Carnegie Endowment for International Peace
Division of International Law

THE HAGUE COURT REPORTS

Second Series

COMPRISING THE AWARDS, ACCOMPANIED BY SYLLABI, THE AGREEMENTS FOR THE ARBITRATION, AND OTHER DOCUMENTS IN EACH CASE SUBMITTED TO THE PERMANENT COURT OF ARBITRATION AND TO COMMISSIONS OF INQUIRY UNDER THE PROVISIONS OF THE CONVENTIONS OF 1899 AND 1907 FOR THE PACIFIC SETTLEMENT OF INTERNATIONAL DISPUTES

Edited with an Introduction by
James Brown Scott

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INTRODUCTION

A decade and a half ago the Carnegie Endowment for International Peace brought together and issued in convenient form a collection of the cases which had been tried before the Permanent Court of Arbitration. The present volume contains the cases which have since been decided by that beneficent institution. The two volumes place before the reader interested in such matters the awards in each case, preceded by a syllabus giving in summary form the facts involved and the holding of the tribunal; and also, in each case, the agreements submitting the controversy to the appropriate tribunal for settlement. It is sufficient here to state, without going into details, that the cases contained in the first volume were sixteen in number, of which fourteen were arbitrations and two were cases submitted to international commissions of inquiry.

The present volume consists of *The Expropriated Religious Properties Case* (Great Britain, Spain and France *vs.* Portugal), decided in 1920,—a single arbitration, one may say, with numerous cases; the *French Claims against Peru*, some four in number, decided the following year; the *Norwegian Claims Case* (Norway *vs.* United States), decided in 1922; the *Island of Palmas Case* (Netherlands *vs.* United States), decided in 1928; and finally, the *Tubantia Case* (Netherlands *vs.* Germany), referred to and passed upon in 1922 by an international commission of inquiry. The *Palmas*, the last in date, was an arbitration submitted to a single arbiter, the Honorable Max Huber, a member of the Permanent Court of Arbitration, and member and at a later time President of the Permanent Court of International Justice. The other cases were arbitrations of a limited nature, under what is known as "summary procedure."

If the two collections be regarded as a series, it will not be necessary to discourse at length upon the Convention for the Pacific Settlement of International Disputes, as drafted and adopted by the First Hague Peace Conference of 1899, nor upon the revised form in which it left the hands of the members of the Second Hague Peace Conference of 1907; nor will it be necessary to dwell upon the Commission of Inquiry, inasmuch as the introduction to the first volume of the series states the origin of the Convention and of the institutions created in accordance with its terms for the decision of the controversies which should be referred to them.

Nevertheless, without again summarizing the terms of the Pacific Settlement Convention, it is well to remark that the regular, as distinguished from the summary procedure, contemplates an arbitral tribunal of five members, two of which (in the original document) might be the nationals of the govern-

ments in controversy, under a neutral president, this being modified in 1907 by a provision that only one of the arbitrators could be the national of each of the contending countries. It should be said, however, that the provisions of the convention regarding the formation and procedure of the tribunal are in the nature of recommendations, leaving to the parties in dispute full liberty in the choice of the tribunal, with the suggestion of the type and the procedure set forth in the Pacific Settlement Convention, should the Powers be unwilling or unable to form a tribunal without having recourse to the convention. The Hague Tribunal contemplates oral argument. As the text of the convention is contained in the present volume, it is only necessary to state that arbitration by summary procedure, to use the caption of the section, recommends a tribunal of three, each party appointing an arbiter, and a third as president, who shall not be a national of either, chosen by agreement of the parties or by lot. The characteristic of the summary procedure is the absence of oral argument, as the proceedings are exclusively in writing, although, as would be expected, the tribunal very properly may "demand oral explanations from the agents of the two parties, as well as from the experts and witnesses whose appearance in Court it may consider useful."

Because of the presence of the Dogger Bank Case in the preceding volume, it seems unnecessary to state in detail either the origin or the nature or the formation of a commission of inquiry.[1] It is sufficient to remark that the members of the commission, in the absence of special agreement to the contrary, are appointed in the same way as in the case of the arbitral tribunal. The point to be borne in mind is that the commission is a fact-finding body; that it sets forth the facts as found from testimony supplied by the parties in controversy in a report directed to the parties in issue, leaving further proceedings to depend upon the parties themselves.

Three of the five cases contained in the present volume were submitted to special tribunals under the summary procedure set forth in Articles 86–90 of the revised convention.

Perhaps it may be said that the reader may properly be spared comment upon the cases included in the present volume, inasmuch as the awards speak for themselves. Nevertheless, it seems advisable to indulge in more than a word of comment upon them.

The first of the series is the so-called "Portuguese" case, which deals with claims for expropriated religious properties, presented by Great Britain, Spain and France. These all had a common origin, a common submission and a common rule of decision. The laws of Portugal had forbidden religious bodies or persons to acquire property in Portugal, either in their own names or in the names of others but intended for the use of such bodies or

[1] The interested reader will find all the information he needs for an understanding of the procedure before such a tribunal in Part III of the Pacific Settlement Convention, Articles 9–36, inclusive, pp. xx–xxvi of the present volume.

persons. Through the negligence or connivance or informal permission of the government, properties were, however, acquired in contravention of law during the period of the monarchy. The claimants were alleged to be of British, French and Spanish nationality. They were members of the Catholic Church, claiming that they were despoiled of their property. It was natural that, in such circumstances, there should be an inclination on the part of the several governments to present claims in behalf of their subjects or citizens. This was done; but an examination of the laws which they were accused of having violated inclined the authorities of the claimant governments to a compromise. The Republic of Portugal, which had been proclaimed in 1910, was not at the time over-stable, and it apparently was not in the interest of the government to refuse a compromise, inasmuch as the Portuguese are almost without exception members of the Catholic Church. The result was that an "understanding was reached at Lisbon on August 13, 1920, and duly notified to the Secretariat of the Tribunal, the British, French and Portuguese Governments," by virtue whereof the tribunal was vested with "complete freedom in settling, according to equity and by a single judgment or several judgments, the claims which form the subject of the arbitration."

The tribunal met on September 2, 1920, stating that, as the claimants had introduced capital into Portugal, and as the Portuguese Government had not seized the property as "a source of pecuniary gain, any more than it had been the intention of the claimants to violate the respect due to the laws and institutions of Portugal," the finding of the tribunal should be equitable, bearing in mind the twofold situation; and the monies awarded by the tribunal were to be deposited at a fixed date in Lisbon in the legations of the claimant countries. Awards were generally made in the case of the British and of the French claimants. They were, however, with but an exception or two, refused to the Spanish claimants, because of their failure to prove, according to the Spanish and Portuguese laws, their Spanish nationality. From the "Introductory Note" of a separate publication of these awards, the following paragraphs are lifted:

> Aside from the general interest which always attaches to a dispute between nations and its peaceful settlement according to rules of law and equity, in the awards in the matter of expropriated religious properties in Portugal, to which Great Britain, Spain and France on the one hand, and Portugal on the other, were parties, there is a very special interest, as showing that the nations, after the war, have resumed the orderly process of settling their disputes, which was so rudely interrupted by war. . . .
>
> It would have been a simple matter for Great Britain and France to settle their claims with Portugal through diplomatic channels, inasmuch as they were allied in the World War against a common enemy. They preferred, however—and wisely,—judicial settlement to diplomatic adjustment, and before the ratifications of the Treaty of Versailles had been deposited at Paris on January 10, 1920, they took steps to have the cases

presented to the Tribunal of Arbitration at The Hague in the course of 1920. By this foresight on their part, evidence was given to the world that the Permanent Court of Arbitration had survived the war, and that the disputes of nations, of a legal nature, could in the future, as in the past, be submitted to a tribunal of arbitration at The Hague, if the nations desired to do so.

During the sessions of the Second Hague Peace Conference, the cornerstone of the Peace Palace, due to the munificence of Andrew Carnegie, was laid. In August, 1913, it was formally opened as the seat of the Permanent Court of Arbitration. The controversies between Great Britain, Spain and France, against Portugal, in the matter of the expropriated religious properties were decided in the Peace Palace, and the decision of these disputes was the first occasion on which the Peace Palace was used for the purpose for which it was constructed.

We thus have a demonstration that justice is surviving the World War. It has survived previous wars. It will survive future wars.

The French claims against Peru were arbitrated in 1921, and a decision was entered in favor of French citizens in whose behalf the French Republic had on February 2, 1914, concluded with Peru an agreement for arbitration. The facts are painfully simple. Peru, under the conditions set forth in the arbitration, was indebted in what, before the World War, would have been considered large sums of money, and eventually awards were rendered in favor of the claimants. The case, indeed, is what would be called a *cause celèbre.* It has figured largely in the English courts; it was the subject of decisions in the Belgian courts, and of an arbitral award of the highest value by the Franco-Chilean Tribunal at Lausanne. These cases, one in the High Court of Justice in England (decree of February 23, 1888), the second in the Court of Appeals of Brussels (decree of July 10, 1888), and the award of Lausanne (July 5, 1901), determine the nature of a *de facto,* as distinguished from a *de jure,* government, and the effect of each, in what may be considered the leading cases on the subject of the recognition of governments and of states.

In view of the frequency with which the relations between *de facto* and *de jure* governments make their appearance in international relations, it seems advisable to do more than refer to the cases in question. In addition to the three cases cited in the award, there was a previous English case decided in the Chancery Division in 1887. The question turned on the *de facto* government of Peru and on one of the phases of the guano transaction in question. Mr. Justice Chitty, a distinguished member of a famous family bred in the practice of the law said: "The first and one of the principal grounds relied on by the Plaintiffs is that the agreement of compromise was made on behalf of the *de facto* government of the Republic which was not the *de jure* government. But the Court," he continued, "is bound to take cognizance of the recognition of a *de facto* government by the government of this country, and it was admitted by Plaintiffs' counsel at the bar that the *de facto* government

was duly recognised by the Queen." The effect of this recognition upon the court and the claim before it, Mr. Justice Chitty states in two weighty sentences: "The Court declines to investigate, and indeed has no proper means of investigating, the title of the actual government of a foreign state which has been thus recognised. This attempted distinction between the *de facto* and the *de jure* government which runs through the statement of claim is untenable."[1]

So much for what may be called the antecedents.

The decision of the court on this perplexing question of international law is in a single sentence as above quoted: "This attempted distinction between the *de facto* and the *de jure* government which runs through the statement of claim is untenable." It would be difficult to find a shorter or a more accurate statement of the law and practice of nations in this respect. However, a year later the liability of Peru was again litigated, and the rights of the parties were decided in what may be called a full length decision. Having stated the facts in detail, Mr. Justice Kay, after examining the precedents, both English and American, stated the law from our own Wheaton: "In the case of international transactions, where foreigners and foreign Governments are concerned, the authority is presumed to exist, and may be inferred from the general treaty-making power, unless there be some express limitation in the fundamental laws of the State. So, also, where foreign Governments and their subjects treat with the actual head of the State, or the Government *de facto*, recognised by the acquiescence of the nation, for the acquisition of any portion of the public domain or of private confiscated property, the acts of such Government must, on principle, be considered valid by the lawful sovereign on his restoration, although they were acts of him who is considered by the restored sovereign as an usurper." To this passage from Wheaton Mr. Justice Kay added: "This distinguishes the dealings as to the public property of a State between the State and its own subjects from similar dealings with foreigners, which the succeeding Government by international law must treat as valid."[2]

In another phase of the case, the Belgian Court of Appeals, after invoking the authority of Mr. Justice Chitty and the two English cases, stated that the action taken by the Peruvian decree of October 25, 1886, was based exclusively upon the considerations:

> That the Constitution annuls the acts of usurpers and that de Pierola as well as Iglesias has usurped supreme power; that it is established by the documents in the case that Belgium has recognized the government of Pierola, which must therefore be held to have been regularly established, notwithstanding any affirmation to the contrary; that this must be so at

[1] *Republic of Peru* v. *Peruvian Guano Company*, Law Reports (Chancery Division, 1887), Vol. XXXVI, pp. 489, 497.

[2] *Republic of Peru* v. *Dreyfus Brothers & Co.*, Law Reports (Chancery Division, 1888), Vol. XXXVIII, pp. 348, 361.

all events when passing upon the obligatory force of acts effected between the recognized representative of Peru and persons other than Peruvian nationals; that such acts cease to be exclusively submitted to the law of Peru but are controlled by the principles of private international law; that these principles require the respect of conventions contracted between the recognized government and citizens of foreign nationality; and that such conventions or contracts bind the nation and can not be disregarded by new representatives. . . .

That, if the decree of 1886 should receive the interpretation which the appellant company accords it, the court should refuse to apply it in the actual case: first, because in principle laws only have executory effect within the limits of the territory; that merchandise which has been found in Belgium since 1880 and the title to which had been regularly transferred subsequently in conformity with the laws of Belgium should not be submitted to the Peruvian law of October 25, 1886; second, because the Belgian courts have recognized in several final decisions [the rights of claimants] . . . and previous to the decree of 1886, its application would constitute a violation of Belgian sovereignty; the rights belonging to Dreyfus Brothers & Co. having been established by the judicial power in conformity with the laws in force in Belgium, can not be withdrawn by a foreign law.[1]

The case before the Franco-Chilean Arbitral Court, called the award of Lausanne, of July 5, 1901, gives the most careful and elaborate discussion which has come to the attention of the undersigned. It is another phase of the case known as Dreyfus Brothers & Co., which must have seemed interminable to the Peruvian Government and which it would have liked to see decided, if only to be rid of it once and for all. Like the Swiss awards in general, it is a masterpiece. The phase of the question of interest, dealing with the effect of actions of a *de facto* government upon its *de jure* successor, occupies ten full pages (288–298) of quarto format. Only two quotations may be made from this masterly award.

First, "that the applicability of Article 10 of the Constitution of 1860 reduces itself to whether the former Constitution should prevail over the new; that this question is connected with that of the dictatorial régime; that this question can therefore only be decided by a principle superior to positive law, since revolutions of a political organism, and which the public powers are unable to resist escape from the application of this law, which is established in view of a different order of things."

Its origin and its reason for the rule and its acceptance is as stated in the second, "that according to a principle of the law of nations, at first denied theoretically in the dynastic interest by the diplomacy of European monarchies, applied, however, in fact in a series of cases today universally admitted, the capacity of a government to represent the State in its international relations depends in no degree whatever upon the legitimacy of its

[1] *La Belgique Judiciaire*, Tome XLVI—Deuxième série, Tome 21, 10 juillet, 1888 (No. 77, Dimanche, 23 septembre 1888), pp. 1218, 1225–6.

origin; so that foreign states no longer refuse to recognize governments *de facto*, and the usurper who exercises power in fact, with an express or tacit consent of the nation, acts and concludes validly in the name of the state treaties which the legitimate government, upon its restoration, is bound to respect."[1] This holding of the tribunal, supported by an array of authorities, is as good international law as it once was only republican doctrine.

The two judicial decisions and the arbitral award which have been the subject of discussion established the liability of Peru; and the award in the present case is one of accounting rather than of law, but is of importance because it removed from the domain of controversy the disputes between the French Government, in behalf of its citizens, with the Government of Peru.

The Norwegian ship cases, decided October 13, 1922, are important because of the subject-matter,—the right of a nation to requisition for its own purposes not only ships under construction, but the contracts for construction of ships the keels of which have not been laid. There could be no doubt as to the liability for ships under construction and the materials already "in the yard," to use the technical expression. It might be asserted that liability for the contracts requisitioned could not be doubted, had it not been doubted by the Government of the United States. On these two points, the Norwegian award is an international authority, confirmed two years later by a decision of the Supreme Court of the United States,—if it can be said that a municipal decision can be looked upon as confirming an international award.

The tribunal was constituted under the special agreement of June 30, 1921, between the Kingdom of Norway and the Government of the United States, in accordance with the summary procedure, and also under the general procedure, in order to allow agents and counsel to support their cases "by oral arguments."

The tribunal of the summary type was composed of a representative on behalf of the Government of the United States, the Honorable Chandler P. Anderson, and on behalf of the Kingdom of Norway, His Excellency Benjamin Vogt. The umpire, Mr. James Vallotton of Switzerland, was appointed by the Swiss Confederation, at the request of the two governments.

The majority award, from which the American arbitrator dissented, was rendered by Mr. Vallotton and his Norwegian colleague on October 13, 1922.

In view of the elaborate opinion announcing and justifying the award in this case, it should be read as a whole by anyone interested in the subject. It seems unnecessary, therefore, to do more in this connection than to call attention to certain phases of the award, of a general nature. The tribunal held that the United States was liable not merely for the vessels under construction and the materials on hand but also for the contracts to build,

[1] *Tribunal Arbitral Franco-Chilien*, 1901, pp. 288, 290.

although the proposed ship was not under construction and the material was not on hand.

It is interesting to observe that this holding on behalf of the tribunal was also the holding in the case of the *Brooks-Scanlon Corporation* v. *United States*, decided by the Supreme Court of the United States on May 12, 1924. Mr. Justice Butler, speaking on behalf of the Court, stated: "It must be held that the claimant's contract, and its rights and interests thereunder, were expropriated." In a later portion of his opinion, he added: "It is the sum which, considering all the circumstances—uncertainties of the war and the rest—probably could have been obtained for an assignment of the contract and claimant's rights thereunder; that is, the sum that would in all probability result from fair negotiations between an owner who is willing to sell and a purchaser who desires to buy." And in a still later passage: "the sum which will put it [the owner of the contract] in as good a position pecuniarily as it would have been in if its property had not been taken."[1]

The theory upon which cases of this kind are decided is that a contract is property.

It is interesting to observe that Mr. Justice Sutherland, who had argued the case on behalf of the United States before the Hague Tribunal, but before his appointment to the bench, took no part in the consideration of the case before the Supreme Court, the reason being that it involved the same question as the arbitration proceedings.

Recurring to the award of the Tribunal of Arbitration, it is said that the Government of the United States did not deny liability in the premises, but, rejecting the contention that the contracts were requisitioned, offered the sum of $2,679,220. The tribunal, however, awarded the sum of $11,995,000. The claimants before the tribunal were fifteen. Of these, in but two of the cases, ships were under construction and material on hand.

The special agreement provided that the tribunal should determine the claims in question "in accordance with the principles of law and equity" but should determine what sum, if any, should "be paid in settlement of each claim." The umpire explains at considerable length the meaning to be given to "the principles of law and equity." But two phrases from this portion of the opinion may be quoted before passing to the comment of Secretary of State Hughes upon the award. The first is: "The Tribunal agrees with the contention of the United States that there was nothing in this emergency legislation, under the special circumstances, that was contrary to international law." The second is that in this respect—quoting the Fifth Amendment of the Constitution of the United States, to the effect that private property shall not be taken for public use without just compensation—the public law of the parties is in complete accord with the international public law of all civilized countries.

[1] 265 *U. S. Reports*, pp. 106, 121, 123–4, 126.

It has been remarked that the Honorable Chandler P. Anderson, American arbitrator, did not concur in the award. In a letter addressed to the Secretary General of the Permanent Court of Arbitration, Mr. Anderson stated that the majority of the tribunal had, in his opinion, "disregarded the terms of submission and exceeded the authority conferred upon the United States-Norway Arbitration Tribunal by the Special Agreement of June 30, 1921, which imposes definite limits upon its jurisdiction." He therefore "refused to be present when the award" was pronounced, announcing this fact to the Secretary General of the Permanent Court of Arbitration, and requesting the latter to state to the tribunal the reasons for his absence.[1]

It may be proper for the sake of completeness to quote the statement of the American Agent, Mr. William C. Dennis, made in open court immediately after the reading of the award: "I have of course had no opportunity to consult with my Government in regard to the award which has just been pronounced but I deem it my duty on behalf of the United States to reserve all the rights of the United States arising out of the plain and manifest departure of the award from the terms of submission and from the 'essential error' to use the language of the authorities, by which it is invalidated."[2]

In the letter which Secretary of State Hughes addressed to the Norwegian Minister at Washington, under date of February 26, 1923, accepting the award, he insisted upon the right of the requisitioning government to determine the nature and the extent of the emergency, adding that discrimination should not be made between the requisitioning of property of Americans and of aliens residing within the jurisdiction of the United States.

The second objection to the award made by Secretary of State Hughes concerned the failure of the tribunal to discuss "the particular circumstances of the different claims or of the method of calculation applied, or of the reasons for determining upon the amounts awarded in each case"; and that the award gave "no clue to the method of determining why one amount was awarded rather than another."

For these reasons, Secretary of State Hughes informed the Norwegian Minister that, while accepting the mandatory obligation, the Government of the United States "finds itself compelled to say that it can not accept certain apparent bases of the award as being declaratory of that law [meaning international law] or as hereafter binding upon this Government as a precedent"; and that "the award can not be deemed by this Government to possess an authoritative character as a precedent."

In the Island of Palmas Case, perhaps the best comment that can be made on the dispute, as such, between the Netherlands and the United States is: See "how great a fire a little matter kindleth." However, the award of the arbitrator, Dr. Max Huber, a former president of the Permanent Court of

[1] *American Journal of International Law*, 1923, Vol. 17, p. 399.
[2] *Ibid.*

International Justice, is not only unanswerable; it is a contribution of the highest value and would, if standing alone, justify the creation of the Permanent Court of Arbitration and the resort to arbitration by the nations, if they could only be assured of a Max Huber as arbitrator.

The island—infinitesimal in extent—fell within the boundaries attributed to the United States by the treaty of 1898 between Spain and the United States, if Spain had title to the island; and the question arose because the keen eyes of Major-General Leonard Wood noted it upon the map and advised the Government of the United States to assert title to its possession. General Wood ran across it in a visit he made to that part of the world in 1906.

The authorities of the Netherlands were in possession, under a claim of legal title. If such were the case at the time of the Treaty of Paris of December 10, 1898, by which Spain ceded to the United States its possessions in that part of the world, the claim of the United States would be unfounded. The question was, therefore, whose was the ownership of the island at the time of the treaty?

Unable to agree upon the matter, a special agreement was concluded on January 23, 1925, between the United States of America and the Netherlands to determine the question. The tribunal was to consist of a single arbitrator, and Dr. Huber was appointed as such. It is perhaps inaccurate to say that the tribunal met and decided the question, because Dr. Huber was the tribunal. The fact is that he rendered his opinion on April 4, 1928, holding:

1. That the American claim, being derivative and based on that of Spain, was founded on the titles of discovery, of recognition by treaty, and of contiguity; that the title of discovery was an inchoate title and had not been completed within a reasonable period by effective occupation of the island by Spain; that the title of recognition by treaty did not apply; and that the title of contiguity, understood as a basis of territorial sovereignty, has no foundation in international law.
2. That according to the evidence submitted, the Netherland title of sovereignty had been adequately established by continuous and peaceful display of authority over a long period of time.
3. That the Island of Palmas therefore forms in its entirety a part of the Netherlands territory.

As the text of the award, containing the reasoning by which it was reached, is before the reader who cares to peruse it, it might well seem that a reference to the page in the volume where it is to be found would satisfy the purpose of the present introduction. However, inasmuch as the reasons advanced by the arbitrator in support of the decision were such as to make it, in the opinion of the undersigned, the most perfect statement to be found in the books on the principles of law applicable to the controversy, the undersigned believes that he should justify his opinion by a summary of the reasons upon which the award was based.

In the first place, it is to be observed that no dispute had arisen between the United States and Spain, on the one hand, or the Government of the Netherlands, on the other, before the treaty of 1898, in regard to the island. The controversy was of more recent origin and subsequent to the treaty of December 10, 1898. It is also to be observed that the island was claimed, to quote the arbitrator's exact language, "as a territory attached for a very long period to territories relatively close at hand which"—and this is the point of importance—"are incontestably under the sovereignty of the one or the other of them." That is to say, the claim of a third party, be it Spain or any country other than that of the United States, was excluded from consideration.

The claim of the United States to title was derivative, that is to say, it rested upon the cession of Spanish possessions in Philippine waters. The title put forward by the United States, in behalf of Spain, for that country was not a party to the proceedings, was that of discovery. For the purposes of this introduction, it is sufficient to say that discovery alone was not, in the opinion of the arbiter, nor in international law, sufficient in itself. At most it gave a right to occupation but, in the absence of occupation under a claim of right—in the present case by discovery—Spain would not have had title to the island and therefore could pass none by way of cession to the United States.

A phrase very frequently used in such matters is "inchoate right,"—an expression admittedly indefinite. If it has a meaning, it must be something like that of a child in the street who, finding a penny, claims it as against his companions, on the ground that he had seen it first. Seeing the penny conveys no right; seeing the land conveys no title. Discovery justifies occupation according to the practice of nations, but occupation only gives legal effect to discovery. An "inchoate right," if it be a right, can only mean justification to occupy after discovery as distinct from seeing the land afar. The arbitrator puts these views in a dignified and scholarly manner.

It was not established by the proof submitted that the title which the United States claimed to acquire by cession of Spanish possessions in Pacific waters rested upon discovery and occupation as against all the world.

The Government of the United States further based its claim upon the ground of "contiguity," that is to say, that the Island of Palmas was contiguous to the territory admittedly belonging to Spain. Granting that Spain did not have title, either by discovery or inchoate right followed by occupation, the Government of the United States insisted that the island, as contiguous to the admitted Spanish territory, could be acquired because of contiguity and therefore passed by the cession. The arbitrator very properly held that title because of contiguity did not exist in international law, and that the title claimed by the United States therefore failed either because of proof of fact or of law, the arbitrator finding that the Netherlands Govern-

ment had claimed possession and was in possession long before the treaty with Spain, and that it had claimed sovereignty and was in the actual exercise of sovereignty before the treaty, to say nothing of possession after the treaty. The award was necessarily in favor of the claim of title of the Royal Netherland Government.

These passing observations are only intended to call the reader's attention to the award and the reasons justifying it. They show perhaps the importance of the award but they give no idea of the care and thoroughness with which the arbitrator has invested his decision.

The *Tubantia* case, the last contained in the present volume, arose out of the World War. A Netherland merchant ship destined to South America was sunk by a torpedo in the early hours of March 16, 1916, a short time after its departure from Amsterdam.

The commission was one of inquiry and consisted of five members: one from Germany, one from the Netherlands, as subjects of the disputants, the other commissioners being of Denmark, of Sweden and of Switzerland, all being in the naval service of their respective governments, with the Swiss member as president of the commission.

The torpedo was a German torpedo and it was alleged that the *Tubantia* was sunk by the discharge of this torpedo from a German vessel. The German Government, admitting the destruction of the vessel by a German torpedo, insisted that the torpedo was not discharged from the vessel taxed with responsibility but that it was a floating torpedo. The commission, sitting at The Hague, rendered its award in favor of the Netherlands on February 27, 1922, in accordance with the special agreement concluded at Berlin on March 30th of the preceding year. It is what is called a "factual award," to use an expression which is making its way into our language, settling the dispute without establishing a principle of law, inasmuch as the tribunal considered it impossible to determine whether the torpedoing took place knowingly or through error, and "it was unable to find, upon the evidence produced by Germany, that the loss of the vessel had been caused by striking a torpedo which had remained afloat after missing another vessel."

* * *

The awards are in each case printed in the language in which they were rendered. Therefore, of the five awards, two (the Norwegian and the Island of Palmas cases) are in English, and three (the expropriated religious properties, the French claims against Peru and the *Tubantia* cases) are in French, an English translation of the awards in French being given in the text of the volume, with the French awards and documents in the Appendix. It is to be hoped that the reports will therefore appeal to a large audience, since the cases are important, otherwise they would not have been submitted to arbi-

tration. They are of interest to those who believe in peaceful settlement instead of a resort to force in the adjustment of international differences, and they should make a very special appeal to those who believe in all methods of peaceful settlement, including arbitration through the Permanent Court of Arbitration at The Hague. Each of the five cases is eloquent testimony of the acceptance of the Permanent Court of Arbitration and of the services which it can render in the future because of the services which it is rendering in the present and has rendered in a long and an honorable past.

For some years The Hague was the arbitral center of the world, because of the installation of the Permanent Court of Arbitration in the noble Peace Palace of that city; it is today the center of international justice, because of the installation of the Permanent Court of International Justice in the same noble palace; and it should be said that, because of both institutions, The Hague is the center of arbitration and of judicial settlement.

There is a difference between the two institutions; otherwise the Permanent Court of International Justice—later in date—would not have been established. The difference seems to be in equity and is twofold. The temporary tribunal of the Permanent Court of Arbitration is composed of judges appointed by the parties to the controversy after the dispute has arisen. On the other hand, the Permanent Court of International Justice, as its name implies, is a tribunal in existence before the dispute and composed of judges of a nine years' tenure appointed previously, before resort to the tribunal.

A third difference exists, it would seem as a fact, and should be recognized as such, that the Permanent Court of Arbitration is to decide the case before it upon the basis of respect to law,—not necessarily upon law, though the heavens fall. It may therefore be what is not inappropriately called "political equity." The Permanent Court of International Justice, however, is a court of justice in the sense that it is a court of law, and it should decide according to the law, not upon a basis of its respect, and it should be obliged to do so if it does not do so of its own accord.

There is a disposition in the statute of the court which confuses the jurisdiction of tribunal of arbitration and court of justice, greatly perplexing to the believers in political equity and in strict process of law. It is in Article 38. After providing the law to be applied by the court and the order of its application, the thirty-eighth article states that "this provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto."

There are friends of the court who feel that such a provision turns the court of justice into a Permanent Court of Arbitration at the will of the parties subject to its jurisdiction. The presence of such a provision is tantamount to an invitation, for its application breaks down the line which should separate these two beneficent institutions. "Political equity,"

either at the request of parties or upon the court's own motion, should be avoided, as the expression may throw doubt upon the nature of the decision, even although it be not open to criticism. An award *ex aequo et bono* by a temporary tribunal of the Permanent Court of Arbitration is in accordance with the nature of arbitration, unless otherwise provided on the understanding of the parties who resort to the tribunal. There is a sphere for each of these institutions, and neither should be sacrificed to the other. The world has need of all ways and means of settling international disputes.

JAMES BROWN SCOTT,
Director of the Division of International Law.

WASHINGTON, D. C.,
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