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## WILLIAM HOWARD TAFT AND THE TAFT ARBITRATION TREATIES

JOHN E. NOYES\*

ONE of my favorite presidential quotes is from William Howard Taft: “International Law,” he said, “is really a wonderful creation.”<sup>1</sup> In this symposium, we celebrate John Murphy’s wonderful creations, his contributions to international law, and his fortieth anniversary of law teaching. We are also approaching another anniversary: the centenary of the two Taft Arbitration Treaties with France and the United Kingdom, proposed in 1910 and signed on August 3, 1911, during Taft’s single term as President of the United States.<sup>2</sup> Those treaties, which were never ratified, authorized one side in an interstate dispute to initiate arbitration of any justiciable controversy. They made no exceptions for matters affecting “national honor” or “vital national interests.”

The Taft Arbitration Treaties represent one significant effort to legalize international relations. The treaties were proposed, negotiated, and promoted in an historical setting far different from today’s. Nevertheless, the Taft Arbitration Treaties help us think about the roles of formal third-party dispute settlement mechanisms and the importance of utopian visions in shaping international law.

Part I of this Essay explains Taft’s interest in international law, placing it in historical context. In Part II, I outline key features of the treaties and explore the debate over their ratification. Part III then reflects on the significance of the treaties.

### I. WILLIAM HOWARD TAFT, INTERNATIONAL LAW, AND THE PEACE MOVEMENT

William Howard Taft respected international law throughout his career. His study of international law as an undergraduate provided, in the words of one biographer, “a useful frame of reference” in his later career.<sup>3</sup>

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\* Roger J. Traynor Professor of Law, California Western School of Law. Thanks to Thomas Barton, Dino Kritsiotis, and Sarah Seene, who commented on drafts of this essay, and to Melissa Arnold, who provided valuable research assistance.

1. William Howard Taft, Response to the American Society of International Law (Apr. 29, 1911), *in* 5 AM. SOC’Y INT’L L. PROC. 340, 341 (1911).

2. For the text of the treaties with France and the United Kingdom, see 5 AM. J. INT’L L. 249 (Supp. 1911) and *id.* at 253, respectively. The treaties are hereinafter referred to collectively as the Taft Arbitration Treaties, and the U.S.-U.K. treaty is reproduced in the Appendix.

3. DAVID H. BURTON, WILLIAM HOWARD TAFT: CONFIDENT PEACEMAKER 7 (2004).

After Taft left the presidency, he taught international law at Yale.<sup>4</sup> As President and private citizen, he often urged the enforcement of U.S. bilateral treaties of amity, believing some U.S. states' treatment of immigrants violated those treaties.<sup>5</sup>

Taft sought not only to uphold existing international law, but to develop it. He particularly favored formal third-party international dispute settlement. In 1896 the American Conference on International Arbitration appointed Taft to an executive committee to promote a proposed permanent system of arbitration between the United States and Great Britain, a system to which Taft gave his "emphatic endorsement."<sup>6</sup> As President, Taft urged several ad hoc arbitrations, in addition to his bilateral arbitration treaties with France and the United Kingdom.<sup>7</sup> Taft himself served as an international arbitrator, both before and during his tenure as Chief Justice of the U.S. Supreme Court (1921-1930).<sup>8</sup>

After his term as President, Taft headed the League to Enforce Peace. The League's Charter incorporated features of the bilateral arbitration treaties Taft had pursued as President.<sup>9</sup> The League promoted enforceable international law: countries would submit justiciable controversies to an international court, and would commit to using force against any state that engaged in hostilities before going to court.<sup>10</sup> Following World War

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4. See FREDERICK C. HICKS, *WILLIAM HOWARD TAFT: YALE PROFESSOR OF LAW & NEW HAVEN CITIZEN* 49-50 (1945).

5. See WILLIAM HOWARD TAFT, *THE UNITED STATES AND PEACE* 90-132 (1914).

6. *THE AMERICAN CONFERENCE ON INTERNATIONAL ARBITRATION HELD IN WASHINGTON, D.C. APRIL 22 AND 23, 1896*, at 88-89, 155 (New York, Baker & Taylor Co. 1896).

7. See 16 *A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 7771, 7778-80* (James D. Richardson ed., 1913); PAOLO E. COLETTA, *THE PRESIDENCY OF WILLIAM HOWARD TAFT* 168-69, 175 (1973). However, Taft equivocated about whether the United States should arbitrate a dispute concerning exemptions for U.S. vessels passing through the Panama Canal, exemptions the United Kingdom considered illegal under a U.S.-U.K. treaty. The United States eventually repealed the exemptions by legislation. See COLETTA, *supra*, at 174, 257; LEWIS L. GOULD, *THE WILLIAM HOWARD TAFT PRESIDENCY 187-89* (2009); 2 HENRY F. PRINGLE, *THE LIFE AND TIMES OF WILLIAM HOWARD TAFT* 651-53 (Archon Books 1964) (1939); *Taft for Canal Arbitration Now*, N.Y. TIMES, Jan. 5, 1913.

8. Most notably, while he was Chief Justice of the U.S. Supreme Court, Taft was the sole arbitrator in the *Aguilar-Armory and Royal Bank of Canada Claims (Tinoco Arbitration)* (Gr. Brit. v. Costa Rica), 1 R.I.A.A. 369 (1923). Chief Justice Taft also served as an arbitrator in a boundary dispute between Panama and Costa Rica. See BURTON, *supra* note 3, at 116. Before being named to the Supreme Court, Taft was appointed to a three-person commercial arbitration panel that considered Canada's responsibility to British corporate shareholders. See *Canada Asks Taft to Represent Her*, N.Y. TIMES, June 15, 1920; *Grand Trunk Stock Declared Worthless*, N.Y. TIMES, Sept. 8, 1921.

9. See William Howard Taft, *Proposal of the League to Enforce Peace* (June 17, 1915), in 7 *THE COLLECTED WORKS OF WILLIAM HOWARD TAFT: TAFT PAPERS ON LEAGUE OF NATIONS* 3 (Frank X. Gerrity ed., 2003) [hereinafter 7 *COLLECTED WORKS*].

10. See RUHL J. BARTLETT, *THE LEAGUE TO ENFORCE PEACE* (1944); BURTON, *supra* note 3, at 90-96, 101; PRINGLE, *supra* note 7, at 928-39; William Howard Taft,

I, Taft also favored U.S. entry into the League of Nations and U.S. acceptance of the jurisdiction of the Permanent Court of International Justice (PCIJ).

Taft actively supported other international law organizations as well. He thought non-governmental organizations could help educate the public about international law and promote international codification and dispute settlement. For example, Taft was an active Vice President of the American Society of International Law. He resigned when he became President of the United States, but continued as Honorary President of the society and hosted receptions at the White House as part of the society's annual meetings. Taft also served as Honorary President of the American Society for the Judicial Settlement of International Disputes, which was formed in 1910. When the American Branch of the International Law Association was founded in 1922, Taft, by then Chief Justice of the U.S. Supreme Court, accepted an appointment as Honorary President of that organization as well. I note that John Murphy is an Honorary Vice President and Patron of the American Branch. One of the many things I admire about John is his commitment to international law organizations and to their educational and law development efforts.

Taft of course spent time and energy on many issues other than the development of international law. Tariffs and Interior Department controversies occupied Taft during his presidency, as did efforts to advance international trade through a program disparagingly dubbed "dollar diplomacy." The President weathered a crisis with Mexico and dealt with a host of other international and domestic issues.<sup>11</sup> Still, Taft devoted significant attention to international law. Like many of his professional contemporaries, he was "dedicated to building world peace by legalizing the conduct of international relations."<sup>12</sup> Taft believed his arbitration treaties, in particular, would be "the great jewel of my administration."<sup>13</sup>

In terms of the U.S. political spectrum of a century ago, Taft was conservative. Four significant candidates sought the presidency in 1912: Eugene Debs, the Socialist; Woodrow Wilson, the Democratic nominee, who would succeed Taft as President; Theodore Roosevelt, Taft's predecessor as President, who ran on the Progressive ticket and drew support from the progressive wing of the Republican party; and President William Howard Taft, the Republican nominee, seeking his second term. The stances of U.S. political parties a century ago do not translate neatly into the modern

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Address at the World Court Congress, Cleveland, OH: Plan for a League of Nations to Enforce Peace (May 12, 1915), in 7 COLLECTED WORKS, *supra* note 9, at 36.

11. See FRANCIS L. BRODERICK, PROGRESSIVISM AT RISK: ELECTING A PRESIDENT IN 1912, at 32-36 (1989); DAVID H. BURTON, THE LEARNED PRESIDENCY: THEODORE ROOSEVELT, WILLIAM HOWARD TAFT, WOODROW WILSON 115-18 (1988).

12. MARK WESTON JANIS, AMERICA AND THE LAW OF NATIONS 1776-1939, at 144 (2010).

13. 2 ARCHIBALD W. BUTT, TAFT AND ROOSEVELT: THE INTIMATE LETTERS OF ARCHIE BUTT, MILITARY AIDE 635 (1930).

U.S. political landscape, but Taft was on the right and pro-business extreme of the 1912 political spectrum.<sup>14</sup> In short, Taft was a conservative Republican politician who strongly supported international law—and not just existing international law, but its progressive development.

Several factors may well help explain Taft's efforts to legalize international relations and his advocacy of arbitration treaties applicable to all justiciable disputes. First, Taft was familiar with international issues and, even before becoming President, saw in his professional work that treaties could serve essential purposes. Taft served in the Roosevelt Administration as Governor General of the Philippines (1900-1903) and Secretary of War (1904-1908). He pursued diplomatic initiatives in Panama and Cuba and negotiated understandings or agreements with Japan and the Vatican.<sup>15</sup> While working as Solicitor General of the United States (1890-1892), Taft dealt with the intersection of international and national law when he litigated a Behring Sea dispute with the United Kingdom.<sup>16</sup>

Second, Taft was a lawyer and a judge.<sup>17</sup> More particularly, he venerated courts and believed that judges would fairly apply rules of law.<sup>18</sup> In Taft's view, judges or arbitrators could fulfill that role on the international as well as the national plane.<sup>19</sup>

Third, Taft valued order and stability. International legal mechanisms—in particular, arbitral institutions—could contribute to a stable environment in which businesses and individuals would flourish.<sup>20</sup> Taft envisioned a more peaceful, orderly world and thought progress in law and society was possible.<sup>21</sup> His vision of international law was largely positivist, in keeping with mainstream early twentieth-century views about the “scientific” foundations of the discipline. If the world lacked legal struc-

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14. See BRODERICK, *supra* note 11, at 169-70.

15. See *id.* at 27-29.

16. See BURTON, *supra* note 3, at 18-19.

17. In addition to working as Solicitor General, Taft served as a judge on the Superior Court of Ohio (1887-1890), a judge on the U.S. Sixth Circuit Court of Appeals (1893-1900), and Chief Justice of the U.S. Supreme Court (1921-1930).

18. See JUDITH ICKE ANDERSON, WILLIAM HOWARD TAFT: AN INTIMATE HISTORY 259 (1981); BRODERICK, *supra* note 11, at 26; BURTON, *supra* note 11, at 109-10, 197.

19. See BURTON, *supra* note 3, at 115; BURTON, *supra* note 11, at 118-19; DAVID S. PATTERSON, TOWARD A WARLESS WORLD: THE TRAVAIL OF THE AMERICAN PEACE MOVEMENT, 1887-1914, at 165 (1976). Elihu Root, Secretary of State during Taft's presidency, held similar views. See Mary Ellen O'Connell, *Arbitration and the Avoidance of War: The Nineteenth-Century American Vision*, in THE SWORD AND THE SCALES: THE UNITED STATES AND INTERNATIONAL COURTS AND TRIBUNALS 30, 41 (Cesare P.R. Romano ed., 2009).

20. See BURTON, *supra* note 11, at 107 (positing that societal progress derived from impulses toward personal freedom and right to personal property, which law could help uphold); WALTER V. SCHOLLES & MARIE V. SCHOLLES, THE FOREIGN POLICIES OF THE TAFT ADMINISTRATION 247 (1970).

21. See BURTON, *supra* note 3 (exploring these themes).

tures to further the goal of an orderly international system, one should build them.<sup>22</sup>

Fourth, and most fundamentally, Taft's effort to create arbitral structures fit squarely with the established social and religious views of the day. In late nineteenth- and early twentieth-century America and Europe, a rule-of-law movement promoting international courts and arbitral institutions had gained much traction. Churches and popular peace societies advocated international codification and international courts, viewing these measures as alternatives to war. Significantly for Taft, it was not only ordinary citizens who favored international courts and arbitral mechanisms. American leaders did too. Taft was part of the establishment, and he joined prominent businessmen, top lawyers, university presidents, and ministers of major churches in supporting and directing international rule-of-law organizations.<sup>23</sup> Republicans, in particular, were dedicated to advancing international peace through legal mechanisms.<sup>24</sup>

The start of the twentieth century was a period of great interest in constructing mechanisms to enforce international law.<sup>25</sup> Taft built on enthusiasm generated by nineteenth-century arbitrations, some of which, such as the 1872 U.S.-U.K. *Alabama Claims* arbitration,<sup>26</sup> the 1905 U.K.-Russia *Dogger Bank* inquiry,<sup>27</sup> and the 1909 France-Germany *Casablanca* arbitration,<sup>28</sup> helped defuse sensitive, politicized disputes. Between 1795 and 1914, countries established over 200 arbitral tribunals, with the United Kingdom and the United States creating many of them.<sup>29</sup> More than 120 bilateral arbitration treaties were concluded between 1900 and 1914 alone.<sup>30</sup> The Hague Peace Conferences of 1899 and 1907 had institutionalized international arbitral mechanisms and proposed an Interna-

22. See FRANCIS ANTHONY BOYLE, *FOUNDATIONS OF WORLD ORDER: THE LEGALIST APPROACH TO INTERNATIONAL RELATIONS, 1896-1922*, at 10-14 (1999); BURTON, *supra* note 3, at 60; O'Connell, *supra* note 19.

23. See JANIS, *supra* note 12, at 144; PATTERSON, *supra* note 19, at 171-73; John P. Campbell, *Taft, Roosevelt, and the Arbitration Treaties of 1911*, 53 J. AM. HIST. 279, 288 (1966).

24. See BOYLE, *supra* note 22, at 17.

25. See JANIS, *supra* note 12, at 144-57.

26. See *id.* at 131-34; Tom Bingham, *The Alabama Claims Arbitration*, 54 INT'L & COMP. L.Q. 1 (2005); O'Connell, *supra* note 19, at 34-37.

27. Incident in the North Sea (The Dogger Bank Case) (Gr. Brit. v. Russ.), Hague Ct. Rep. (Scott) 403 (Comm'n of Inquiry 1905).

28. Case of Casablanca (Fr. v. Ger.), 11 R.I.A.A. 119 (Perm. Ct. Arb. 1909); see Robert A. Friedlander, *Who Put Out the Lamps? Thoughts on International Law and the Coming of World War I*, 20 DUQ. L. REV. 569, 574-76 (1982).

29. See Nicholas Butler, *Arbitration and Conciliation Treaties*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Rüdiger Wolfrum ed.), available at <http://www.mpepil.com> (last updated Aug. 2011); William Howard Taft, Address at the First Annual Assemblage of the League to Enforce Peace, Washington, DC: Constitutionality of the Proposals (May 26, 1916), in 7 COLLECTED WORKS, *supra* note 9, at 55, 57.

30. SHABTAI ROSENNE, *THE WORLD COURT: WHAT IT IS AND HOW IT WORKS* 10 (5th rev. ed. 1995).

tional Prize Court.<sup>31</sup> Taft noted the many historical examples of binding arbitrations and maintained that treaties providing for arbitration fell within the treaty-making authority of the U.S. Constitution.<sup>32</sup>

The religious dimension of this international law project was critically important. Before the Civil War, Christian utopians founded a peace movement and sought to further its goals by promoting international courts and tribunals of general jurisdiction. After the Civil War, and especially beginning in the 1880s, the religious community supported international courts with renewed energy and provided Taft with his most receptive audiences. Taft was Unitarian, but he shared with mainstream Christians a belief that international legal mechanisms could contribute significantly to a more peaceful and just world.<sup>33</sup> In short, the Taft Arbitration Treaties may be situated in the broader context of a purportedly universal religious utopian movement. Many Europeans also favored peace initiatives and formal international dispute settlement, providing hope that American efforts to promote international arbitration would be well-received abroad.

Proposals for international courts also followed a rule-of-law model familiar to Americans. Indeed, for many in the peace movement, the U.S. federal structure, including a Supreme Court able to decide interstate controversies between U.S. states, provided an attractive template for international legalization efforts.<sup>34</sup> Several leading U.S. academics and public figures endorsed this view.<sup>35</sup> The movement for international arbitration and adjudication did not appear “foreign” to American observers. Instead, this movement built on U.S. experiences, including successful international arbitrations, religious traditions, and legal structures.

Taft approached proposals for international arbitration in a conservative and practical fashion. He did not support the bolder disarmament initiatives of the pacifist wing of the peace movement.<sup>36</sup> In Taft’s view, the United States had to maintain military preparedness.<sup>37</sup> Taft admitted his

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31. See David D. Caron, *War and International Adjudication: Reflections on the 1899 Peace Conference*, 94 AM. J. INT’L L. 4 (2000).

32. TAFT, *supra* note 5, at 90-132.

33. See generally BURTON, *supra* note 11, at 135; R.B.C. Howell, *Life and Times of William Howard Taft*, 17 TENN. L. REV. 281, 281-82 (1942); William Howard Taft, Address at the Laying of the Cornerstone of the Universalist Church, Portland, OR (Oct. 3, 1909), in 3 THE COLLECTED WORKS OF WILLIAM HOWARD TAFT 252, 253 (David H. Burton ed., 2002). For a discussion of the influence of religion on the American movement for peace, international law, and international courts, see JANIS, *supra* note 12, at 42-91, 138-43.

34. See Caron, *supra* note 31, at 10; Taft, *supra* note 10, at 38-44.

35. See, e.g., BOYLE, *supra* note 22, at 25-26; Robert Lansing, *Notes on World Sovereignty*, 15 AM. J. INT’L L. 13, 15, 19 (1921) (manuscript prepared in 1906); John E. Noyes, *Raleigh Colston Minor*, in 15 AM. NAT’L BIOGRAPHY 574 (John A. Garfaty & Mark C. Carnes eds., 1999).

36. See PATTERSON, *supra* note 19, at 166-69.

37. See BURTON, *supra* note 3, at 81, 93, 99.

treaties would not guarantee a peaceful world and recognized that resort to war, though undesirable, remained an option legal at international law.

Taft's conservatism also led him to work deliberately toward implementing his vision of international tribunals empowered to help peacefully resolve disputes. In March 1910 he proposed bilateral arbitration treaties with Britain and France, signing those two treaties in August 1911 and sending them to the Senate for its advice and consent. A grander rule-of-law vision underlay Taft's effort to conclude the two treaties. Taft and other proponents believed they would serve as models for other countries to make the same arrangements for binding arbitration. Germany and Japan were frequently mentioned as future U.S. arbitration treaty partners, and Taft hoped the Netherlands, Norway, Russia, and Sweden would join the project as well.<sup>38</sup> A web of bilateral arbitration treaties with the United States was to be only the start of efforts to build a more peaceful world. Taft anticipated that this web would persuade pairs of European states to conclude such treaties.<sup>39</sup> A permanent international court, applying a code of international law, was the ultimate goal.<sup>40</sup> Indeed, interstate arbitrations fell short of a rule-of-law ideal: bilateral arbitral tribunals, as opposed to one international court, might apply international law inconsistently or be more prone to base their decisions on political accommodation, thus less assuredly furthering the cause of international peace in accordance with the law.<sup>41</sup> Taft likely would have preferred an international court of general jurisdiction, but he thought it politically most feasible to begin by entering treaties with two Western allies, which shared common values and historic ties with the United States.

Although Taft's proposed arbitration treaties represented a break with the foreign policy of Theodore Roosevelt,<sup>42</sup> Taft's immediate predecessor as President, the treaties were not radical initiatives in the context of American views about international law at the start of the twentieth century. Part II looks more closely at the Taft Arbitration Treaties and the debate they engendered. This debate and the ultimate fate of the treaties reveal limits on the United States' enthusiasm for international legalization projects, even during this period of history.

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38. See PRINGLE, *supra* note 7, at 744.

39. See WILLIAM HOWARD TAFT, *POPULAR GOVERNMENT: ITS ESSENCE, ITS PERMANENCE AND ITS PERILS* 262 (1913) [hereinafter TAFT, *POPULAR GOVERNMENT*].

40. See BURTON, *supra* note 3, at 86; TAFT, *POPULAR GOVERNMENT*, *supra* note 39, at 262; Editorial Comment, *President Taft on International Peace*, 5 AM. J. INT'L L. 718, 721 (1911). Indeed, more generally, Taft in his various foreign policy initiatives sought "a world-ordered diplomacy that would evolve naturally, leading eventually to an international organization whose purpose would be peace within the community of nations." BURTON, *supra* note 3, at 60.

41. See Campbell, *supra* note 23, at 293; Edward Gordon, *Legal Disputes Under Article 36(2) of the Statute*, in *THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS* 183, 205-06 (Lori F. Damrosch ed., 1987).

42. See BURTON, *supra* note 3, at 64.

## II. THE TAFT ARBITRATION TREATIES AND THE DEBATE OVER SENATE ADVICE AND CONSENT<sup>43</sup>

President Taft proposed his bilateral arbitration treaties in a speech to the American Peace and Arbitration League on March 22, 1910.<sup>44</sup> He intended the treaties to replace 1908 U.S.-U.K. and U.S.-France bilateral arbitration treaties.<sup>45</sup> Those 1908 treaties were the end product of earlier international legalization efforts. After the Senate failed to approve an 1897 general arbitration treaty with Britain,<sup>46</sup> the United States negotiated a series of bilateral arbitration treaties in 1904 and 1905, known as the Hay Arbitration Treaties after Secretary of State John Hay.<sup>47</sup> The Hay Treaties called for the Permanent Court of Arbitration to hear interstate disputes referred to it by special agreement, but they did not extend to disputes affecting “the vital interests, the independence, or the honor of the two

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43. For contemporary views about the Taft Arbitration Treaties, see HENRY CABOT LODGE, *THE GENERAL ARBITRATION TREATIES WITH GREAT BRITAIN AND FRANCE*, S. DOC. NO. 62-353 (2d Sess. 1912); PHILANDER C. KNOX, *THE PENDING ARBITRATION TREATIES*, S. DOC. NO. 62-298 (2d Sess. 1911); S. DOC. NO. 62-98 (1st Sess. 1911); AM. SOC'Y FOR JUDICIAL SETTLEMENT OF INT'L DISPUTES, *PROCEEDINGS OF SECOND NATIONAL CONFERENCE* (James Brown Scott ed., 1911) (including articles by Jacob Gould Schurman, John H. Latané, O.F. Hershey, Philander C. Knox, and John Temple Graves); William Cullen Dennis, *The Arbitration Treaties and the Senate Amendments*, 6 AM. J. INT'L L. 614 (1912); William C. Dennis, *The Pending Arbitration Treaty with Great Britain*, 60 U. PA. L. REV. 388 (1912); Editorial Comment, *The Pending Treaty of Arbitration Between the United States and Great Britain*, 6 AM. J. INT'L L. 149, 167 (1912); *Third Session*, 6 AM. SOC'Y INT'L L. PROC. 87 (1912) (including papers by George Turner and Richard Olney and comments by Theodore Marburg and William C. Dennis); Editorial Comment, *The Treaties of Arbitration with Great Britain and France*, 6 AM. J. INT'L L. 460 (1912). For Taft's own analysis, see, e.g., TAFT, *supra* note 5, at 90-132.

For later accounts, see PATTERSON, *supra* note 19, at 169-80; PRINGLE, *supra* note 7, at 738-55; Campbell, *supra* note 23; Robert J. Fischer, *Henry Cabot Lodge and the Taft Arbitration Treaties*, 78 SO. ATLANTIC Q. 244 (1979); E. James Hindman, *The General Arbitration Treaties of William Howard Taft*, 36 THE HISTORIAN 52 (1973); John E. Noyes, *Taft Arbitration Treaties (1911)*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, *supra* note 29; Hans-Jürgen Schlochauer, *Taft Arbitration Treaties (1911)*, in 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 751 (R. Bernhard ed., 1996).

44. See PATTERSON, *supra* note 19, at 169; PRINGLE, *supra* note 7, at 738-39; *Taft Is for Peace with Reservations*, N.Y. TIMES, Mar. 23, 1910, at 1.

45. Arbitration Convention, U.S.-Gr. Brit., Apr. 4, 1908, 35 Stat. 1960; Convention for Settlement of Disputes by Arbitration, U.S.-Fr., Feb. 10, 1908, 35 Stat. 1925.

46. The U.S. Senate failed by three votes to provide the two-thirds margin necessary for its advice and consent to the 1897 Olney-Pauncefort general arbitration treaty with Britain. Arbitration Treaty, U.S.-Gr. Brit., Jan. 11, 1897, S. DOC. NO. 58-161 (3d Sess. 1905); see PATTERSON, *supra* note 19, at 28-29, 36-47; Michael Blakeney, *The Olney-Pauncefort Treaty of 1897—The Failure of Anglo-American General Arbitration*, 8 ANGLO-AM. L. REV. 175 (1979).

47. The United States based the Hay Treaties on a 1903 France-U.K. treaty. Agreement for the Settlement by Arbitration of Certain Classes of Questions Which May Arise Between the Two Governments, Fr.-Gr. Brit., Oct. 14, 1903, 194 Consol. T.S. 194; see BOYLE, *supra* note 22, at 31-32.

Contracting States.”<sup>48</sup> President Theodore Roosevelt refused to ratify the Hay Treaties when the Senate insisted on consenting to the arbitration of each dispute, a change that, in Roosevelt’s view, turned the obligation to arbitrate into an empty “agreement to agree.”<sup>49</sup> However, Roosevelt reversed his opposition, and the United States, in 1908-1909, ratified twenty-two bilateral arbitration treaties (the Root Treaties) that were substantially identical to the Hay Treaties as modified by the Senate; the 1908 treaties with France and the United Kingdom were two of the twenty-two.<sup>50</sup>

As negotiated by U.S. Secretary of State Philander C. Knox and signed on August 3, 1911, the Taft Arbitration Treaties—sometimes called the Knox Arbitration Treaties—contained three significant features. First, they did not, as had the 1908 treaties, exempt matters affecting vital interests or national honor. They applied to “[a]ll differences hereafter arising between” the parties, not settled by diplomatic means, “relating to international matters in which the high contracting parties are concerned by virtue of a claim of right made by one against the other under treaty or otherwise . . . and which are justiciable in their nature.”<sup>51</sup>

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48. *E.g.*, Arbitration Convention, U.S.-Port., art. I, Nov. 23, 1904, 3 UNPERFECTED TREATIES OF THE UNITED STATES OF AMERICA: 1776-1976, at 487, 488 (Christian L. Wiktor ed., 1977).

49. *Taft on Treaty Making Urges Executive Right*, N.Y. TIMES, May 28, 1905; accord PATTERSON, *supra* note 19, at 126-27; Ronald F. Reter, *President Theodore Roosevelt and the Senate’s “Advice and Consent” to Treaties*, 44 THE HISTORIAN 483, 492-95 (1982).

50. Arbitration Convention, U.S.-Para., Mar. 13, 1909, 36 Stat. 2190; Arbitration Convention, U.S.-Braz., Jan. 23, 1909, 37 Stat. 1535; Arbitration Convention, U.S.-Austria-Hung., Jan. 15, 1909, 36 Stat. 2156; Arbitration Convention, U.S.-Costa Rica, Jan. 13, 1909, 36 Stat. 2175; Arbitration Convention, U.S.-Uru., Jan. 9, 1909, 38 Stat. 1741; Arbitration Convention, U.S.-Ecuador, Jan. 7, 1909, 36 Stat. 2456; Arbitration Convention, U.S.-Haiti, Jan. 7, 1909, 36 Stat. 2193; Arbitration Convention, U.S.-El Sal., Dec. 21, 1908, 36 Stat. 2172; Arbitration Convention, U.S.-Peru, Dec. 5, 1908, 36 Stat. 2169; Arbitration Convention, U.S.-China, Oct. 8, 1908, 36 Stat. 2154; Arbitration Convention, U.S.-Den., May 18, 1908, 36 Stat. 2151; Convention for Settlement of Disputes by Arbitration, U.S.-Japan, May 5, 1908, 35 Stat. 2050; Arbitration Convention, U.S.-Neth., May 2, 1908, 36 Stat. 2148; Convention for Settlement of Disputes by Arbitration, U.S.-Swed., May 2, 1908, 35 Stat. 2047; Arbitration Convention, U.S.-Spain, Apr. 20, 1908, 35 Stat. 1957; Arbitration Convention, U.S.-Port., Apr. 6, 1908, 35 Stat. 2085; Arbitration Convention, U.S.-Gr. Brit., *supra* note 45; Convention for the Pacific Settlement of Disputes, U.S.-Nor., Apr. 4, 1908, 35 Stat. 1994; Arbitration Convention, U.S.-It., Mar. 28, 1908, 35 Stat. 2091; Convention for the Purpose of Pacific Settlement of Disputes, U.S.-Mex., Mar. 24, 1908, 35 Stat. 1997; Arbitration Convention, U.S.-Switz., Feb. 29, 1908, 35 Stat. 2088; Convention for Settlement of Disputes by Arbitration, U.S.-Fr., *supra* note 45; see S. DOC. NO. 62-98 (1st Sess. 1911); BOYLE, *supra* note 22, at 31-34; PATTERSON, *supra* note 19, at 128.

51. Taft Arbitration Treaties, *supra* note 2, art. I. The earlier 1908 treaties referred to “differences . . . of a legal nature” rather than to claims of right. See, *e.g.*, Arbitration Convention, U.S.-Gr. Brit., *supra* note 45, art. I; Convention for Settlement of Disputes by Arbitration, U.S.-Fr., *supra* note 45, art. I.

Second, the treaties explicitly invoked equity. An international dispute was deemed “justiciable” if it was “susceptible of decision by the application of the principles of law or equity.”<sup>52</sup>

A third notable feature of the Taft Arbitration Treaties was their institutional mechanism for settling disagreements over whether a difference was subject to arbitration. If the parties disagreed about the justiciability of a dispute, a Joint High Commission of Inquiry would consider the matter. Each party was to designate three of its nationals to serve on the Commission, which would operate pursuant to Articles 9-36 of the 1907 Hague Convention for the Pacific Settlement of International Disputes.<sup>53</sup> Under Article III(3) of the treaties, if five or six commissioners determined that a dispute was justiciable, it would “be referred to arbitration in accordance with” the treaty’s provisions. These provisions required the parties to conclude a special agreement “in each case,” referring the matter either to the Permanent Court of Arbitration or to another party-designated arbitral tribunal.<sup>54</sup> In considering such special agreements, the Senate would thus have a say in specifying details concerning each arbitration, but many Senators concluded that the Senate could not override a Commission determination that a controversy was arbitrable.<sup>55</sup>

The treaties also accorded the Joint High Commission of Inquiry additional dispute settlement roles. Either party could refer any controversy to the Commission for investigation. The Commission’s investigative authority encompassed justiciable controversies prior to their submission to arbitration, as well as other, non-justiciable controversies.<sup>56</sup> When the Commission investigated a matter, it could not render a binding decision. Rather, it could “examine into and report upon the particular questions or matters referred to it, for the purpose of facilitating the solution of disputes by elucidating the facts,” “define the issues presented by such questions,” and make “appropriate” recommendations.<sup>57</sup>

What were the main arguments for and against the Taft Arbitration Treaties, and why were they not ratified? Some political factors undoubtedly contributed to the Senate’s difficulties with the treaties. Historians

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52. Taft Arbitration Treaties, *supra* note 2, art. I.

53. The parties could agree to modify the Commission’s composition or procedures. *Id.* art. II.

54. *Id.* art. I.

55. See TAFT, *supra* note 5, at 109-10; Campbell, *supra* note 23, at 282; Fischer, *supra* note 43, at 255-56. But see Mr. Knox on the Treaties, N.Y. TIMES, Dec. 3, 1911 (Secretary of State Knox arguing that Senate would retain “unimpaired powers” even after Commission decision that matter was justiciable). President Taft and his Secretary of State sometimes disagreed about how to interpret the arbitration treaties. See PATTERSON, *supra* note 19, at 177-78.

56. Taft Arbitration Treaties, *supra* note 2, art. II. Either party could postpone for a year the reference of a dispute to the Commission, in order to allow diplomatic discussion and negotiation. *Id.*

57. *Id.* art. III. For discussion of the roles of international commissions of inquiry, see J.G. MERRILLS, INTERNATIONAL DISPUTE SETTLEMENT 45-63 (4th ed. 2005).

have noted that Taft lacked political skill in dealing with Congress and that he failed to consult sufficiently with Senate leaders before presenting the Senate with the signed treaties.<sup>58</sup> Some German-Americans and Irish-Americans objected to the U.S.-France and U.S.-U.K. initiatives.<sup>59</sup> Taft perceived that success with the treaties might lead to political gains on other fronts,<sup>60</sup> and Democrats resisted giving the Republican President a Senate victory in the year leading up to a presidential election.<sup>61</sup> But the debate over the treaties also revealed that proponents and opponents of the Taft Arbitration Treaties held fundamentally different views about the value of legalizing international relations through recourse to formal third-party dispute settlement.

President Taft toured the country to campaign for his arbitration treaties. The treaties were popular, and Taft's arguments resonated, suggesting how favorably many Americans viewed international law and legal process at the time.<sup>62</sup> Taft asserted arbitrators could and would apply international law honorably and fairly. He regularly and publicly acknowledged that the United States might lose some cases—even important cases, since the treaties did not exempt matters of vital national interest or national honor. “We cannot make an omelet without breaking eggs,” he said, and “[w]e cannot submit international questions to arbitration without the prospect of losing.”<sup>63</sup> But that was fine, according to Taft, because the alternative to solving a dispute peacefully could well be war, expensive and horrific, or a never-ending arms race, itself expensive and quite possibly making war more likely.

Although fact-finding commissions of inquiry could be useful in settling some disputes, Taft, leaders of the “international peace and courts” movement, and much of the public saw arbitration and war as the two main alternatives when states could not settle important differences diplomatically. How exactly would arbitration prevent war? Some arguments made by proponents lacked nuance, relying on a view of countries behaving like individuals: dueling was outlawed; individuals now used legal mechanisms to settle their disputes peacefully; countries could and should

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58. See ANDERSON, *supra* note 18, at 133, 192-93; SCHOLES & SCHOLES, *supra* note 20, at 10 & n.18. Professor Peri Arnold thoughtfully argues that Taft's manifest successes in his pre-presidential career, where he held positions that required him to carry out specified mandates, did not prepare him with the skills he would need to become a successful President. See PERI E. ARNOLD, *REMAKING THE PRESIDENCY: ROOSEVELT, TAFT, AND WILSON* 71-99 (2009).

59. See FISCHER, *supra* note 43, at 249; HINDMAN, *supra* note 43, at 60.

60. See BUTT, *supra* note 13, at 635; PATTERSON, *supra* note 19, at 178-79; see also BUTT, *supra* note 13, at 612, 732 (noting Taft's willingness to forfeit political gains on other issues in order to secure approval of treaties).

61. See PATTERSON, *supra* note 19, at 178; FISCHER, *supra* note 43, at 249; HINDMAN, *supra* note 43, at 64.

62. See BARTLETT, *supra* note 10; PATTERSON, *supra* note 6, at 170; PRINGLE, *supra* note 7, at 753; CAMPBELL, *supra* note 23, at 280-81.

63. *Taft Intimates Appeal to People*, N.Y. TIMES, Aug. 16, 1911.

follow a similar path.<sup>64</sup> Taft and other treaty proponents also made additional arguments. Arbitration would lead to reasoned, fair decisions that states, committed to the rule of law, would implement. It was thus important that states accepting the arbitration treaties have a tradition of respect for law.<sup>65</sup> Arbitration also could serve the practical function of providing time for tensions to cool.<sup>66</sup>

Taft never ratified the arbitration treaties, because the Senate gave its advice and consent to them with what he saw as crippling changes. Opponents focused on two features of the treaties: the language governing justiciability and the treaties' failure to make exceptions for politically sensitive issues. More broadly, the debate revealed the contours of the disagreement about when it was appropriate to allow third-party tribunals to hear international legal disputes.

First, opponents objected to the provisions of the Taft treaties that were to determine whether particular differences were justiciable—that is, to quote the treaties, “susceptible of decision by the application of the principles of law or equity.”<sup>67</sup> Treaty critics wanted to remove Article III(3), which allowed the Joint High Commission to decide justiciability. Without that clause, the Senate retained discretion to determine justiciability, able to approve or reject a special agreement providing for arbitration on a case-by-case basis.<sup>68</sup>

The debate over Article III(3) was often framed in constitutional terms. Treaty opponents argued that the Senate could not constitutionally “delegate” its responsibilities concerning treaties to an international commission.<sup>69</sup> For Taft, the constitutional delegation objection was without merit. He forcefully and persuasively rejected it, invoking sovereignty and precedent. As a sovereign nation, Taft said, the United States “may, . . . through its treaty-making power, consent to any agreement with other powers relating to subject matter that is . . . made the subject of treaties.”<sup>70</sup> In dozens of previous arbitrations in which the United States had participated, “it was never suggested that the Government was delegating any

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64. See PRINGLE, *supra* note 7, at 750; *Tells Taft's Work for World Peace*, N.Y. TIMES, Apr. 3, 1911.

65. See TAFT, POPULAR GOVERNMENT, *supra* note 39, at 258, 263 (noting need for parties to have “well-ordered and just governments” reflecting “proper authority”).

66. See Caron, *supra* note 31, at 7-8; Leo Gross, *The International Court of Justice: Consideration of Requirements for Enhancing Its Role in the International Legal Order*, in THE FUTURE OF THE INTERNATIONAL COURT OF JUSTICE 24 (1976); *Taft on Peace and Politics*, N.Y. TIMES, Dec. 20, 1911, at 1; *supra* note 55 and accompanying text.

67. Taft Arbitration Treaties, *supra* note 2, art. I.

68. Taft had initially favored authorizing an arbitral tribunal to determine on its own which matters were arbitrable, but he concluded that the treaties would gain political support by incorporating the supermajority procedure of the Joint High Commission. See PRINGLE, *supra* note 7, at 746.

69. See S. REP. NO. 62-98 (1st Sess. 1911).

70. Taft, *supra* note 29, at 56 (citing *Geoffrey v. Riggs*, 133 U.S. 258 (1889)).

power at all to the tribunal.”<sup>71</sup> Agreements to arbitrate “questions which had not yet arisen described only by definition and classification” presented no new constitutional delegation concerns.<sup>72</sup> By giving its advice and consent to the Hague International Prize Court Convention,<sup>73</sup> Taft noted, the Senate had recognized the legality even of agreements allowing an international court or tribunal to rule on its own jurisdiction.<sup>74</sup> The constitutional challenge to the Taft Arbitration Treaties likely reflected many Senators’ views that the Senate “should” be directly involved in deciding whether to arbitrate each particular international dispute.

Opponents of the Taft Arbitration Treaties also criticized the vagueness of the “susceptible of decision by the application of the principles of law or equity” standard the Joint High Commission would use to determine justiciability.<sup>75</sup> Taft responded that the jurisprudence of the U.S. Supreme Court determining the justiciability of disputes between U.S. states provided helpful standards. As the Supreme Court had indicated, disputes between U.S. states were essentially like disputes between countries.<sup>76</sup> Taft thought it clear that some matters, such as the right of a country to self-preservation, were non-justiciable.<sup>77</sup> Furthermore, numerous international arbitrations had successfully proceeded under mandates authorizing, *inter alia*, recourse to equity, thus providing international practice that would have informed the commissioners.<sup>78</sup> In the end, however, the Senate accepted the opposition point of view, voting forty-two to forty

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71. *Id.* at 57.

72. *Id.*; accord 5 Hackworth DIGEST § 471, at 67-68.

73. Hague Convention (No. XII) Relative to the Creation of an International Prize Court, Oct. 18, 1907, 205 Consol. T.S. 381 (not in force).

74. See Taft, *supra* note 29, at 57-58. The United Kingdom did not accept the International Prize Court, and the United States never proceeded with this Convention. For an introduction to the Prize Convention, see BOYLE, *supra* note 22, at 59-64.

75. See S. REP. NO. 62-98 (1st Sess. 1911). For an excellent account of various historical efforts to specify the meaning of “justiciable disputes,” see Gordon, *supra* note 41.

76. See TAFT, *supra* note 5, at 157-61.

77. See PRINGLE, *supra* note 7, at 745; TAFT, *supra* note 5, at 103-07, 123-24. Taft himself was not entirely consistent in his pronouncements about whether certain classes of politically sensitive cases would be found justiciable. See Fischer, *supra* note 43, at 250.

78. See Dennis, *Pending Arbitration with Great Britain*, *supra* note 43, at 398-99 (collecting sources); Taft, *supra* note 29, at 56-57. Treaty opponents particularly objected to the reference to equity in the proposed U.S.–France Treaty, since France did not share the Anglo-American system of equity. However, as used in international arbitration agreements, the term “equity” referred to “general ideas common to humanity but not reduced to the condition of working rules.” J.H. RALSTON, *INTERNATIONAL ARBITRATIONS FROM ATHENS TO LOCARNO* 16 (1929). Taft stressed that the phrase “law or equity” should be read as a whole, with equity being used when necessary to “mitigate[ ] the severity of the law” and “reach[ ] justice.” TAFT, *supra* note 5, at 107-08. In short, “equity” in the Taft Treaties’ justiciability test was similar but not necessarily identical to “equity” in Anglo-American jurisprudence.

to cut Article III(3) of the two treaties, thus removing the authority of the Joint High Commission to decide justiciability. Without Article III(3), the treaties allowed the Senate to determine justiciability itself, on a case-by-case basis.

The opposition raised a second, predictable point: the treaties should make some exceptions for matters affecting national honor or vital national interests. Taft believed such exceptions would be dangerous:

Questions of national honor and of vital interest include all those questions, the agitation of which is likely to lead to war, and, therefore, arbitration treaties which except such questions may be said to be treaties for the settlement of those questions that never would involve war in their settlement anyhow.<sup>79</sup>

Where vital national interests were involved, in other words, Taft thought arbitration could be most useful. He noted that the United States and other countries had a good track record of settling major disputes peacefully, as in the 1872 *Alabama Claims* arbitration. Also, Taft said, the categories of “vital interest” or “national honor” were too likely to be manipulated. Almost anything could be characterized as a “vital interest,” so excepting those categories could let a country avoid arbitration at will.<sup>80</sup>

Many Senators disagreed with the idea of submitting matters of vital national interest to binding international arbitration.<sup>81</sup> They thought Taft’s legalistic approach would inappropriately constrain U.S. flexibility and proposed exempting some sensitive disputes from the scope of the treaties. The exemptions concerned disputes over: the Monroe Doctrine “or other purely governmental policy”; the admission of “aliens” into the United States or into U.S. state educational institutions; the repayment of bonds owed by U.S. states; and the “territorial integrity” of the United States.<sup>82</sup> In general, most Senators disagreed with the view that the treaties should cover all sensitive justiciable disputes. The proposal to add the exemptions to the Taft Arbitration Treaties passed, forty-six to thirty-six.

Taft’s opponents also raised other arguments, which broadly reflected strands of U.S. foreign policy that viewed “foreign entanglements” with skepticism and that sought to preserve unilateral U.S. freedom of action, particularly in the Western Hemisphere. Some treaty opponents thought

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79. TAFT, *POPULAR GOVERNMENT*, *supra* note 39, at 261.

80. TAFT, *supra* note 5, at 99-100; *accord* Gordon, *supra* note 41, at 208-09.

81. *See, e.g.*, Fischer, *supra* note 43 (recognizing Senator Henry Cabot Lodge as leading opponent).

82. *See, e.g.*, TAFT, *supra* note 5, at 117-26; Fischer, *supra* note 43. It is not clear that all the exceptions were necessary to satisfy the concerns of treaty opponents. For example, the exemption relating to repayment of bonds was a concern of senators from southern states that owed debts on bonds, but the Taft Arbitration Treaties provided that only disputes “hereafter arising,” not disputes related to events arising prior to the conclusion of the treaties, would be subject to arbitration. Taft Arbitration Treaties, *supra* note 2, art. 1.

there would probably be more complaints against the United States than the other way around, making the arbitral playing field uneven. They saw the legal standards that an arbitral tribunal would apply as too indeterminate,<sup>83</sup> and feared that international tribunals might not be impartial.<sup>84</sup> Not all observers relished the prospect of peaceful resolution of disputes in accordance with the law, arguing that the United States should preserve the option to use force, especially on matters of vital interest. Theodore Roosevelt, who opposed the Taft treaties, advocated “righteousness over peace.” Roosevelt and a few other high-profile opponents, including Admiral Alfred Thayer Mahan, voiced anti-legalist themes: the importance of upholding national prestige and power and of furthering “manly” national goals regardless of legal objections.<sup>85</sup>

Taft resolutely sought to advance the arbitration treaties. He remained unpersuaded by arguments questioning the wisdom of arbitral tribunals authorized to judge the legality of U.S. and foreign actions. For Taft, the opponents’ arguments amounted to “the doctrine of despair,”<sup>86</sup> a distressing rejection of the valuable role of international legal process in helping settle international disputes peacefully.<sup>87</sup>

By a vote of seventy-six to three, the Senate eventually approved the Taft Arbitration Treaties with the amendments exempting particular subject matters and deleting Article III(3) (thereby removing any role for the Joint High Commission in deciding justiciability). Taft refused to ratify the treaties. He thought the Senate had “crippled,”<sup>88</sup> “maimed,”<sup>89</sup> “truncated,”<sup>90</sup> and “emasculated”<sup>91</sup> them, leaving them in a form that even “their own father could not recognize.”<sup>92</sup> Taft maintained he had planned to resubmit the treaties to the Senate after the people had replaced some senators in the 1912 election, but instead, he noted, the voters decided to replace him.<sup>93</sup>

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83. See PRINGLE, *supra* note 7, at 746.

84. See Gordon, *supra* note 41, at 206-07; William Howard Taft, Address at the Metropolitan Opera House: The Paris Covenant for a League of Nations (Mar. 4, 1919), in 7 COLLECTED WORKS, *supra* note 9, at 241, 241-42.

85. See BARTLETT, *supra* note 10, at 20-21; PRINGLE, *supra* note 7, at 743-44; Campbell, *supra* note 23, at 295-96; Fischer, *supra* note 43, at 258; *Roosevelt Assails the Taft Treaties*, N.Y. TIMES, Sept. 8, 1911; see also LODGE, *supra* note 43.

86. Taft, *supra* note 84, at 242.

87. See TAFT, POPULAR GOVERNMENT, *supra* note 39, at 266.

88. William Howard Taft, Address at Montclair, NJ: The League: Why and How (Dec. 30, 1918), in 7 COLLECTED WORKS, *supra* note 9, at 165, 166.

89. *Id.*

90. *Id.*

91. Taft, *supra* note 84, at 241.

92. Taft, *supra* note 88, at 166.

93. *Id.*

### III. THE TAFT ARBITRATION TREATIES AND THE LEGALIZATION OF INTERNATIONAL RELATIONS

The Taft Arbitration Treaties represented an effort to legalize international relations. The treaties, although not radical in the context of 1911, did expand on previous bilateral efforts to provide for an interstate arbitral mechanism that would be ready to operate when a dispute arose. The popular treaties met with opposition; as discussed in Part II, the U.S. Senate sought to approve arbitrations on a case-by-case basis and to exempt certain sensitive issues from the scope of arbitrations. Nonetheless, many prominent Americans, including President Taft, viewed with optimism the development of international law to solve international disputes and help insure a more peaceful world. As Professor Mark Janis has persuasively demonstrated, influential U.S. churches and peace societies, operating both before and after the Civil War, “deeply influenced” late nineteenth- and early twentieth-century American leaders, persuading them “that the law of nations was fundamentally a good thing”<sup>94</sup> and prompting “great expectations . . . for public international arbitration as an alternative to war.”<sup>95</sup>

Optimism about international third-party dispute settlement did not dissipate immediately following Taft’s defeat in his 1912 reelection bid. The United States accepted a series of bilateral dispute settlement treaties soon after the Senate refused to approve the Taft Arbitration Treaties in the form Taft had submitted them. During 1913-1914, William Jennings Bryan, Secretary of State in Woodrow Wilson’s Administration, negotiated over two dozen dispute settlement treaties with various countries, including from Latin America; twenty-two were ratified.<sup>96</sup> The Bryan Treaties

94. JANIS, *supra* note 12, at 91.

95. *Id.* at 148.

96. Treaty for the Advancement of Peace, U.S.-Ecuador, Oct. 13, 1914, 39 Stat. 1650; Treaty for the Advancement of Peace, U.S.-Swed., Oct. 13, 1914, 38 Stat. 1872; Treaty for the Advancement of Peace, U.S.-Russ., Sept. 18-Oct. 1, 1914, 39 Stat. 1622; Treaty for the Advancement of Peace, U.S.-China, Sept. 15, 1914, 39 Stat. 1642; Treaty for the Advancement of Peace, U.S.-Fr., Sept. 15, 1914, 38 Stat. 1887; Treaty for the Advancement of Peace, U.S.-Gr. Brit., Sept. 15, 1914, 38 Stat. 1853; Treaty for the Advancement of Peace, U.S.-Spain, Sept. 15, 1914, 38 Stat. 1862; Treaty for the Advancement of Peace, U.S.-Para., Aug. 29, 1914, 39 Stat. 1615; Treaty for the Advancement of Peace, U.S.-Braz., July 24, 1914, 39 Stat. 1698; Treaty for the Advancement of Peace, U.S.-Chile, July 24, 1914, 39 Stat. 1645; Treaty for the Advancement of Peace, U.S.-Uru., July 20, 1914, 38 Stat. 1908; Treaty for the Advancement of Peace, U.S.-Peru, July 14, 1914, 39 Stat. 1611; Treaty for the Advancement of Peace, U.S.-Nor., June 24, 1914, 38 Stat. 1843; Treaty for the Advancement of Peace, U.S.-It., May 5, 1914, 39 Stat. 1618; Treaty for the Advancement of Peace, U.S.-Den., Apr. 17, 1914, 38 Stat. 1883; Treaty for the Advancement of Peace, U.S.-Venez., Mar. 21, 1914, 42 Stat. 1920; Treaty for the Advancement of Peace, U.S.-Costa Rica, Feb. 13, 1914, 38 Stat. 1856; Treaty for the Advancement of Peace, U.S.-Port., Feb. 4, 1914, 38 Stat. 1847; Treaty for the Advancement of Peace, U.S.-Bol., Jan. 22, 1914, 38 Stat. 1868; Treaty for the Advancement of Peace, U.S.-Neth., Dec. 18, 1913, 45 Stat. 2462; Treaty for the Advancement of Peace, U.S.-Hond., Nov. 3, 1913, 39 Stat. 1672; Treaty for the

did not authorize binding interstate arbitrations. Instead, they built on the fact-finding mechanism of the Joint High Commission proposed in the Taft Arbitration Treaties. The Bryan Treaties established conciliation commissions to hear disputes that could not be settled by diplomatic means or by arbitration. Commission investigations were intended to provide a “cooling off period” to defuse tensions, and the commissions could render only non-binding recommendations.<sup>97</sup> Because the recommendations were non-binding, the subject matters that the commissions could consider were not subject to exemptions. The Bryan Treaties supplemented arbitration treaties such as the 1908-1909 Root Treaties.<sup>98</sup> For a pair of states accepting both a Root Treaty and a Bryan Treaty, every category of international dispute was subject either to arbitration or to a non-binding third-party international dispute settlement procedure.<sup>99</sup>

Efforts to promote a permanent international court continued as well, backed by prominent peace advocates and international lawyers, including those involved with Taft’s League to Enforce Peace. For many, the goal was an international court, which would replace the need for general arbitration treaties.<sup>100</sup> Not everyone, however, was enthusiastic: during this period, some Americans opposed U.S. submission to the obligatory jurisdiction of international courts authorized to issue binding rulings on questions of international law. Indeed, the United States rejected participation in the Central American Court of Justice, formed in 1907, and, following World War I, the country refused to join the League of Nations or separately to accept the Statute of the PCIJ.<sup>101</sup> Still, it may not be too much of a stretch to hypothesize that a bit more political skill or flexibility on the part of Presidents Taft and Wilson might have led to different results. Had Taft first built a consensus with Senate leaders, and had he negotiated his arbitration treaties with France and the United Kingdom on those consensus terms, it seems likely that the United States would have accepted the treaties.<sup>102</sup> Historians have suggested that had President Wilson accepted various Republican reservations to the Covenant of the League of Nations, the United States might well, at the end of World War I, have joined the League and participated in cases before the PCIJ.<sup>103</sup>

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Advancement of Peace, U.S.-Guat., Sept. 20, 1913, 38 Stat. 1840; see BOYLE, *supra* note 22, at 124-26; Hans-Jürgen Schlochauer, *Bryan Treaties (1913-14)*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, *supra* note 29.

97. Articles 12 and 15 of the Covenant of the League of Nations also incorporated techniques of institutional investigation of disputes and a “cooling off period” before states could take further actions that might escalate tensions.

98. See *supra* notes 45-50 and accompanying text.

99. See BOYLE, *supra* note 22, at 125.

100. See, e.g., O’Connell, *supra* note 19, at 44.

101. See BOYLE, *supra* note 22, at 47-54.

102. See PATTERSON, *supra* note 19, at 174-75.

103. See ARNOLD, *supra* note 58, at 140. However, it is far from certain that the United States, which by the 1920s was approaching great power status, would have

One may fairly ask whether stronger U.S. arbitration treaties or U.S. participation in the PCIJ would have made any significant difference to the course of history. The point may be debated, and the answer must of course remain speculative, but there are reasons for skepticism. The British and French were willing to appease other states in the new institutional setting of the League, and it is questionable whether U.S. participation in the League or in PCIJ cases would have affected many international disputes. In highly politicized twentieth-century cases before the International Court of Justice (ICJ), the successor to the PCIJ, parties accused of acting illegally have simply refused to appear, and the decisions in those cases appear to have contributed only marginally, if at all, to resolving the disputes at issue.<sup>104</sup> Furthermore, the procedures of international arbitral tribunals, the PCIJ, and the ICJ have not accommodated full consideration of the interests of third parties or the international community.<sup>105</sup> It has proved difficult to satisfactorily resolve highly politicized modern disputes through international judicial process.

From the distance of a century, Taft's efforts to promote his arbitration treaties may appear naively optimistic. Global international legal institutions, including the PCIJ and the ICJ, have not prevented horrendous wars. Today, the functions of international courts and tribunals, and of compromissory clauses in treaties, are varied and nuanced.<sup>106</sup> It is not that international courts and tribunals do not play important roles; their proliferation suggests that states, individuals, and other international actors find them useful.<sup>107</sup> But the view that international arbitration or an international court can assure the peaceful settlement of disputes between rival states has largely disappeared. In the words of Professor David Caron, "[w]hile contemporary observers are likely to believe that adjudica-

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accepted the optional clause (compulsory) jurisdiction of the Permanent Court. See MICHLA POMERANCE, *THE UNITED STATES AND THE WORLD COURT AS A "SUPREME COURT OF THE NATIONS": DREAMS, ILLUSIONS AND DISILLUSION* 80-81 (1996).

104. See, e.g., Mark W. Janis, *Somber Reflections on the Compulsory Jurisdiction of the International Court*, 81 AM. J. INT'L L. 144 (1987).

105. See CHRISTINE CHINKIN, *THIRD PARTIES IN INTERNATIONAL LAW* 147-217, 247-88 (1993).

106. See RICHARD B. BILDER, *INTERNATIONAL DISPUTE SETTLEMENT AND THE ROLE OF ADJUDICATION* (1986); YUVAL SHANY, *THE COMPETING JURISDICTIONS OF INTERNATIONAL COURTS AND TRIBUNALS* (2003); Karen J. Alter, *Delegating to International Courts: Self-Binding vs. Other-Binding Delegation*, 71 LAW & CONTEMP. PROBS., Winter 2008, at 37; David D. Caron, *Towards a Political Theory of International Courts and Tribunals*, 24 BERKELEY J. INT'L L. 401 (2006); John E. Noyes, *The Functions of Compromissory Clauses in U.S. Treaties*, 34 VA. J. INT'L L. 831 (1994).

107. The United States participates in several significant formal third-party dispute settlement arrangements established by multilateral treaties. See, e.g., Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, Dec. 4, 1995, 2167 U.N.T.S. 88; [World Trade Organization] Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, 1869 U.N.T.S. 401.

tion and mediation may facilitate the resolution of disputes between parties that genuinely wish to avoid conflict, these same observers would probably find it difficult to recreate the profound and widespread nineteenth-century faith in the peacekeeping ability of an international court.”<sup>108</sup>

As John Murphy has so ably explored, the world faces rule-of-law challenges far different from those of 1911.<sup>109</sup> Bilateral interstate arbitration treaties appear ill-suited to address the multilateral challenges posed by global terrorism, nuclear proliferation, gross human rights abuses, or climate change. International law itself has changed, now encompassing some matters, such as recourse to force, that many early twentieth-century international lawyers would have regarded as completely within the discretion of states.<sup>110</sup> International legal disputes also are now less likely to be perceived in state-centric terms than they were a century ago; a wide variety of non-state entities—including individuals, corporations, and international institutions—have international legal rights and responsibilities.<sup>111</sup> The Taft Arbitration Treaties provided for jurisdiction over pairs of states, but not over non-state actors. General bilateral arbitration treaties—even a web of them—seem unlikely to provide effective solutions for many modern international problems. For a host of reasons, no one is going to start a centennial campaign to bring back the Taft Arbitration Treaties.

The Taft Arbitration Treaties nevertheless suggest questions about twenty-first-century efforts to legalize international relations. First, how can we identify and foster shared perspectives, which seem essential in addressing problems of peace, security, human rights, and the environment? The notion of “shared perspectives” helps explain why the Taft Arbitration Treaties attracted as much support as they did. America had cultural and historical ties with France and the United Kingdom. Taft stressed the importance of concluding arbitration treaties with countries sharing a tradition of respect for law and legal institutions.<sup>112</sup> A common

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108. Caron, *supra* note 31, at 8-9. “[T]oday the international community, at least as regards the use of force, expects less from the machinery of interstate adjudication. It is not viewed with the same unbridled expectations.” *Id.* at 24.

109. See JOHN F. MURPHY, *THE EVOLVING DIMENSIONS OF INTERNATIONAL LAW* (2010); JOHN F. MURPHY, *THE UNITED STATES AND THE RULE OF LAW IN INTERNATIONAL AFFAIRS* (2004).

110. See WILLIAM EDWARD HALL, *A TREATISE ON INTERNATIONAL LAW* § 16, at 64-65 (London, Clarendon Press 1895). Recall that Taft considered matters related to national survival as non-justiciable, thus not falling within the scope of his arbitration treaties. See *supra* note 77 and accompanying text.

111. This change is a matter of degree, depending in part on the forum, the issue, and particular decision makers’ jurisprudential perspectives. Even at the high point of state-centric positivism, some forums acknowledged the international legal rights of some non-state actors. See Mark W. Janis, *Individuals as Subjects of International Law*, 17 CORNELL INT’L L.J. 61 (1984); Jordan J. Paust, *Nonstate Actor Participation in International Law and the Pretense of Exclusion*, 51 VA. J. INT’L L. 977 (2011).

112. See *supra* note 65 and accompanying text.

religious tradition also provided impetus behind the Taft Arbitration Treaties, for many viewed the treaties as furthering Christian utopian goals. Today, it seems essential to identify, develop, and strengthen common perspectives and values if we are to provide a solid foundation for important international legal initiatives. Perhaps international law regimes themselves may contribute to identifying and fostering shared values and perspectives.<sup>113</sup>

For those not content with a modest view of the potential contributions of international law and institutions—contributions limited to technical, “realistic” cooperation regimes—Taft’s efforts pose a second question: Is it helpful to articulate and pursue a utopian vision in order to structure actions, including international law initiatives? William Howard Taft was a practical politician, but his advocacy of the Taft Arbitration Treaties, his later leadership of the League to Enforce Peace, and his support for the League of Nations suggest he was motivated by such a vision. Taft sought a stable, ordered world in which legal institutions—ultimately, an international court—would substitute peaceful dispute settlement for war, a world in which economic development and justice could flourish.

I applaud John Murphy for tackling the big issues, for recognizing the importance of the rule of law in international affairs, and for so cogently analyzing modern challenges to that rule of law.

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113. See generally Jutta Brunnée & Stephen J. Toope, *International Law and Constructivism: Elements of an Interactional Theory of International Law*, 39 COLUM. J. TRANSNAT’L L. 19 (2000).

## APPENDIX

GENERAL ARBITRATION TREATY BETWEEN GREAT BRITAIN  
AND THE UNITED STATES

*Signed at Washington, August 3, 1911*

The United States of America and His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India, being equally desirous of perpetuating the peace, which has happily existed between the two nations, as established in 1814 by the Treaty of Ghent, and has never since been interrupted by an appeal to arms, and which has been confirmed and strengthened in recent years by a number of treaties whereby pending controversies have been adjusted by agreement or settled by arbitration or otherwise provided for; so that now for, the first time there are no important questions of difference outstanding between them, and being resolved that no future differences shall be a cause of hostilities between them or interrupt their good relations and friendship;

The high contracting parties have, therefore, determined, in furtherance of these ends, to conclude a treaty extending the scope and obligations of the policy of arbitration adopted in their present arbitration treaty of April 4, 1908, so as to exclude certain exceptions contained in that treaty and to provide means for the peaceful solution of all questions of difference which it shall be found impossible in future to settle by diplomacy, and for that purpose they have appointed as their respective plenipotentiaries:

The President of the United States of America, the Honorable Philander C. Knox, Secretary of State of the United States; and

His Britannic Majesty, the Right Honorable James Bryce, O. M., his Ambassador Extraordinary and Plenipotentiary at Washington;

Who, having communicated to one another their full powers, found in good and due form, have agreed upon the following articles:

## ARTICLE I.

All differences hereafter arising between the high contracting parties, which it has not been possible to adjust by diplomacy, relating to international matters in which the high contracting parties are concerned by virtue of a claim of right made by one against the other under treaty or otherwise, and which are justiciable in their nature by reason of being susceptible of decision by the application of the principles of law or equity, shall be submitted to the Permanent Court of Arbitration established at The Hague by the Convention of October 18, 1907, or to some other arbitral tribunal as may be decided in each case by special agreement, which special agreement shall provide for the organization of such tribunal if necessary, define the scope of the powers of the arbitrators, the question

or questions at issue, and settle the terms of reference and the procedure thereunder.

The provisions of Articles 37 to 90, inclusive, of the Convention for the Pacific Settlement of International Disputes concluded at the Second Peace Conference at The Hague on the 18th October, 1907, so far as applicable, and unless they are inconsistent with or modified by the provisions of the special agreement to be concluded in each case, and excepting Articles 53 and 54 of such convention, shall govern the arbitration proceedings to be taken under this treaty.

The special agreement in each case shall be made on the part of the United States by the President of the United States, by and with the advice and consent of the Senate thereof, His Majesty's Government reserving the right before concluding a special agreement in any matter affecting the interests of a self-governing dominion of the British Empire to obtain the concurrence therein of the government of that dominion.

Such agreements shall be binding when confirmed by the two governments by an exchange of notes.

## ARTICLE II.

The high contracting parties further agree to institute as occasion arises, and as hereinafter provided, a joint high commission of inquiry to which, upon the request of either party, shall be referred for impartial and conscientious investigation any controversy between the parties within the scope of Article I, before such controversy has been submitted to arbitration, and also any other controversy hereafter arising between them even if they are not agreed that it falls within the scope of Article I; provided, however, that such reference may be postponed until the expiration of one year after the date of the formal request therefor, in order to afford an opportunity for diplomatic discussion and adjustment of the questions in controversy, if either party desires such postponement.

Whenever a question or matter of difference is referred to the joint high commission of inquiry, as herein provided, each of the high contracting parties shall designate three of its nationals to act as members of the commission of inquiry for the purposes of such reference; or the commission may be otherwise constituted in any particular case by the terms of reference, the membership of the commission and the terms of reference to be determined in each case by an exchange of notes.

The provisions of Articles 9 to 36, inclusive, of the Convention for the Pacific Settlement of International Disputes concluded at The Hague on the 18th October, 1907, so far as applicable and unless they are inconsistent with the provisions of this treaty, or are modified by the terms of reference agreed upon in any particular case, shall govern the organization and procedure of the commission.

## ARTICLE III.

The joint high commission of inquiry, instituted in each case as provided for in Article II, is authorized to examine into and report upon the particular questions or matters referred to it, for the purpose of facilitating the solution of disputes by elucidating the facts, and to define the issues presented by such questions, and also to include in its report such recommendations and conclusions as may be appropriate.

The reports of the commission shall not be regarded as decisions of the questions or matters so submitted either on the facts or on the law and shall in no way have the character of an arbitral award.

It is further agreed, however, that in cases in which the parties disagree as to whether or not a difference is subject to arbitration under Article I of this treaty, that question shall be submitted to the joint high commission of inquiry; and if all or all but one of the members of the commission agree and report that such difference is within the scope of Article I, it shall be referred to arbitration in accordance with the provisions of this treaty.

## ARTICLE IV.

The commission shall have power to administer oaths to witnesses and take evidence on oath whenever deemed necessary in any proceeding, or inquiry, or matter within its jurisdiction under this treaty; and the high contracting parties agree to adopt such legislation as may be appropriate and necessary to give the commission the powers above mentioned, and to provide for the issue of subpoenas and for compelling the attendance of witnesses in the proceedings before the commission.

On the inquiry both sides must be heard, and each party is entitled to appoint an agent, whose duty it shall be to represent his government before the commission and to present to the commission, either personally or through counsel retained for that purpose, such evidence and arguments as he may deem necessary and appropriate for the information of the commission.

## ARTICLE V.

The commission shall meet whenever called upon to make an examination and report under the terms of this treaty, and the commission may fix such times and places for its meetings as may be necessary, subject at all times to special call or direction of the two governments. Each commissioner, upon the first joint meeting of the commission after his appointment, shall, before proceeding with the work of the commission, make and subscribe a solemn declaration in writing that he will faithfully and impartially perform the duties imposed upon him under this treaty, and such declaration shall be entered on the records of the proceedings of the commission.

The United States and British sections of the commission may each appoint a secretary, and these shall act as joint secretaries of the commission at its joint sessions, and the commission may employ experts and clerical assistants from time to time as it may deem advisable. The salaries and personal expenses of the commission and of the agents and counsel and of the secretaries shall be paid by their respective governments and all reasonable and necessary joint expenses of the commission incurred by it shall be paid in equal moieties by the high contracting parties.

ARTICLE VI.

This treaty shall supersede the arbitration treaty concluded between the high contracting parties on April 4, 1908, but all agreements, awards, and proceedings under that treaty shall continue in force and effect and this treaty shall not affect in any way the provisions of the treaty of January 11, 1909, relating to questions arising between the United States and the Dominion of Canada.

ARTICLE VII.

The present treaty shall be ratified by the President of the United States of America, by and with the advice and consent of the Senate thereof, and by His Britannic Majesty. The ratifications shall be exchanged at Washington as soon as possible and the treaty shall take effect on the date of the exchange of its ratifications. It shall thereafter remain in force continuously unless and until terminated by twenty-four months' written notice given by either high contracting party to the other.

In faith whereof the respective plenipotentiaries have signed this treaty in duplicate and have hereunto affixed their seals.

Done at Washington the third day of August, in the year of our Lord one thousand nine hundred and eleven.

[SEAL.]

[SEAL.]

PHILANDER C. KNOX.

JAMES BRYCE.