The Japanese-controlled *North China Standard* of Peking (April 5th) goes so far as to remark that "China's 'face-saving' proclivities" had descended to "simian antics" and that the United States had been a party to this "puerile practice." It characterized the Chinese note of inquiry about the Nanking bombardment as "effrontery," maintained that it should have been "flung back in the teeth of the maker," and criticised the exchange of notes about treaty revision as "meaningless." Even the representative *Peking and Tientsin Times* (British) deems it necessary to acquit America of playing a "dirty trick," apparently, largely on the ground that the other "aggrieved powers have not coöperated whole-heartedly at any time since the outrages occurred," and that the "British Government by its December, 1926, Memorandum and its proposals of January, 1927, cut the ground from under the feet of other powers" and "did much to undermine international solidarity."

This tempest in the International Teapot of the Treaty Ports is not only interesting but characteristic. The state of mind which it represents is one of the elements which make a just and reasonable solution of the problems arising between China and the Western Powers so difficult, for the repercussion of local foreign sentiment in China is naturally and legitimately felt in every capital of the world. And the holding of a just balance between the legitimate interests, sentiments and demands of "the man on the spot," the legitimate aspirations of the Chinese people, and the true interests of the Western Powers and the world at large, is a task of peculiar delicacy. In this instance the balance has been held in a steady hand.

We have protected American life and property and secured the promise of adequate reparation for wrongs done to American citizens without unnecessarily humiliating a great people. We have coöperated in joint concerns with the other Western Powers without going to the point of making them the keepers of our national interests or our national conscience.

WILLIAM C. DENNIS.

THE RULE OF UNANIMITY AND THE FIFTH RESERVATION TO AMERICAN ADHERENCE TO THE PERMANENT COURT

Sir John Fischer Williams, in his illuminating article concerning "The League of Nations and Unanimity," contributed to this JOURNAL[1] has stated that "unanimity is the necessary rule for international matters in this sense that no independent state can be compelled without its own consent to accept obligations," though he admits that the League of Nations "has in its own limited sphere broken with and passed beyond the principle of unanimity." It is now quite evident that the United States Senate, in its fifth reservation to the Protocol of Signature of the Statute of the Permanent Court of International Justice, has raised problems of fundamental signifi-

[1] July, 1925, p. 475.

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cance for the League, as well as for the United States. The second part of this reservation provides that the court shall not, "without the consent of the United States, entertain any request for an advisory opinion touching any dispute or question in which the United States has or claims an interest." This would appear on first impression to require merely that it should be accorded entire equality with all members of the League. This impression is based on the presumption that unanimity is necessary in asking the court for an advisory opinion. "No such presumption, however, has so far been established," according to the Final Act of the Conference of States members of the Permanent Court of International Justice, held in Geneva on September 1, 1926.[2]

Article 5 of the Covenant of the League provides that:

> Except where otherwise provided in this Covenant or by the terms of the present treaty, decisions at any meeting of the Assembly or of the Council "shall require the agreement of all the Members of the League represented at the meeting. All matters of procedure at meetings of the Assembly or of the Council, including the appointment of committees to investigate particular matters, shall be regulated by the Assembly or by the Council and may be decided by a majority of the Members of the League represented at the meeting.

It may be inferred, therefore, that requests for advisory opinions should require unanimity. But Article 15 of the Covenant specifically provides that decisions of the Council with respect to actual disputes requires what may be termed a "qualified unanimity," namely, of the members of the Council "other than the representatives of one or more of the parties to the dispute." In practice this might mean that a decision affecting a large number of members of the Council would be reached actually by a minority of its members. It would seem clear, however, that whenever the League requests the Permanent Court of International Justice for an advisory opinion concerning such disputes, perfect unanimity is not required. This was the evident belief of the Council in the dispute over Mosul between Great Britain and Turkey, though the precise point was not definitively determined because of the peculiar circumstances of the controversy. The fact that the court declined to give an advisory opinion in the Eastern Carelia controversy, because of the refusal of Russia to participate as an interested party, does not settle the matter. It will be recalled that the court then said:

> There has been some discussion as to whether questions of an advisory opinion, if they relate to matters which form the subject of a pending dispute between nations, should be put to the Court without the consent of the parties. It is unnecessary in the present case to deal with this topic.

And the Council of the League, in its subsequent action in this dispute, expressly reserved the right to submit requests for advisory opinions in similar

[2] Printed in Supplement to this JOURNAL, Vol. 21 (1927), p. 1.

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situations. It is not difficult to visualize a situation where the Council might formulate its request for an advisory opinion, either with respect to an actual dispute or to an anticipated dispute, in so guarded a form as to afford an ample basis of fact to enable the court to reach a decision, without requiring the presence of any of the interested parties. This request might be so framed as to appear to be purely a question of procedure, like the Mosul case, requiring merely a majority vote. If the request concerned such a matter as the interpretation of the Monroe Doctrine, the interest of the United States in this problem would be most apparent.

In regard to procedural matters in the League, it has been ingeniously argued that, inasmuch as the Council and the Assembly have reserved the right to interpret the Covenant, a question whether or not the specific matter under discussion was one of procedure would first have to be resolved by a unanimous vote! If this were true, any nation in the League would have the right of a suspensive veto amounting to the power to completely paralyze all action by the League. It is difficult to concede that the doctrine of unanimity could lead to so absurd a result.

We are led, therefore, by the foregoing considerations to recognize that the Conference of States, held in Geneva in 1926, was entirely sound in its conclusion that no presumption has been so far established that the adoption of a request for an advisory opinion by the Council or Assembly requires a unanimous vote. "It is therefore impossible to say with certainty whether in some cases, or possibly in all cases, a decision by a majority is not sufficient." In the light of this conclusion, the condition imposed by the United States Senate in the fifth reservation is seen to amount to a demand for a privileged position, and not for equal rights with the other members of the Court. Whether requests for advisory opinions require absolute unanimity, qualified unanimity, or a mere majority, the United States Senate insists that no request for an advisory opinion "touching any dispute or question in which the United States has or claims an interest" shall be entertained by the court without the consent of the United States.

It is a matter of peculiar interest to inquire why the members of the League of Nations should seem disposed to allow this fundamental question concerning unanimity to remain unsolved. An obvious answer is that they feel unable to reach a definite decision because of the complications and the implications of the problem. They are unwilling, by an arbitrary decision based possibly on inadequate discussion, to restrict unduly the larger usefulness of the League. Another answer is that advanced most ably by Sir Cecil Hurst in the Geneva Conference of 1926 to the effect that: "It would, in fact, be better to wait for the rule of law to develop out of practical cases rather than to ask the Court to give a binding opinion upon a problem which at present was not ripe for solution." This attitude of *solvitur ambulando,* so characteristic of the Anglo-Saxon mind, is quite intelligible and entitled to the utmost respect.

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Still another answer, of extreme importance, is that the League should be reluctant to surrender a powerful, indirect method of securing obligatory jurisdiction of the court over all international disputes through requests for advisory opinions adopted by a mere majority vote. It has been argued with considerable show of reason that the advisory opinion should supplement the jurisdiction of the League over all disputes which may be brought before it. This would appear to be the logical implication of the controversy between France and Great Britain concerning the nationality decrees in Tunis and Morocco. France was virtually constrained, *nolens volens*, to allow the dispute to be referred to the court for an advisory opinion. If it be found possible to achieve obligatory jurisdiction by the indirect route of advisory opinions adroitly requested for that purpose, it would seem evident that the United States might have still stronger reasons for insisting on the fifth reservation in order to guard against all constraint, even though of a moral kind, with respect to any essential interests such as might be involved, for example, in an interpretation of the Monroe Doctrine.

Various representatives at the Geneva Conference argued that this fundamental issue concerning unanimity should be referred to the Permanent Court of International Justice for final determination. Senator Thomas J. Walsh has urged that this be done. Mr. Charles Evans Hughes, in his presidential address before the American Society of International Law on April 28, 1927,[3] quotes, with entire approval, the view expressed by Mr. Raul Fernandez, who was a member of the Advisory Commission of Jurists which drafted the statute of the court, that "the solution of this difficulty is in the hands of the Council and the Assembly at Geneva," and that "the only possible solution is the formal admission that a request for an advisory opinion is one of those questions for which a unanimous vote is necessary." But such proposals are unacceptable to many of the members of the League of Nations for the reasons already indicated, namely, reluctance to impair the possible usefulness of the League, the desire to find a working solution in actual practice, and insistence on the right of the League to be the final judge of its own powers.

If the court were asked to settle this legal question once for all, and should decide that a unanimous vote is necessary for the adoption of any request for an advisory opinion, it might greatly facilitate the ultimate decision of the United States to adhere to the court. There would still remain, however, the troublesome problem of "qualified unanimity," where the votes of interested parties in disputes brought before the League would be ignored under the general powers of the Council and of the Assembly. It may prove impossible for the United States to reconcile itself to so important a constraint. If the court should decide that requests for advisory opinions might in some cases be adopted by a mere majority vote, the United States would be faced with the difficult alternative of either receding completely

[3] See Proceedings, p. 15.

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from the condition imposed by the fifth reservation, or of remaining indefinitely out of the court. In any event, there is no doubt that the United States already enjoys full access to the court, and that its well-known predilection for arbitration and the judicial settlement of international disputes should lead it to make use of the court whenever a dispute may arise which the ordinary methods of diplomacy may not be able to adjust.

PHILIP MARSHALL BROWN.

CONSERVATION OF MARITIME LIFE

The decrease in certain species of fish and maritime life and the threatened extermination of other species are matters of growing importance in international relations. The lessening area of grazing lands is affecting the supply of animal food. Proposals are being made that the conservation of food fisheries be undertaken by general international coöperation.

There have already been some limited agreements relating to fish and animal life in the high seas where conservation would otherwise have been impossible because outside national jurisdiction. The general treaty of 1882 for the regulation of the North Sea fisheries aims to conserve maritime food resources outside territorial waters. The convention between the United States and Mexico of December 23, 1925, in Section III states as one of its purposes the "conserving and developing of the marine life resources in the ocean waters off certain coasts of each nation." A joint commission has been appointed to carry out the purpose and provisions are agreed upon for making regulations effective. This convention applies "to both territorial and extra-territorial waters." States are, in general, reluctant to agree to any regulation which will affect their freedom of action within territorial waters. Recent technical investigations seem to indicate that it may be more important for the conservation of maritime life to regulate action within territorial waters than in the high sea. Such regulation would imply a recognition of some degree of modification in former claims to exclusive jurisdiction in territorial waters and a recognition of the general well-being as paramount to special national claims.

The United States' position as to the preservation of maritime life would doubtless be as Mr. Justice Holmes affirmed in regard to bird life in Missouri *v.* Holland (252 U. S. [1920] 416):

> Here a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another Power. The subject-matter is only transitorily within the State and has no permanent habitat therein. But for the treaty and the statute there soon might be no birds for any Powers to deal with. We see nothing in the Constitution that compels the Government to sit by while a food supply is cut off and the protectors of our forests and our crops are destroyed.

GEORGE GRAFTON WILSON.

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