EDITORIAL COMMENT

LOOKING TOWARDS THE ARBITRATION OF THE DISPUTE OVER THE CHACO BOREAL

Both states now at war over the Chaco Boreal have frequently professed a readiness to accept arbitration as a means of final adjustment of their controversy. They have been unable, however, to agree as to the precise issue to be arbitrated; they have been far apart in regard to the scope or content of the area to which the title should be adjudicated. Nor have they found accord as to tests that should be applied in determining the better claim, or concerning the disposition of military forces pending an arbitral award or in relation to an arrangement for one. Numerous proposals for arbitration that have come from abroad have embraced terms that have failed to produce agreement. The recent report of the Chaco Commission of the League of Nations, submitted to the Council on May 9, 1934, tells the story of failure.[1]

In the bitterness of armed conflict, agreement between opposing belligerents on such basic matters is obviously difficult of attainment. That difficulty is, moreover, greatly enhanced by the fear of those in governmental control lest acceptance of particular terms of adjustment be regarded at home as a surrender of solid claims worthy of faithful support. Responsible statesmen of either belligerent cannot be expected to make what they regard as personally, if not nationally, suicidal blunders in an effort to reach accord. They can afford to make substantial concessions as to a scheme of arbitration or a temporary disposition of military forces only when an impartial and competent outside body, after fullest investigation and hearing, so decrees or so advises, or when the sheer power of an adversary yields no alternative. Otherwise they may well acknowledge their impotence to pay the price required for a judicial settlement. Latin American boundary disputes have borne ample witness to the truth of this statement. Arbitral awards have at times destroyed obstacles to agreement that diplomats have previously found it impossible to hew down, and yet which they were willing enough to see removed from the horizon. In the light of such conditions, the inquiry suggests itself whether a practicable and hence not unwelcome means of securing a basis of arbitral accord between Bolivia and Paraguay may not be available by recourse to a process that does not demand of either republic those serious initial concessions that seemingly frustrate attempts to conclude an agreement necessary for such an adjustment.

[1] League of Nations, Doc. C. 154. M. 64. 1934. VII; this JOURNAL, Supplement, p. 137. See also Minutes of the Seventy-Second (Extraordinary) Session of the Council, May 15 and May 20, 1933, "Dispute between Bolivia and Paraguay," League of Nations, Official Journal, 1933, 749–789.

https://doi.org/10.2307/2190757 Published online by Cambridge University Press

The effective obstacle is not removed when an outside state or body or group, with lofty purpose and mediatory instincts, proposes a plan or basis of arbitration that calls for an agreement embodying important concessions by either of the contestants. The merit of such a plan may, and is likely to be, rendered abortive by the character of what is involved in order to produce acquiescence. It may be greatly doubted whether mediation, in so far as it marks the effort to reconcile differences by demanding special sacrifices by the opposing states, offers, under the circumstances, a peace-producing remedy. What at the moment seems to be needed is not a strong diplomatic or mediatory recommendation to yield national pretensions, but rather a judicial and non-mediatory and non-diplomatic opinion indicating that a particular stand or term on which willingness to arbitrate is conditioned, is unreasonable or inequitable or even without a solid foundation in law.

It is not unreasonable for either contestant in the Chaco conflict to assert that its major contentions as to conditions of arbitration should not be surrendered save as a result of such a conclusion from an impartial and authoritative source. Such a stand implies no unwillingness to have recourse to arbitration, but simply unwillingness to assent to a scheme of adjustment where the issues are so framed as to cut off opportunity to defend or maintain a particular contention, or to accept a military situation where during the process of adjudication a contestant believes itself placed in a relatively disadvantageous position. To state the proposition in simpler fashion—the final solution of the controversy over the Chaco Boreal is indissolubly associated with the terms of any accepted plan of arbitral settlement. Neither contestant may regard it as safe or reasonable to accept under mere diplomatic or mediatory pressure such terms as will in its judgment undermine its contentions in a final adjudication or impair its military position in the intervening period. This is the crux of the problem. Every outside entity professing concern over the amicable adjustment of the controversy must take cognizance of it. The neutral Powers as well as the League of Nations are not necessarily at the end of their tether because they have heretofore failed to do so.

The proposals for adjustment heretofore emanating from foreign sources have greatly varied in point of character and scope. Without attempting to marshal their distinctive features, it suffices to observe that those which have provided for the broadest use of an arbitral tribunal have failed to go the whole way, as by arranging an adjudication on all of the issues between the states at variance, embracing, for example, questions concerning what areas should be involved, what tests should be applied, what disposition should be made of military forces, and also what should be the relation, in point of time, of the cessation of hostilities or an armistice, to the arrangement to arbitrate. Again, the proposals for arbitral settlement of largest scope have not only demanded the sacrifice of major national pretensions, but also have called for the entrusting to an outside body the exercise

https://doi.org/10.2307/2190757 Published online by Cambridge University Press

of powers which might be deemed by either contestant to be contrary to its own fundamental law.[2] No proposals thus far seen have been barren of provisions demanding those initial sacrifices which have heretofore proved to be, and still remain, an insuperable obstacle to accord.[3] Finally, when it has been proposed that the advice of an international tribunal be taken, it has not been planned to consult such a body on all of the issues involved.[4] In general, proposals along the traditional mediatory line have resulted in a series of natural failures.

In order to find a better procedure at the present hour, it is necessary to scrutinize the issues now understood to exist between the two republics in relation to the matter of an arbitral adjustment. The recent report of the Chaco Commission of the League of Nations sheds light on this point.

It is understood to be contended by Paraguay that the final cessation of hostilities should be conditioned upon adequate guarantees of security; that state has manifested great reluctance to agree to an armistice to allow of negotiations, fearing that a mere suspension of hostilities would operate in favor of its adversary.[5] As to the settlement of the substantive question, the Government of that country has been opposed "to any immediate discussions of the bases of an arbitration agreement," holding that not until after the cessation of hostilities would it be possible to consider a legal decision, or even a direct agreement.[6] The same republic has, moreover, been opposed to attempts to divide the Chaco Boreal into zones which would, in its judgment, be a division disregardful of its geographical and historical unity which it is contended that any legal settlement should respect.

Bolivia asserts that the question to be settled by arbitration should be solved in accordance with the principles of the declarations of the American

[2] There is an obvious distinction between conferring upon an arbitral tribunal power to determine whether, in case of disagreement between the parties, the issue between them is one which they have agreed to arbitrate, and delegating to such a body power to decide what, in the absence of previous agreement, shall be arbitrated. See, in this connection, minority report by Mr. Root (for himself and Messrs. Cullom and Burton) from the Senate Committee on ForeignRelations, Aug. 18, 1911, in relation to proposed general arbitration treaties, with Great Britain and France, Senate Doc. No. 98, 62d Cong., 1st Sess., 9–10.

[3] The writer has not seen the text of the proposal referred to in an Associated Press despatch from Buenos Aires of Aug. 31, 1934, as having been made by Argentina, Brazil and the United States.

[4] This is understood to have been the case with respect to the so-called Mendoza Act of Feb. 2, 1933. It is not understood that the question touching the relationship of the cessation of hostilities or armistice to an agreement to arbitrate was to be embraced in the matters on which, in case of difficulty, the Permanent Court of International Justice, might be asked for an advisory opinion. See, in this connection, Report of the Chaco Commission, *ibid*, p. 29 (Supplement to this JOURNAL, p. 171).

[5] See, however, Associated Press despatch of Aug. 31, 1934, referring to an acceptance by Paraguay of a proposal from Argentina, Brazil and the United States for a cessation of hostilities while terms of peace should be under discussion.

[6] See Report of the Chaco Commission, pp. 35–42 (Supplement to this JOURNAL, pp. 179–188).

https://doi.org/10.2307/2190757 Published online by Cambridge University Press

nations of August 3, 1932, and that the award should apply the principle of the *uti possidetis juris* of 1810; that the territory in controversy should be awarded to the country possessed of the better titles, validity being denied to acts of enforced occupation, that is, should include the so-called "Hayes Zone" and be bounded by longitudinal and latitudinal limits which are specified. It also contends that when an agreement has been reached on these points, consideration should be given to such cognate questions as the details of an armistice, the body to be entrusted with arbitration, and the exchange of prisoners.

Briefly, one party appears to desire the conclusion of a treaty of security and peace, the settlement of the substantive question being postponed until later. Its adversary, on the other hand, urges the necessity of concluding an agreement on the substantive question, the security clauses, which might be negotiated simultaneously with such agreement, being regarded as a corollary.[6a] It will thus be seen that the solution of the territorial controversy is bound up in that also of one of an essential military character touching the extent to which either belligerent may fairly, even in the course of steps looking to amicable adjustment, utilize benefits derived from military achievements effected since the outbreak of the war.[7]

It is suggested by the writer that as a means of effecting accord concerning an arbitration, the terms on which either republic conditions its readiness to accept such form of adjustment should be submitted to a competent international body of jurists for an advisory opinion. This simple proposal may appear to call for brief explanation. In the first place, the agreement requisite for the attaining of such an opinion would probably not demand a formal treaty between the contracting parties, if the arrangement imposed no legal obligation to accept the advice to be given. As an incident in the preliminary procedure involved in the termination of a war, it is probable that it could be consummated by executive agreement, and hence perfected in short order, as might be the case with an arrangement for an armistice. As no legal obligation to accept the results of the opinion would burden either side, recourse to the aid of the advisory body would be free from difficulties to be anticipated or encountered were the attempt made by treaty to clothe a tribunal with power to decide what should be adjudicated. Nevertheless, the value, and possibly also the influence of the advisory opinion would not for that reason be necessarily diminished. If it came from an authoritative and impartial and competent source, expressing the views of judges rather than of diplomats or statesmen, it would serve to reveal the inequitableness of what was inequitable, and the weakness of what lacked strength. Its great value would lie in the freedom which it gave to the

[6a] See Report of the Chaco Commission, p. 40 (Supplement to this JOURNAL, p. 186).

[7] It should be observed also that the Paraguayan Government has sought to have incorporated in a treaty of peace an arrangement for an investigation, under the auspices of the League of Nations, into the responsibility for the origin of the war.

https://doi.org/10.2307/2190757 Published online by Cambridge University Press

advocates of untenable positions to abandon the same without being charged with unfaithfulness to the interests of their country. Thus in reality to a group of judges, rather than to the representatives of foreign offices, could be ascribed the yielding of concessions productive of the bases of arbitral accord. By such process neither party would be obliged at the outset to modify its stand concerning what should or should not be arbitrated; and no claim in that regard would be denounced by the tribunal as untenable until the claimant had exhausted the fullest opportunity to establish its position.

In view of the nature of the issue touching the relationship in point of time between an agreement to arbitrate and the cessation of hostilities, it is conceivable that the agreement calling for an advisory opinion might need to be made even prior to an armistice.[8] That would not be an insurmountable difficulty. Agreements between belligerents in the course of their conflict are not infrequent; and if the republics now at variance could not be persuaded to accept an armistice during the period of seeking an advisory opinion, that circumstance would not necessarily render ineffectual the procedure here contemplated.[9]

The enquiry before the advisory body would not necessarily involve, and should be kept apart from, an adjudication on the merits of the case. It would probably not call for the production or examination of evidence of title to be relied upon by either party. The function of the tribunal would somewhat resemble that of a domestic court when passing upon contentions set up in a demurrer; for the hearing or adjudication would be for the purpose of determining whether, admitting allegations of fact to be true, the relevant law supported particular claims touching the scope of what should be arbitrated or the character of tests to be applied by the tribunal, or the implications to be derived from military achievements. It may be observed parenthetically that with both Paraguay and Bolivia alive to the exact

[8] It is not sought to be intimated that an agreement for an advisory opinion should precede an armistice, but simply that a cessation of hostilities, however much to be desired at all times, would not be a legal prerequisite to the consummation and performance of an appropriate arrangement for such opinion.

It will be borne in mind that an armistice refers both to an agreement between belligerents and to the condition of affairs prevailing during the life of the compact (U. S. Army, Rules of Land Warfare, 1917, Nos. 256a–275). See Hall, International Law, Higgins' 7th ed., § 192, p. 585.

According to an Associated Press despatch of Aug. 31, 1934: "Paraguay accepted and Bolivia was considering today the proposal made by Argentina, Brazil and the United States for cessation of hostilities while terms for peace were discussed at Buenos Aires."

[9] It may here be noted that the draft treaty submitted by the Chaco Commission of the League of Nations to the Council of that body for the acceptance of the states at variance went to the other extreme, and contemplated no cessation of hostilities until twenty-four hours after the entry into force of the arrangement, which was to be ratified according to the constitutional law of the two states and to enter into force twelve hours "after its ratification by both countries."

https://doi.org/10.2307/2190757 Published online by Cambridge University Press

nature of their respective claims, adequate presentation and development of their contentions as to the appropriate basis of an arbitration could be quickly made, and fairly disposed of in a relatively brief space of time. Ninety days from the conclusion of an agreement to employ such a procedure might suffice for the production of a desired opinion. The matter of time might, however, play so important a part as to be decisive of the choice of the tribunal to which recourse for an opinion should be had; and it might even serve to cause a preference for a body other than the Permanent Court of International Justice if an appreciable saving of time could so be effected. In such event the competence of the body whose advice was to be sought should of course be unassailable with respect not only to loftiness of character, but also to familiarity with that portion of the body of the law of nations that pertains in a special degree to the acquisition and retention of rights of sovereignty, and to the solution of differences when those rights are challenged in the course of boundary disputes.

By way of summary, it is suggested, for the reasons above set forth, that the main issues as to the terms of arbitration embracing the several contentions of the opposing states be referred to an appropriate international tribunal for an advisory opinion designed to indicate what conditions should, under the circumstances, be regarded as unreasonable barriers, and, conversely, what concessions for the sake of an arbitral adjustment might fairly be demanded by either state from its adversary. Recourse to such a procedure would involve no double arbitration. It would call for no initial sacrifice by either republic of any serious pretension. Finally, it would beget a juridical conclusion which, if followed, should remove obstacles that have heretofore completely thwarted any amicable settlement. The contestant whose assertions as to the terms of such a settlement fared badly at the hands of the advisory body would still have the solid assurance that in proceeding with an arbitration it had lost no advantage which it should have retained, and that the terms prescribed for the final settlement did not impair essential rights. Such a conviction would, it is believed, encourage both parties to accept the full benefits of the advisory opinion despite the absence of a legal obligation to do so. Moreover, that encouragement would be strengthened by the realization that failure to concede what the advisory tribunal required for the sake of an adjustment might inspire wide condemnation.

It is accordingly suggested that any organization or state or group of states not participating in the existing conflict, and which professes a real interest in the renewal of peace in South America, should smooth the way for the states at variance to seek through an advisory opinion of an appropriate international tribunal the terms on which recourse to arbitration should be had. Such a body might prove to be "the repairer of the breach, the restorer of paths to dwell in."

Charles Cheney Hyde

https://doi.org/10.2307/2190757 Published online by Cambridge University Press