in the elections of judges of the Permanent Court of International Justice. These invitations have been issued by the Secretary-General of the League of Nations in pursuance of the provisions in Article 5 of the Statute of the Permanent Court of International Justice, annexed to the Protocol of Signature of December 16, 1920. The first invitation in 1921 was declined by the American group in a reply to the Secretary-General on September 15, 1921, reading as follows:⁷

Considering that our appointment by the President as members of the Permanent Court of Arbitration was, under the Hague Convention of 1907,⁸ to perform the functions contemplated in that Convention and that your invitation to nominate candidates for judges of the new Permanent Court of International Justice is under another treaty, to which the United States is not a party, and in respect of which no authority has been conferred upon us, we reluctantly reached the conclusion that we were not entitled to make official nominations for the new Court.

The specious reasoning of this reply, due to political exigencies of the moment, was abandoned by the American group, composed of the same four men, when a second invitation was received by them in 1923, and nominations have been made by the American group in each of the subsequent elections—in 1923, 1928, 1929, 1930, 1935, 1936, 1937, 1938, and 1939.⁹

MANLEY O. HUDSON

⁷ League of Nations Doc., A.92.1921.V.

⁸ This was not strictly accurate. Both the 1899 and the 1907 Conventions are in force for the United States *vis-à-vis* different groups of other states; the appointments by the President are made under both conventions, therefore.

⁹ The 1939 election was postponed and has not yet been held.