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# Summaries of Judgments, Advisory Opinions and Orders of the Permanent Court of International Justice

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# FOREWORD

This publication contains summaries of judgments, advisory opinions and orders of the Permanent Court of International Justice. It has been prepared by the Codification Division of the Office of Legal Affairs, in the framework of the United Nations Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law. The publication includes the text of the summaries of the judgments, advisory opinions and orders, as published in the Permanent Court's annual reports, as well as summaries of the observations and opinions by Judges, as prepared by the Codification Division. While the annual reports of the Permanent Court were published in French and English (its two official languages), the present publication is made available in all the official languages of the United Nations, thus aiming at increasing public awareness of the work of the Permanent Court and facilitating access to its jurisprudence.

*History of the Permanent Court of International Justice*

The establishment of the Permanent Court, the predecessor of the International Court of Justice, was provided for in Article 14 of the Covenant of the League of Nations, creating the first "regular world tribunal for determining disputes between States" (*Official Journal of the League of Nations, Special Supplement No. 194*, p.100 (1946) (A.35.1946)). The Permanent Court held its inaugural sitting in 1922 and was dissolved in 1946; between these years, the Permanent Court dealt with 29 contentious cases and delivered 27 advisory opinions. The Permanent Court participated in the settlement of a number of international disputes, and its judgments contributed, in the words of the Assembly of the League, "to the development of the doctrines of international law" (*ibid.*). Given that the Statute of the International Court of Justice is based very closely on that of the Permanent Court, the decisions summarized in this publication have played and continue to play an important role in understanding the jurisprudence of the principal judicial organ of the United Nations.

*Summaries of the cases before the Permanent Court*

This publication reproduces summaries that were published under Series E of the publications of the Permanent Court, containing the annual reports of the Permanent Court. The summaries were prepared by the Registry of the Permanent Court and did not involve the responsibility of the Court itself. They are made available for information purposes and should not be quoted as the actual texts they refer to.

The reproduced summaries cover all judgments and advisory opinions delivered by the Permanent Court. Certain orders were assigned a number by the Permanent Court and were therefore summarized under separate headings in the annual reports of the Permanent Court: they are also reproduced under separate entries hereinafter. Other orders are covered in the course of the summaries of the corresponding judgments and advisory opinions.

In the interest of authenticity, the original texts of the summaries published by the Permanent Court are reproduced with minimal editing; changes in approach or style, which inevitably occurred over the life of the Permanent Court, have been maintained.

*Opinions and observations by the Judges*

The summaries published in the annual reports of the Permanent Court did not include summaries of any opinions or observations appended by the Judges to the judgments, advisory opinions and orders of the Permanent Court. The Codification Division of the United Nations Office of Legal Affairs has prepared summaries of those opinions and observations in order to provide a more com-

plete understanding of the cases before the Permanent Court. These summaries consist primarily of extracts of the original opinions and observations, and have been prepared in accordance with the style adopted by the Registry of the Permanent Court. The summaries of opinions are made available for information purposes and should not be quoted as the actual texts they refer to.

*The numbering system of the judgments, advisory opinions and orders*

The numbering system utilized in this publication reflects the final format adopted by the Permanent Court. Up until 1 January 1931, the judicial decisions of the Permanent Court were published under two distinct series: Series A for the collection of judgments and Series B for the collection of advisory opinions. On 21 February 1931, the Permanent Court adopted an amendment to its Rules providing for the publication of its judgments, advisory opinions and orders in a single series (Series A/B). At that time, the Permanent Court retroactively assigned new numbering to cover all judgments, advisory opinions and orders published since its establishment (the first fascicule of the new Series A/B was therefore numbered 40). Under this system, therefore, all judgments, advisory opinions and orders were attributed consecutive numbers under Series A/B, which reached number 80 by the time of the dissolution of the Permanent Court. In the interests of clarity and authenticity, this publication utilizes this final adjusted numbering system, as adopted by the Permanent Court in 1931. However, reference is made at the commencement of each summary to the original Series A, Series B or Series A/B numbering for each case so that the original full text of the judgment, advisory opinion or order can be more easily located. For further explanation regarding the adoption of the new numbering system by the Permanent Court, see the Eighth Annual Report of the Permanent Court of International Justice (15 June 1931—15 June 1932), Series E, No. 8, pp. 309–313.

# 1. NOMINATION OF THE WORKERS' DELEGATE FOR THE NETHERLANDS AT THE THIRD SESSION OF THE INTERNATIONAL LABOUR CONFERENCE

## Advisory Opinion of 31 July 1922 (Series B, No. 1)

**First Annual Report of the Permanent Court of International Justice (1 January 1922—15 June 1925), Series E, No. 1, pp. 185–188**

*International Labour Conferences—Nomination of non-Government delegates; duties of Governments Art. 389, paragraph 3, of Treaty of Versailles*

*History of the question*

The third paragraph of Article 389 of the Treaty of Versailles lays down that the Governments of Members of the International Labour Organization undertake to nominate the non-Government delegates for the general conferences and their advisers in agreement with the industrial organizations, if such organizations exist, which are most representative of employers or workpeople, as the case may be, in their respective countries.

The Netherlands Minister of Labour, when he had to make the nominations for the first General Labour Conference which was to meet at Washington at the end of 1919, with the object of arriving at the agreement prescribed in Article 389, invited the five Netherlands Labour Organizations which he regarded as the most important, to take part in a consultation. One of them, the least important, declined to do so; three others agreed to propose a single candidate for nomination; whilst the fifth, numerically the largest, the Netherlands Confederation of Trades Unions, considered itself entitled to propose the workers' delegate. The Netherlands workers' delegate to the first two sessions of the Labour Conference was nominated from that Confederation. But in 1921, for the third Conference, the Minister of Labour, in spite of the opposition of the Netherlands Confederation of Trades Unions, nominated as delegate the candidate put forward by the three other organizations in agreement.

The Netherlands Confederation of Trades Unions then addressed a protest to the International Labour Office. When the Conference assembled, it admitted the Netherlands delegate who had been nominated, but invited the Governing Body of the I.L.O. to request the Council of the League of Nations to obtain an advisory opinion from the Court upon the question whether the Netherlands Workers' delegate to the third Session of the International Labour Conference had been nominated in accordance with the terms of paragraph 3 of Article 389 of the Treaty of Versailles.

*The Council's Request*

The Council consented to this request, and, on May 12th, 1922, adopted a Resolution giving effect to it.

*Composition of the Court*

The Court considered the question at its first Session (June 15th to August 22nd, 1922). It was composed as follows:

MM. Loder, *President*; Weiss, *Vice-President;* Lord Finlay, MM. Nyholm, Moore, de Bustamante, Altamira, Oda, Anzilotti, Beichmann, Negulesco.

Notice of the request had been given to the Members of the League of Nations through the Secretary-General of the League, to the States mentioned in the Annex to the Covenant, to Germany, Hungary and to the following organizations:

The International Association for the Legal Protection of Workers;

The International Federation of Christian Trades-Unions;

The International Federation of Trades Unions.

*Hearings*

The Court decided to hear at a public sitting the representatives of any of the Governments or International Organizations above-mentioned, which gave notice to that effect. Oral statements were accordingly made on behalf of the following:

(1) The British Government;

(2) The Netherlands Government;

(3) The International Federation of Trades Unions;

(4) The International Federation of Christian Trades Unions;

(5) The International Labour Office.

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*Opinion No. 1 (analysis)*

The Court's Opinion was delivered on July 31st, 1922.

It observes in the first place that the Netherlands Confederation of Trades Unions is the organization possessing the largest number of members, and though it would not necessarily follow that it is the most representative, it may for the purposes of the Opinion be assumed to be so.

The Treaty of Versailles however speaks of the most representative organizations in the plural. There is no criterion for the definition of the word "representative" and the question which organizations are the most representative is a question to be decided in the particular case, having regard to the circumstances in each particular country when the choice falls to be made. It is the duty of the Government concerned to decide this question. In the present case, the Netherlands Government came to the conclusion that the three organizations which had arrived at an agreement and which together included more members than the Netherlands Confederation of Trades Unions by itself, were collectively more representative of the workpeople of the Netherlands.

Could the Netherlands Government dispense with an agreement with the Netherlands Confederation of Trades Unions and content itself with an agreement with the three other organizations? As has been seen, the Treaty speaks of agreement with the most representative industrial organizations; the aim therefore of each Government must of course be an agreement with all the organizations most representative of employers or workpeople, as the case may be; that, however, is only an ideal which it is extremely difficult to attain and which cannot, therefore, be considered as the normal case contemplated in paragraph 3 of Article 389. What is required of the Governments is that they should do their best to effect an agreement which, in the circumstances, may be regarded as the best for the purpose of ensuring the representation of the workers of the country. This is what the Netherlands Government did when, after failing to reach an agreement with all the industrial organizations which it regarded as the most representative, it nominated, the Workers' delegate in agreement with the organizations

which, taken together, included a majority of the organized workers of the country. For these reasons, the Court's reply to the question put to it is in the affirmative.

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*Effects of the Opinion*

By a Resolution dated September 1st, 1922, the Council noted the Court's Opinion and transmitted it to the Director of the International Labour Office.

*International Labour Organization*

M. Albert Thomas gave an account of the Opinion in his report to the fourth session of the International Labour Conference[1]. The report lays stress on certain practical consequences of the Opinion, and in particular upon the following indications which, in his opinion, were to be derived from the reasoning of the Opinion and which might usefully be borne in mind by States in making their selections:

(1) where there are several industrial organizations, not only the most representative organization, but the most representative organizations must be consulted;

(2) the undertaking given by governments to make nominations in agreement with the industrial organizations is not a mere moral obligation, but an obligation by which the governments are bound to one another;

(3) governments are bound to try to bring about an agreement between the various organizations;

(4) the Court has no intention of encroaching, by its observations, upon the powers of the Credentials Committee of the Conference.

*Netherlands Government*

Furthermore, as regards the Netherlands Government, it is to be noted that the Foreign Minister of the Netherlands, in his report to the States General for the period May 1921 to October 1922, dealt very fully with the question and its history, the essential parts of the Opinion being reproduced.

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[1] Report dated Geneva, October 9th, 1922. See First Part: Composition of the Conference; Interpretation of Art. 389 of Treaty of Versailles, p. 23.

## 2. COMPETENCE OF THE ILO IN REGARD TO INTERNATIONAL REGULATION OF THE CONDITIONS OF THE LABOUR OF PERSONS EMPLOYED IN AGRICULTURE

**Advisory Opinion of 12 August 1922 (Series B, No. 2)**

## COMPETENCE OF THE ILO TO EXAMINE PROPOSAL FOR THE ORGANIZATION AND DEVELOPMENT OF THE METHODS OF AGRICULTURAL PRODUCTION

**Advisory Opinion of 12 August 1922 (Series B, No. 3)**

**First Annual Report of the Permanent Court of International Justice (1 January 1922—15 June 1925), Series E, No. 1, pp. 189–194**

*Opinion No. 2:—International Labour Organization—Its competence in regard to agriculture—"Industry" (Part XIII, Treaty of Versailles) includes agriculture—Sources for the interpretation of a text: the manner of its application and the work done in preparation of it*

*Opinion No. 3:—International Labour Organization—Its competence in regard to production (agricultural or otherwise)*

*History of the question*

One part of the various Treaties of Peace signed on the conclusion of the war of 1914–1918—in the Treaty of Versailles, Part XIII—is devoted to the establishment of an International Labour Organization. This Organization is intended to perform certain duties in connection with labour, and to this end it includes amongst other things a General Conference, which is to meet at least once a year, a Governing Body and an International Labour Office.

Certain questions concerning agricultural labour, the consideration of which had been postponed at the first meeting of the General Conference (Washington, October—November 1919) were included on the agenda of the third Conference which was to meet at Geneva in October 1921. The Swiss Government proposed that the discussions of these questions should once more be postponed, but did not pursue the matter, in consequence of a communication from the Governing Body. The French Government, in two memoranda dated May 13th and October 7th, 1921, pointed out that the discussion of the questions of agricultural labour would be inopportune, and furthermore that, as the Treaty did not mention agricultural workers, the International Labour Organization had no competence in the matter. On these grounds it requested the withdrawal of these points from the agenda.

The Conference, when it met, passed a resolution affirming by 74 votes to 20 its competence as regards agricultural labour, and approved three draft conventions and seven recommendations concerning the protection of agricultural workers. Then, on January 13th, 1922, the French representative on the Council of the League of Nations submitted to the Council a resolution to the effect that the Court should be requested to give an opinion on this point. The Council adopted a resolution to this effect on May 12th, 1922.

Subsequently, on July 18th, 1922, also at the request of the French Government, the Council framed another resolution, this time asking the Court to give a further advisory opinion on the question whether the examination of proposals for the organization and development of methods of agricultural production and of other questions of a like character falls within the competence of the International Labour Organization. In the opinion of the French Government, a decision upon this point

was necessary in order to dispose of a question which remained obscure, in spite of the statements of the Director of the International Labour Office who disclaimed any competence in the matter.

*Composition of the Court*

The Court considered the questions submitted at its first Session, which lasted from June 15th to August 12th, 1922. It was composed as follows:

MM. Loder, *President*; Weiss, *Vice-President;* Lord Finlay, MM. Nyholm, Moore, de Bustamante, Altamira, Oda, Anzilotti, Beichmann[1], Negulesco.

Notice of the first request had been given to Members of the League of Nations through the Secretary-General of the League, to States mentioned in the Annex to the Covenant, to Germany, Hungary and the following Organizations:

The International Federation of Agricultural Trades Unions;

The International League of Agricultural Associations (*Internationaler Bund der Landwirtschaftlichen Genossenschaften*);

The International Agricultural Commission;

The International Federation of Christian Unions of Land-Workers;

The International Federation of Land-Workers;

The International Institute of Agriculture at Rome;

The International Federation of Trades Unions;

The International Association for the Legal Protection of Workers.

*Hearings*

The Court decided to hear at a public sitting the representatives of any of the Governments or Organizations above-mentioned who gave notice of advice to that effect; whereupon oral statements were made on behalf of the following:

(1) The French Government.

(2) The British Government.

(3) The Portuguese Government.

(4) The Hungarian Government.

(5) The International Agricultural Commission.

(6) The International Labour Office.

(7) The International Federation of Trades Unions.

As regards the supplementary request, it was communicated to the States which had received notice of the first and to the International Institute of Agriculture at Rome. A hearing was granted upon this question to the representatives of the French Government and of the International Labour Office.

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[1] M. Beichmann, Deputy-Judge, took part in the deliberations concerning the first of these two questions, but was obliged to leave for Norway before the terms of the Opinion were finally settled. He did not take part in the preparation of the Opinion concerning the methods of agricultural production.

*Opinion No. 2 (analysis)*

On August 12th, 1922, the Court delivered both the opinions for which it had been asked. In the first, it proceeds at once to lay down as a principle that in considering this question the meaning of the Treaty is not to be determined merely upon particular phrases which, if detached from the context, may be interpreted in more than one sense. One of the objects of the Treaty is to establish a permanent organization for labour in general. This militates against the argument that agriculture, which is, beyond all question, the most ancient and the greatest industry in the world, is to be considered as left outside the scope of the Organization. Moreover, the principles enunciated in the Preamble of Part XIII apply to agricultural workers as much as to others. The same may be said as regards the clauses which follow. In particular, Article 427 leaves no doubt as to the comprehensive character of Part XIII of the Treaty; for it alludes to the well-being of industrial wage-earners, without limitation or qualification.

The argument for incompetence is found, on analysis, to rest almost entirely upon the contention that, because the French words *industrie* and *industriel*, which ordinarily refer to manufactures, occur in the French text of certain clauses, Part XIII as a whole must be confined within that limit. This argument is not well founded. Though these words may be used in a restricted sense in opposition to agriculture, in their primary and general sense they include that form of production. But considering the context in which these words occur in the first text, and in Part XIII read as a whole, there is no ambiguity as to the inclusion of agriculture. Moreover, if there were any ambiguity, the Court might have considered the action taken under the Treaty between June 28th, 1919, the date of signature, and October 1921: none of the Contracting Parties had raised the question whether agricultural labour fell within the competence of the International Labour Organization, and the subject of agriculture had been repeatedly dealt with in one form and another. There is nothing in the preparatory work, which was adduced in argument against the claim of competence, to disturb the conclusion arrived at by the Court. Moreover, the arguments used for the exclusion of agriculture might with equal force be used for the exclusion of navigation and fisheries, and it has never been suggested that either of these great industries was not within the competence of the Labour Organization.

For these reasons, the Court is of opinion that the competence of the International Labour Organization does extend to international regulations of the conditions of labour of persons employed in agriculture.

M. Weiss, Vice-President, and M. Negulesco, Deputy-Judge, availing themselves of the terms of Article 71 of the Rules of Court to the effect that "the opinions of dissenting judges may, at their request, be attached to the Opinion of the Court", declared that they could not concur in the Opinion given by the Court.

*Opinion No. 3 (analysis)*

To the supplementary question, the Court's reply is in the negative.

In the first place, it observes that there is no reason for treating the subject of agricultural production separately. The question before the Court in effect relates to production as a whole, since the Treaty includes agriculture as well as other industries. Part XIII, however, contains no provisions concerning production; but it does not follow that the International Labour Organization must totally exclude from its consideration the effect upon production of measures which it may seek to promote for the benefit of the workers. Nevertheless, the consideration of methods of production in themselves is alien to its sphere of activity. Moreover, it has never laid claim to this competence.

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*Effects of the Opinions*

The Director of the International Labour Office, in his general report to the fourth Session of the International Labour Conference (dated Geneva, October 9th, 1922), gave an analysis of these two Opinions. He stated that the position maintained by the International Labour Organization had thus received legal confirmation and that the Office would proceed with the task which it had undertaken[2].

M. de Vogué, French delegate to the fourth Session of the Conference, made the following declaration on October 28th, 1922, on behalf of the French Government[3]:

(*Translation*)

"We accept the opinion given by the Permanent Court of International Justice with the deference due to that high tribunal. The best proof of this is my presence here as representing not only the French Government but also French agriculture. We intend to co-operate loyally and sincerely with the International Labour Organization in regard to agriculture, subject to the one condition sanctioned by Article 427 of the Treaty, namely, that the conditions which we regard as essential to agricultural labour and social peace shall not be disturbed."

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## 3. NATIONALITY DECREES IN TUNIS AND MOROCCO

### Advisory Opinion of 7 February 1923 (Series B, No. 4)

**First Annual Report of the Permanent Court of International Justice (1 January 1922—15 June 1925), Series E, No. 1, pp. 195–199**

*Council of League of Nations—Domestic jurisdiction of a Party to a dispute (Art. 15, para. 8, of Covenant)—Questions of nationality are in principle of domestic concern—But a question which involves the interpretation of international instruments is not of domestic concern*

*History of the question*

On November 8th, 1921, a Decree was promulgated by the Bey of Tunis, the first article of which enacts as follows:

> "With the exception of citizens, subjects or nationals of the Protecting Power (other than our own subjects), every person born in the territory of our Kingdom of parents one of whom was also born there, is a Tunisian, subject to the provisions of conventions or treaties binding the Tunisian Government."

On the same date, the President of the French Republic issued a Decree of which the first article was as follows:

> "Every person born in the Regency of Tunis of parents of whom one, justiciable as a foreigner in the French Courts of the Protectorate, was also born there, is French."

Similar legislation was introduced at the same time in Morocco (French Zone).

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[2] See General Report, 2nd Part: *The Question of Competence in Agricultural Matters*, p. 73; and *Agricultural Production*, p. 80.

[3] Eighth meeting.

The British Ambassador in Paris protested to the French Government against the application to British subjects of the decrees promulgated in Tunis, and also stated that his Government was unable to recognize that the decrees put into force in the French Zone of Morocco were applicable to persons entitled to British nationality. As it was not found possible to adjust the divergence of views, the British Government proposed to the French that the matter should be referred to the Court, invoking amongst other things, the Franco-British Arbitration Convention of October 14th, 1903. The French Government refused to submit the matter to arbitral or judicial settlement, whereupon the British Government stated, on July 14th, 1922, that it had no alternative but to submit the dispute to the Council of the League of Nations, relying on Articles 13 and 15 of the Covenant[1]. The Quai d'Orsay replied that the question was not one for consideration by the Council of the League of Nations, having regard to the reservation made in paragraph 8 of Article 15 of the Covenant concerning questions which by international law are solely within the domestic jurisdiction of one Party.

*Request of the Council*

The Governments concerned then came to an agreement, under the auspices of the Council, to the effect that the latter should request the Court to give an advisory opinion on this question of jurisdiction, *viz.* whether the dispute is or is not, by international law, solely a matter of domestic jurisdiction.

On October 4th, 1922, the Council passed a resolution to this effect. The Request was communicated by the Registrar of the Court to the Members of the League of Nations (through the Secretary-General of the League), and to the States mentioned in the Annex to the Covenant.

*Composition of the Court*

An extraordinary session of the Court (Second Session) was held, from January 8th to February 7th, 1923, to deal with the question. The following judges attended:

MM. Loder, *President*; Weiss, *Vice-President*; Lord Finlay, MM. Nyholm, Moore, Altamira[2], Anzilotti, Huber, Beichmann, Negulesco.

*Written documents and oral statements*

The Governments concerned had each filed a Case in November, 1922, and a Counter-Case in December of that year. The Court also heard oral statements by both Parties.

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*Opinion No. 4 (analysis)*

On February 7th, 1923, the Court delivered its Opinion. At the outset, the Court states that the question before it is whether the dispute relates to a matter which, by international law, is solely within the domestic jurisdiction of France, and goes on to observe that as it has to give an opinion upon the nature of the dispute and not upon the merits, nothing in the opinion can be interpreted as indicating a view as regards the merits of the dispute between the Parties.

The Court next observes that, according to the terms of the Request itself, the question must be read in the light of paragraph 8 of Article 15 of the Covenant; and to this end it proceeds to define the meaning of the expression "solely within the domestic jurisdiction" therein contained.

[1] Which concern disputes likely to lead to a rupture.

[2] M. Altamira, Judge, took part in the deliberations concerning the Opinion, but was compelled to leave The Hague before its terms were finally settled.

In the view of the Court, the exclusive jurisdiction of States embraces matters which are not in principle regulated by international law. The extent of this jurisdiction, which, in the opinion of the Court, includes, in principle, questions of nationality, varies with the development of international relations; it is therefore a purely relative question. Moreover, even as regards matters falling within this domain, the right of a State to use its discretion may be restricted by the effect of international obligations. Nevertheless, a dispute, which, in principle, falls within the domestic jurisdiction of a State, is not removed from that domain simply because international engagements are invoked. These engagements must be of a nature to justify the provisional conclusion that they are of juridical importance for the purposes of the dispute. Nor does the mere fact that one of the Parties brings a dispute before the League of Nations suffice to remove it from this exclusive domain.

The Court then proceeds to apply this doctrine to the question before it. For this purpose, it takes the legal grounds and arguments advanced by the Parties one by one; nevertheless, the purpose of this examination is only to enable the Court to form an opinion as to the nature of the dispute, and not as to its merits. For to give an opinion on the merits of the case, in order to reply to a question regarding exclusive jurisdiction, would hardly be in conformity with the system established by the Covenant. From this point of view, the Court considers the contention that France enjoys in Tunis and Morocco the same exclusive right to legislate on questions of nationality as in France itself, and that the local sovereignty of the protected State in conjunction with the public powers exercised by the protecting State may be equivalent to full sovereignty. Similarly, the Court alludes to the question whether the Capitulary rights of Great Britain in Tunis and Morocco still exist, or whether they have lapsed. It also considers the argument put forward by Great Britain based on the most favoured nation clause, and the French contention that Great Britain had formally recognized France's right to legislate as to the nationality of persons in Tunis under the same conditions as in France itself.

The Court, without going into the merits of the dispute and confining itself to consideration of the facts above referred to, arrives at the conclusion that the dispute in question does not relate to a matter which, by international law, is solely within the domestic jurisdiction of France; the Council therefore is competent to deal with the dispute laid before it by Great Britain regarding the nationality decrees in Tunis and Morocco.

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*Effects of the Opinion*

At the public sitting at which the Court delivered this Opinion, the French Agent asked the Court to take note that the French Government proposed to the English Government that the dispute should be submitted to the Permanent Court of International Justice for judgment on the merits.

*Exchange of notes*

Following this declaration and after negotiations between the two Governments, an exchange of notes took place on May 24th, 1923, between His Britannic Majesty's Principal Secretary of State for Foreign Affairs and the French Ambassador in London, by which His Britannic Majesty's Government declared that it was prepared to proceed no further with the case as regards Tunis, on receipt of an undertaking by the French Government that arrangements would be made by them, before January 1st, 1924, whereby a British national born in Tunis of a British national himself born there should be entitled to decline French nationality; this right, however, was not to extend to succeeding generations. It was also stipulated in these notes that a child born in Tunis of a British subject himself born elsewhere than in Tunis would not be claimed as a French national by the French Government, and that French

nationality would not be imposed on any British subject born in Tunis before November 8th, 1921, without giving such person an opportunity to decline it.

As regards Morocco, proceedings were also abandoned, as the question was not at that time of any practical importance.

The exchange of notes was brought to the knowledge of the President of the Court by letters dated June 7th, 1923, from the British and French Ministers at The Hague. The Court took cognizance of the exchange of notes at a public sitting held on June 18th, 1923. The proposal made by the French Government on the occasion of the reading of the Opinion was consequently withdrawn.

*New French Law*

In execution of the Franco-British agreement, the French Government on December 20th promulgated a law (*Journal officiel de la République française, n° du 21 décembre 1923*) regarding the acquisition of French nationality in the Regency of Tunis. This law cancels the decrees of November 8th, 1921, and embodies the conditions of the Franco-British agreement referred to above.

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## 4. STATUS OF EASTERN CARELIA

### Advisory Opinion of 23 July 1923 (Series B, No. 5)

**First Annual Report of the Permanent Court of International Justice**
**(1 January 1922—15 June 1925), Series E, No. 1, pp. 200–203**

*Dispute between a Member and a non-Member of the League of Nations (Art. 17 of the Covenant)—The consent of States as a condition for the legal settlement of a dispute—Refusal by the Court to give an opinion for which it is asked—Grounds for this refusal*

*History of the question*

On October 14th, 1920, the Soviet Government and the Government of Finland terminated the state of war existing between them, by the signature of a Peace Treaty at Dorpat. This Treaty, which came into force on January 1st, 1921, contains clauses guaranteeing certain rights to the inhabitants of two communes which, after having been placed under Finnish protection during the hostilities, were reincorporated in the Soviet Federation and attached to Eastern Carelia, which is described as an autonomous territory. The conditions of Carelian autonomy were embodied in a document entitled "Declarations by the Russian Delegation concerning the autonomy of Eastern Carelia", which was signed on the same day as the Treaty of Dorpat.

This declaration gave rise to a dispute between the signatories of the Treaty. Finland alleged that Russia had failed to fulfil her obligations, and contended that the declaration possessed the same binding force as the Treaty itself. The Soviet Government maintained that that instrument created no contractual obligation and that, being given solely for information, it merely recorded a state of affairs already existing.

The Council of the League of Nations, before whom Finland had laid the question, adopted a Resolution on January 14th, 1922, to the effect that it was prepared to examine the question provided

that the two interested Parties agreed. At the same time, it expressed the desire that some State which was a Member of the League of Nations and in diplomatic relations with Moscow should ascertain the Russian Government's intention in that respect. The Estonian Government complied with the wish expressed by the Council, and invited the Russian Government to submit the dispute regarding Eastern Carelia to the examination of the Council on the basis of Article 17 of the Covenant, and at the same time asked whether that Government "would consent to submit the question to the Council" in accordance with the terms of that article and "to be represented on that body". The Estonian Government, however, met with a refusal.

*The Council's Request*

Subsequently, upon the renewed entreaties of the Finnish Government, the Council on April 21st, 1923, adopted a Resolution asking the Court to give an opinion, taking also into consideration the information which the various countries concerned might submit to it, upon the following questions:

> "Do Articles 10 and 11 of the Treaty of Peace between Finland and Russia, signed at Dorpat on October 14th, 1920, and the annexed Declaration of the Russian Delegation regarding the autonomy of Eastern Carelia, constitute engagements of an international character which place Russia under an obligation to Finland as to the carrying out of the provisions contained therein?"

Notice of the Request was given to the Members of the League of Nations through the Secretary-General of the League and to the States mentioned in the Annex to the Covenant; furthermore, the Registrar was directed to notify the Soviet Government.

*Composition of the Court*

The Court considered the question at its third (ordinary) Session which commenced on June 15th and ended on September 15th, 1923. It was composed as follows:

MM. Loder, *President*; Weiss, *Vice-President*; Lord Finlay, MM. Nyholm, Moore, de Bustamante, Altamira, Oda, Anzilotti, Huber, Wang.

*Hearings*

The Court heard a statement made by the representative of the Finnish Government. It should be observed that the Court had informed him that it would be glad to have his views on the question whether the Court had competence to give effect to the Council's request for an opinion. The Russian Government, for its part, informed the Court by telegram that it found it impossible to take any part in the proceedings "without legal value either in substance or in form" which were to take place before the Court. This telegram also stated the reasons for which the Russian Government considered the matter to be one of domestic concern.

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*Opinion No. 5 (analysis)*

On July 23rd, 1923, the Court gave its reply to the Council's request.

In the first place, this reply states the exact nature of the question concerning which the Court's opinion is asked. This question is whether the Declaration of October 14th, 1920, is in the nature of a contractual obligation, or whether it was merely given for information. This is a question of fact; it must be ascertained whether there is an engagement of an international character and whether the Declaration is to be assimilated to the Treaty of Peace itself.

This question relates to an actual dispute between Finland and Russia. Since Russia is not a Member of the League of Nations, the case is one under Article 17 of the Covenant. According to that article, a State which is not a Member of the League is invited to accept the obligations of membership for the purposes of such dispute, and if the invitation is accepted, the provisions of Articles 12 and 16 may be applied. This rule only accepts and applies a principle which is a fundamental principle of international law, namely, the independence of States. It is well established that no State can be compelled to submit disputes to any kind of pacific settlement without its consent. In the present case, however, Russia has never given her consent: on the contrary, she has on several occasions clearly declared that she accepts no intervention by the League of Nations in the dispute with Finland. The Court therefore finds it impossible to give its opinion on a dispute of this kind.

The Court has other cogent reasons for not replying; as has been seen, the dispute relates to a matter of fact. But in the present case it appears doubtful whether there would be available to the Court material sufficient to enable it to arrive at any conclusion. The Court does not say that there is an absolute rule that the request for an advisory opinion may not involve some enquiry as to facts; but in ordinary circumstances, it is certainly expedient that the facts upon which the opinion of the Court is desired should not be in controversy.

It is true that the Court is asked for an advisory opinion and not for a judgment; but this circumstance does not essentially modify the position. Answering the question put would be substantially equivalent to deciding the dispute between the Parties.

The Court, being a Court of Justice, cannot, even in giving advisory opinions, depart from the essential rules guiding their activity as a Court.

*Dissenting Judges*

The Vice-President, M. Weiss, and also MM. Nyholm, de Bustamante and Altamira, declared that they could not share the views of the majority as to the impossibility of giving an advisory opinion on the Eastern Carelian question.

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*Effects of the reply*

On September 27th, 1923, the Council simply noted the Court's reply.

It should be observed that the Fourth Assembly of the League of Nations, which was sitting at that time, adopted a Resolution on the subject on September 24th, 1923, noting that, in the absence of any decision or opinion to the contrary pronounced by any international tribunal, the Finnish Government maintained its right to consider the clauses in question as agreements of an international order. This Resolution also requested the Council to continue to collect all useful information, with a view to seeking any satisfactory solution rendered possible by subsequent events

## 5. S.S. "WIMBLEDON"

### Judgment of 17 August 1923 (Series A, No. 1)

**First Annual Report of the Permanent Court of International Justice (1 January 1922—15 June 1925), Series E, No. 1, pp. 163–168**

*Admissibility of the suit—Regime of the Kiel Canal; inland waterways and maritime canals; time of peace and of war; belligerents and neutrals—Restrictive interpretation—Neutrality and sovereignty—The right of intervention under Article 63 of the Court Statute is dependent only on a point of fact*

*History of the case*

An English steamship, the "Wimbledon", time-chartered by the French Company *Les Affréteurs réunis*, had been loaded at Salonica, in March 1921, with a cargo of munitions and artillery stores consigned to the Polish Naval Base at Danzig. When the vessel arrived in the course of its voyage at the entrance to the Kiel Canal, it was refused permission to pass through by the Director of Canal Traffic, who based his action on the German neutrality orders issued in connection with the Russo-Polish war and on instructions received by him.

The French Ambassador at Berlin requested the German Government to withdraw this prohibition and to allow the S.S. "Wimbledon" to pass through the Canal, in conformity with Article 380 of the Treaty of Versailles. In reply, he was informed that the German Government was unable to allow a vessel loaded with munitions and artillery stores consigned to the Polish Military Mission at Danzig, to pass through the Canal, because the German neutrality orders of July 25th and 30th, 1920, prohibited the transit of cargoes of this kind destined for Poland or Russia, and Article 380 of the Treaty of Versailles was not an obstacle to the application of these orders to the Kiel Canal.

Without waiting any longer, the *Société des Affréteurs réunis* telegraphed to the captain of the "Wimbledon" ordering him to continue his voyage by the Danish Straits. The vessel weighed anchor on April 1st and, proceeding by Skagen, reached Danzig, its port of destination, on April 6th; it had thus been detained for eleven days, to which must be added two days for deviation.

*Application instituting proceedings*

In the meantime, the incident had given rise to negotiations between the Conference of Ambassadors and the Berlin Government; but these negotiations, in the course of which the contrast between the opposing standpoints had become apparent and the Allied Powers' protest had been met by a statement of Germany's alleged rights and obligations as a neutral in the war between Russia and Poland, led to no result; whereupon the British, French, Italian and Japanese Governments—thereby adopting a course suggested by the German Government itself—decided to bring the matter which had given rise to the negotiations before the jurisdiction instituted by the League of Nations to deal, amongst other matters, with any violation of Articles 380 to 386 of the Treaty of Versailles or any dispute as to their interpretation, *viz.* the Permanent Court of International Justice.

By the application of these Powers, dated January 16th, 1923, it was submitted that the German authorities were wrong in refusing to the S.S. "Wimbledon" free access to the Kiel Canal, and that the German Government was under an obligation to make good the prejudice sustained as a result of this action by the said vessel, *viz.*: 174,084 francs 86 centimes, with interest at 6 per cent. per annum from March 20th, 1921; in the event of payment not being effected within the period fixed, interim interest was claimed.

*Application for permission to intervene*

The application was communicated to the German Government, to the Members of the League of Nations and to signatories of the Treaty of Versailles, the interpretation of which was involved.[1] The four applicant Governments filed, within the times fixed by the Court, a case and a reply, which were respectively answered by a counter-case and rejoinder filed by the respondent. Furthermore, the Polish Government, basing its claim in the last resort on Article 63 of the Statute, which provides that whenever the construction of a convention to which States other than those concerned in the case are Parties in question, such States have the right to intervene in the proceedings, filed in May an application for permission to intervene.

The "Wimbledon" case was placed on the list for the third (ordinary) Session of the Court, which opened on June 15th and terminated on September 15th, 1923. The following judges were present:

MM. Loder, *President*; Weiss, *Vice-President*; Lord Finlay, MM. Nyholm, Moore, de Bustamante, Altamira, Oda, Anzilotti, Huber, Wang.

With the members of the Court sat Professor Schücking, whom Germany, being a Party to the suit and making use of her right to choose a judge of her nationality,[2] had appointed for this purpose.

*Interlocutory judgment on the application for permission to intervene*

The Court first of all had to consider Poland's application to intervene. On June 28th, 1923, after hearing the observations and conclusions of the applicants, respondent and intervener, and having affirmed that the interpretation of certain clauses of the Treaty of Versailles was in fact involved in the suit and that Poland was one of the States which were Parties to that Treaty, the Court allowed the application. Passing next to the suit itself, it heard the statements of the Agents of the Governments concerned and, on August 17th, 1923, delivered judgment.

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*The Court's judgment (analysis)*

In the judgment, the Court states, in the first place, that it can take cognizance of the suit in spite of the fact that the applicants cannot all adduce a prejudice to some pecuniary interest; for they have a clear interest in the execution of the provisions of the Treaty of Versailles relating to the Kiel Canal.

Turning next to the merits of the case, the Court, after analysing these provisions, arrives at the conclusion that the terms of Article 380 give rise to no doubt. It follows that the Canal has ceased to be an internal navigable waterway the use of which by the vessels of States other than the riparian State is left entirely to the discretion of that State. This rule also holds good in the event of Germany's neutrality. For the reservation made in Article 380 to the effect that a vessel must, in order to benefit by the rights of access, fly the flag of a nation at peace with Germany, shows that the authors of the Treaty contemplated the contingency of Germany being in the position of a belligerent. If the conditions of access to the Canal were also to be modified in the event of a conflict between two Powers remaining at peace with Germany, the Treaty would not have failed to say so. But it has not said so and this omission was no doubt intentional. It follows therefore that the general rule establishing free passage is also applicable in the case of Germany's neutrality. Again, the fact that a special section of the Treaty is devoted to the Kiel Canal, and that in this section certain clauses which concern the inland navigable waterways of Germany are repeated, shows that the provisions relating to this Canal are self-contained, and that

[1] Article 63 of the Statute.

[2] Article 31 of the Statute.

principles drawn from other articles of the Treaty, relating for instance to the conditions governing inland waterways in the case of the neutrality of the riparian State, are not intended to be applied to it.

There is no doubt that the clause under consideration places an important limitation on the exercise by Germany of sovereign rights over the Canal, in particular as regards the rights of a neutral power in time of war. The Court acknowledges that this fact constitutes a sufficient reason for the restrictive interpretation of the clause, in case of doubt. But this restrictive interpretation cannot be carried so far as to contradict the plain terms of the article.

Furthermore, the abandonment of the rights in question cannot be regarded as inadmissible for reasons connected with Germany's sovereignty; for the Court declines to see in the conclusion of any treaty by which a State undertakes to perform or refrain from performing a particular act, an abandonment of its sovereignty; on the contrary, the right of entering into international engagements is an attribute of State sovereignty. Again, the Court sees in the analogy which it establishes between the new regime of the Kiel Canal and those applicable to artificial waterways joining two open seas which are assimilated to natural straits, proof that even the passage of war vessels of belligerents does not compromise the neutrality of the sovereign State under whose jurisdiction the Kiel Canal lies. Moreover, the President of the German Delegation expressly admitted this, when he stated in a note to the President of the Conference of Ambassadors that the German Government claimed to apply its neutrality orders only to vessels of commerce and not to war vessels; it follows *a fortiori* that the passage of neutral vessels carrying contraband of war cannot constitute a failure on the part of Germany to fulfil her duties as a neutral.

The Court holds that Germany was perfectly free to regulate her neutrality in the Russo-Polish war, but subject to the condition that she respected and maintained intact her contractual obligations, *viz*., in this case, those entered into by her at Versailles on June 28th, 1919. These obligations involved the definite duty of allowing the passage of the "Wimbledon" through the Kiel Canal, and her duties as a neutral did not oblige her to prohibit it.

As regards the obligation to pay compensation resulting from the conclusion thus reached, the Court gives judgment in favour of the applicants, except as regards certain points. In the first place, the claim for the share of the vessel in the general expenses of the Company which had chartered it, is disallowed. Secondly, the Court considers that interest should run, not from the time of the arrival of the "Wimbledon" at the entrance of the Kiel Canal, but from the date of the judgment establishing Germany's obligation to pay. Lastly, the Court does not award interim interest at a higher rate in the event of the judgment remaining uncomplied with: it neither can nor should contemplate such a contingency.

*Dissenting opinions*

Two of the judges, MM. Anzilotti and Huber, were unable to concur in the judgment of the Court and delivered a dissenting opinion. Professor Schücking, the national judge, was in the same position and also delivered a separate opinion.

*Dissenting opinion by MM. Anzilotti and Huber*

MM. Anzilotti and Huber explain that the essential difference between their standpoint and that of the majority concerns a point which affects the interpretation of international conventions in general. According to them, the question to be decided is: Do the clauses of the Treaty of Versailles relating to the Kiel Canal also apply in the event of Germany's neutrality, or do they only contemplate normal circumstances, that is to say, a state of peace, without affecting the rights and duties of neutrality?

MM. Anzilotti and Huber observe that, for the purposes of the interpretation of international conventions, account must be taken of the complexity of interstate relations and of the fact that the contracting parties are independent political entities. Though it is true that when the wording of a treaty is clear its literal meaning must be accepted as it stands, without limitation or extension, it must not be presumed that the intention was to express an idea which leads to contradictory or impossible consequences or which, in the circumstances, must be regarded as going beyond the intention of the parties.

MM. Anzilotti and Huber recall that international conventions and more particularly those relating to commerce and communications are generally concluded having regard to normal peace conditions. If, as the result of a war, a neutral or belligerent State is faced with the necessity of taking extraordinary measures temporarily affecting the application of such conventions in order to protect its neutrality or for the purposes of national defense, it is entitled to do so even if no express reservations are made in the convention.

The authors of the joint dissenting opinion recognize that a State may enter into engagements affecting its freedom of action as regards wars between third States. But engagements of this kind, having regard to the gravity of the consequences which may ensue, can never be assumed. The right of a State to adopt the course which it considers best suited to the exigencies of its security and to the maintenance of its integrity, is so essential a right that, in case of doubt, treaty stipulations cannot be interpreted as limiting it, even though these stipulations do not conflict with such an interpretation. While this consideration would not be effective against a definite provision expressly referring to the circumstances arising out of a war, no such provision is to be found in the Treaty of Versailles.

MM. Anzilotti and Huber assert that the words "nations at peace with Germany" do not necessarily mean that States which are not at war with her are entitled to avail themselves in all possible circumstances of the provisions of Article 380 and the following Articles; they rather mean that a state of peace is the condition upon which the application of these provisions is dependent. Having considered Article 380 in connection with the other provisions of the same section, MM. Anzilotti and Huber reach the conclusion that the obligations undertaken by Germany to maintain the Kiel Canal free and open to vessels of nations at peace with her does not exclude her right to take the measures necessary to protect her interests as a belligerent or neutral power. This does not mean that the Canal is not also free in time of war, but this freedom will then necessarily be limited either by the exigencies of national defence, if Germany is a belligerent, or, if she is neutral, by the measures which she may take. The legal status of the Kiel Canal, therefore, resembles that of the internal navigable waterways of international concern.

According to the authors of the joint dissenting opinion, the only question to be decided is whether the application to the Kiel Canal of the neutrality regulations adopted by Germany was an arbitrary act calculated unnecessarily to impede traffic. They conclude that such a contention appears impossible, having regard to the gravity of the international and internal political situation at that time.

Finally, MM. Anzilotti and Huber state that if the view be adopted that the passage through the Kiel Canal of any ship could not infringe the neutrality of Germany, they feel called upon to make a reservation with regard to the recognition of a right to international protection for the transport of contraband. It is not disputed that present international law allows neutrals the option of suppressing or tolerating in their territory commerce in and transport of contraband, and more especially of arms and munitions. For this reason it seems difficult to admit a right, as between neutral States, enforceable at law to trade in and to transport contraband, whereas the same interests are unprotected as against a belligerent.

*Dissenting opinion by M. Schücking*

M. Schücking states that the right to free passage through the Kiel Canal undoubtedly assumes the form of a *servitus juris publici voluntuaria* or servitude. He points out that treaties concerning servitudes must be interpreted restrictively in the sense that the servitude, being an exceptional right resting upon the territory of a foreign State, should limit as little as possible the sovereignty of that State, and expresses serious doubts as to whether Germany, in order to safeguard her interests, when placed in the position of a belligerent or neutral, should in fact, under Article 380, lose the right to take special measures as regards the canal, not provided for under Article 381, paragraph 2, also as against ships belonging to States other than her enemies. The Canal is under the jurisdiction of Germany and it has not been neutralised; its use has rather been internationalised, like that of the great inland waterways, and the right to take special measures in times of war or neutrality has not been expressly renounced.

M. Schücking observes that the States benefiting by the servitude are under the obligation *civiliter uti* as regards the State under servitude. The vital interests of the State under servitude must in all circumstances be respected. At the moment the vital interests of Germany made it necessary for her to observe a strict and absolute neutrality. In acting as it did, Germany did not allow a special right of necessity to prevail over her contractual obligations; she merely made use of the natural limitations to which every servitude is subjected.

M. Schücking also observes that one of the two belligerent States—Russia—did not participate in the Versailles Treaty and that Germany therefore remained under an obligation to fulfil her duties as a neutral towards her.

On the basis of Articles 2 and 7 of the fifth Hague Convention of 1907 concerning the rights and duties of Neutral Powers and persons in land warfare, M. Schücking concludes that the passage of the "Wimbledon" was not compatible with Germany's duties as a neutral towards Russia. He further notes that it cannot be the intention of the victorious States to bind Germany, by means of the Versailles Treaty, to commit offences against third States and that a legally binding contractual obligation cannot be undertaken to perform acts which would violate the rights of third parties.

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*Effects of the judgment*

Following upon the judgment given by the Court on August 17th, 1923, in the case of the "Wimbledon", the German Government asked the Guarantee Committee of the Reparation Commission, through the *Kriegslastenkommission* (note dated October 5th, 1923), for its consent to the payment of the damages fixed by the Court.

On November 10th, 1923, a reply in the negative was received, which the German Minister at The Hague communicated to the Registrar of the Court on December 6th, 1923.

## 6. GERMAN SETTLERS IN POLAND

### Advisory Opinion of 10 September 1923 (Series B, No. 6)

**First Annual Report of the Permanent Court of International Justice
(1 January 1922—15 June 1925), Series E, No. 1, pp. 204–209**

*Council of the League of Nations—Its competence in minority questions—Private law contracts and State succession—Determination of the date of the transfer of sovereignty over a ceded territory. Polish Treaty of Minorities—Treaty of Versailles, Art. 256*

*History of the question*

Under the Prussian Law of 1886 and subsequent legislation, persons of German race settled, under contracts concluded with the Prussian Government represented by a Colonisation Commission, in territories which, under the Treaty of Versailles, were to form part of the reconstituted State of Poland. Some of these settlers occupied their holdings under contracts known as *Rentengutsverträge*, by which the property was handed over to them in perpetuity on payment of a fixed rent; others held their land under a *Pachtvertrag*, or lease concluded for a certain number of years.

In the Treaty of Versailles, by which Germany recognized, as the Allied and Associated Powers had already done, the complete independence of Poland, is an article laying down that Powers to which German territory is ceded will acquire all property and possessions situated therein belonging to the German Empire, the value of such acquisitions being credited to the German Government. For the purpose of this article, such property and possessions are deemed to include, amongst other things, all property of the Crown, the Empire or the German States. A Polish law of July 14th, 1920, decrees that the Polish State is to be *ex officio* entered in the land registers in place of the persons in law enumerated above, in cases, amongst others, where the latter were inscribed after November 11th, 1918. Any mortgage or real right inscribed in favour of any of these persons in law since that date is regarded as annulled in favour of the Polish State.

On the basis of these clauses, the Polish Government considered itself entitled simply to evict, amongst others, those of the settlers who had become Polish nationals and whose rights it regarded as not valid against it, namely, those whose *Rentengutsvertrag*, though concluded before November 11th, 1918, had not been followed by *Auflassung*, an indispensable formality required to perfect rights of ownership, and those whose *Pachtvertrag*, concluded before that date, had been transformed into a *Rentengutsvertrag* after that date.

*The Council's Request*

These evictions and the protests made in consequence of them were brought to the knowledge of the League of Nations by a telegram from the German League for the Protection of the Rights of Minorities in Poland to the Secretary-General, dated November 8th, 1921. A committee of the Council, composed of three members, to which the matter was referred in accordance with the usual practice, submitted a preliminary report advising that the Polish Government should be asked to forward its observations and to suspend all measures which might in any way affect the situation of the settlers. After various negotiations between the Polish Delegation and the Secretary-General, the Council adopted a Resolution at London in July 1922, to the effect that the legal question involved should be submitted to a committee of jurists. The Polish Government disputed the soundness of the conclusions of this Committee; whereupon the Council, on February 3rd, 1923, adopted a Resolution requesting the Court to give an advisory opinion on the following questions: (1) whether the non-recognition of the

contracts above-mentioned involves international obligations of the kind contemplated by the so-called Polish Treaty of Minorities, signed at Versailles on June 28th, 1919, and consequently falls within the competence of the League of Nations as defined in that Treaty, and (2), should the answer to question (1) be in the affirmative, whether the position thus adopted by the Polish Government is in conformity with its international obligations.

Notice of the Request transmitted to the Court under this Resolution was given to the Members of the League of Nations, through the Secretary-General of the League, and to the States mentioned in the Annex to the Covenant; further, the Registrar was instructed to notify the German Government.

*Composition of the Court*

The Court considered the question at its third (ordinary) Session held from June 15th to September 15th, 1923. It was composed as follows:

MM. Loder, *President*; Weiss, *Vice-President*; Lord Finlay, MM. Nyholm, Moore, de Bustamante, Altamira, Oda, Anzilotti, Huber, Wang.

*Hearings*

The Court, at the request of the German and Polish Governments, heard oral statements made on behalf of these Governments.

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*Opinion No. 6 (analysis)*

The Court delivered its Opinion on September 10th, 1923.

As regards the first question put to it, relating to the competence of the Council, the Court considers that the question was duly brought to the notice of the Council in accordance with the terms of the Treaty of Minorities, and in conformity with the procedure laid down by the Council itself in minority matters. Furthermore, the Polish law of July 14th, 1920, under which the settlers in question had been evicted from their holdings, was intended to apply, and does in fact apply, to a racial minority in Polish territory. The reasons for this legislation, namely, the degermanization of Polish territories which Prussia had germanized before the war, may be comprehensible; but the Treaty of Minorities is precisely intended to prevent occurrences of this kind. Lastly, the fact that Poland took this action in the exercise of rights possessed by her, or which she claimed to possess, under the Peace Treaty, does not remove the case from the competence of the Council. For, if the Council ceased to be competent whenever the subject before it involved the interpretation of an international engagement, the Minorities Treaty would lose a great part of its value. In this case, the interpretation of the Treaty of Peace must be considered as incidental to the decision of questions under the Minorities Treaty.

The Court then goes on to consider the second question, namely, whether the position taken up by Poland is in conformity with her international obligations. It deals first of all with a point common to both categories of settlers: the importance of the date of the armistice. In regard to this question, the Court considers that it was only on the date of the coming into force of the Peace Treaty that the territories in question passed to Poland. The date of the armistice, therefore, is without importance in this case.

After observing that the contracts are contracts in German law and that German law is still in force in the ceded territories, the Court proceeds to analyse the *Rentengutsverträge*. They are a special kind of contract of sale, conferring on the holder certain rights enforceable at law even before *Auflas-*

*sung*. It is true that before the *Auflassung* the holder is not in the technical sense of the word, owner of the property; but he has a legal right to obtain the title deeds.

The question then arises how far the contracts are affected by the change of sovereignty and of the ownership of State property. In this connection, the Court maintains that private rights must be respected by the new territorial sovereign. For, private rights, including those acquired from the State in the capacity of landowner, can be enforced at law as against the State which succeeds to the sovereignty; moreover, the private rights of the settlers in question are guaranteed under the Minorities Treaty, seeing that the application of the Polish Law of 1920 would be contrary to the obligation assumed by Poland to the effect that all Polish nationals are to enjoy the same civil rights. Neither the Peace Treaty nor the terms of the contracts themselves affect this conclusion: on the contrary, the principle that in the case of a change of sovereignty private rights are to be respected is clearly recognized by that Treaty.

The last point considered by the Court before turning to the *Pachtverträge* is whether it was contrary to the Armistice provisions and to the Protocol of Spa to grant the *Auflassung* after the Armistice. The Court does not consider this to be the case. The *Auflassung*, being merely the fulfilment of contractual obligations entered into by the Prussian State by the conclusion of the *Rentengutsverträge*—this latter act in itself constituting the alienation of the property—cannot be regarded as "removal" of public securities within the meaning of the Armistice Convention, nor as a "diminution" of the value of the public domain within the meaning of the Spa Protocol.

The Court next deals with the *Pachtverträge*. These are contracts which create a very close tie between the lessee and his holding, and which also bestow upon him certain important rights over his holding. For this reason, the change of sovereignty does not affect *Pachtverträge*, which remain in force until their normal expiration or until legally superseded by *Rentengutsverträge*. Moreover, according to the very terms of the *Pachtverträge*, it was customary to exchange a *Pachtvertrag* for a *Rentengutsvertrag*; this exchange was a reasonable and proper operation, conducted in the ordinary course of the management of land by the Prussian State, which retained its administration and proprietary rights in the ceded territory until it passed to Poland upon the coming into force of the Peace Treaty. Lastly, in view of the connection existing between the *Pachtverträge* and the *Rentengutsverträge*, it cannot be said that the grant of the latter was contrary to the Armistice conditions and the Spa Protocol.

The Court's conclusion therefore is firstly that the Council is competent, and secondly, that the position adopted by Poland is not in conformity with her international obligations.

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*Effects of the Opinion*

On September 27th, 1923, the Council noted the Opinion and invited the Polish Government to furnish it with information as to the manner in which it proposed that the question should be settled. The Polish Foreign Minister replied on December 1st, 1923, proposing: (1) a pecuniary arrangement with settlers no longer in possession of their holdings, and (2) the cessation of measures of eviction as regards these settlers against whom judgment had not yet been executed.

On December 17th, the Council declared that the case of the settlers could not be dealt with otherwise than on the basis of the Court's Opinion and that the settlers must receive fair compensation and invited the Polish Government to submit fresh proposals. Furthermore, the Committee of three members entrusted by the Council with the investigation of minority questions was instructed to follow the question. Negotiations ensued between the Polish Government and the Committee, which, on March 3rd, 1924, reported to the Council on the subject. This report was communicated to the Polish representative, who replied in writing on March 14th, 1924. On the following day, the Council adopted

the Committee's report, noted the observations of the Polish representative and requested the Committee to continue negotiations with the Polish Government, giving it full powers to effect a settlement with that Government.

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## 7. ACQUISITION OF POLISH NATIONALITY

### Advisory Opinion of 15 September 1923 (Series B, No. 7)

**First Annual Report of the Permanent Court of International Justice (1 January 1922—15 June 1925), Series E, No. 1, pp. 210–214**

*Council of the League of Nations—Its competence under Minority Treaties—Effect of the transfer of a territory upon the nationality of the inhabitants—Conditions for the acquisition of nationality: origin, domicile [Treaty of Minorities with Poland, Article 4]*

*History of the question*

The Treaty of Minorities signed at Versailles on June 28th, 1919, between the Principal Allied and Associated Powers and Poland contains the following clause in its fourth Article:

> "Poland admits and declares to be Polish nationals, *ipso facto* and without the requirement of any formality, persons of German, Austrian, Hungarian or Russian nationality who were born in the said territory of parents habitually resident there, even if at the date of the coming into force of the present Treaty they are not themselves habitually resident there."

The Polish Government considered itself entitled, under the terms of this article, not to recognize as Polish nationals certain persons who were formerly German nationals, if their parents were not habitually resident in the territory which is now part of Poland, both on the date of the birth of the person concerned and on the date of the entry into force of the Minorities Treaty, i.e. on January 10th, 1920. It treated them as continuing to possess German nationality and consequently applied to them the treatment laid down for persons of non-Polish nationality and refused to allow them to enjoy the guarantees granted by the Treaty.

The German League for the Protection of the Rights of Minorities in Poland brought the matter to the notice of the Secretary-General of the League of Nations in the note dated November 8th, 1921, in which it also brought up the question of the settlers.[1] It was maintained in this note that the conditions for the acquisition of Polish nationality, as enumerated in Article 4 above-mentioned, should be regarded as fulfilled if the persons in question were born in the territory which is now part of Poland and their parents were habitually resident there at the date of this birth.

Following the procedure laid down, the Council instructed a Committee of three of its Members to examine the question. This Committee obtained information from the Polish Government and from the German League in Poland, and, after investigation, proposed that the opinion of jurists should be taken. The Council decided accordingly, and the jurists consulted prepared a report which was communicated to the Polish Government. That Government replied to the effect that it could not accept the interpretation of Article 4 adopted in the report and added that, in its opinion, that article was not one of the clauses placed under the guarantee of the League of Nations.

[1] Which formed the subject of Advisory Opinion No. 6.

*The Council's Request*

Negotiations then took place between German and Polish delegations; but as time passed and no solution was reached, the Council, on February 7th, 1923, decided to ask the Court's opinion firstly as to its own competence in the matter and secondly, should the Court affirm its competence on the question, whether Article 4 referred solely to the habitual residence of the parents at the date of birth of the persons concerned, or whether it also required the parents to have been habitually resident at the moment when the Treaty came into force.

*Composition of the Court*

The Court took this question at its third (ordinary) Session, which lasted from June 15th to September 15th, 1923. It was composed as follows[2]:

MM. Loder, *President*; Weiss, *Vice-President*; Lord Finlay, MM. Nyholm, de Bustamante, Altamira, Oda, Anzilotti, Huber, Wang.

Notice of the request was given to the Members of the League of Nations, through the Secretary-General of the League, and to the States mentioned in the Annex to the Covenant. Further, the Registrar was instructed to inform the German Government.

*Hearings*

The German and Polish Governments, at their request, were granted permission to submit oral statements. The Roumanian Government, which was informed of the request for an opinion on August 6th, also gave notice, on August 25th, of a desire to be granted a hearing. The Court acceded to this request and fixed the hearing for September 3rd, but the Roumanian Government considered that the time thus allowed was too short and therefore submitted no statement.

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*Opinion No. 7 (analysis)*

The Court delivered its Opinion on September 15th, 1923.

As regards the question concerning the competence of the League of Nations, the Court's reply is in the affirmative. The opposite contention maintained by Poland was based on the following argument: to belong to a minority within the meaning of the Treaty, a person must be a Polish national; but in this affair the question was precisely whether the persons concerned were Polish nationals or not. The Court, however, is of opinion that the provisions of the Minorities Treaty do not refer restrictively to Polish "nationals", but considerably extend the conceptions of "minority" and "population", since they allude on the one hand to the "inhabitants" of the territories over which Poland has assumed sovereignty, and, on the other hand, to "inhabitants" differing from the majority of the population in race or religion, and further since the Polish Government is placed under an obligation to protect the inhabitants of Poland without distinction of nationality. It also observes that the Polish Treaty of Minorities was concluded with a State the population of which had not yet been clearly defined as regards political allegiance, and that, in the same Treaty, Poland had accepted, amongst other clauses, certain which established a right to Polish nationality. In consequence of the supreme importance of this right to the persons concerned, it was placed under the guarantee of the League of Nations.

[2] Mr. Moore took part in the deliberations, but was obliged to leave The Hague before the terms of the Opinion were finally settled. He declared, however, that he agreed with the conclusions of the Opinion.

The persons whose nationality is in dispute in this case may, therefore, claim the benefit of the guarantee provided for minorities under the Treaty. The contrary interpretation would deprive the Minorities Treaty of a great part of its value and is therefore inadmissible.

As regards the second question put by the Council to the Court, concerning the merits of the case, the Court considers that to require, as a condition for the acquisition of nationality, that the parents should have been habitually resident not only at the date of birth but also on January 10th, 1920, the date of the coming into force of the Treaty, would be tantamount to adding to the conditions laid down by the Treaty. The Treaty, when it has to determine the effect of a territorial adjustment upon the nationality of the inhabitants of the territories annexed or ceded, adopts both the principle of habitual residence and of origin. The following became Polish: in the first place, German nationals habitually resident in the territories incorporated in Poland; in the second place, persons born in these territories, provided they are born of parents habitually resident there at the time of such birth. This condition indicates a birth occurring in a family established in the territory on the regular and permanent footing presupposed by habitual residence. To require in addition that the parents should retain their domicile at the time when the Treaty came into force would be useless unless the habitual residence of the parents was calculated to create a presumption that the children were habitually resident. But the Treaty itself dispels a presumption of this kind, when it declares that it is not necessary for the persons with whom it deals to be habitually resident in the territories ceded to Poland at the time of the coming into force of the Treaty.

The meaning of Article 4, therefore, clearly is that it is necessary, but also sufficient, that on the date of birth the parents should have been habitually resident, that is to say, should have been established in the territory which subsequently became Polish, in a permanent manner with the intention of remaining there.

One of the judges, Lord Finlay, whilst concurring in the conclusions arrived at by the Court on both questions, added to the Opinion some observations on the question of competency. He would prefer to base the League's competency on the fact that the persons concerned are entitled to Polish nationality.

*Observations by Lord Finlay*

Lord Finlay states that, in the present case, the contention of the Polish Government that the Polish nationality of the persons concerned must be established before they constitute a minority within the meaning of the Minorities Treaty may involve an interpretation of Article 4 of the Treaty and goes therefore to the merits of the main question.

He observes that it is only in so far as the stipulations of the preceding Articles affect persons belonging to minorities of race, language, or religion, that they are placed under the guarantee of the League of Nations by Article 12 of the Treaty of Minorities.

Lord Finlay notes that Article 4 of that Treaty confers upon persons of German race in Poland, *ipso facto,* the status of Polish *ressortissants*, *de plein droit et sans aucune formalité,* if born of parents domiciled in Poland at the time of birth.

From a reading of the relevant provisions of the Treaty of Peace and the Treaty of Minorities (notably Articles 7, 8 and 9), Lord Finlay concludes that while such elementary rights as those of life and liberty are secured to all inhabitants, there are a great many rights secured to Polish *ressortissants* only, including German or other minorities, and it is with regard to such rights that the question of unfair treatment of minorities must arise in the immense majority of cases.

For these reasons, Lord Finlay would have preferred that the Court should not merely have based its answer to the Polish contention as to competency on the view that the minority contemplated by Article 12 may be one of inhabitants simply, but that it should also have pointed out that the Polish case fails even if the minority were to be taken on the basis of *ressortissants*.

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*Effects of the Opinion*

On September 25th, 1923, the Council adopted the Opinion and requested its rapporteur to offer his good offices to the Polish Government for the purpose of considering the application of the relevant articles of the Treaty and, if necessary, of negotiating with the German Government. The Polish representative, on December 10th, 1923, submitted a memorandum proposing the opening of negotiations with the German Government, (1) at Geneva in regard to Articles 3 and 4 of the Minorities Treaty and (2) at some other place in regard to kindred questions. On December 14th, the Council approved the Polish Government's proposal.

The negotiations at Geneva commenced on February 12th, 1924, and were presided over by the Brazilian representative on the Council. As the other negotiations led to no result, the Council, on March 4th, 1924, invited the German and Polish Governments to continue to negotiate on the whole of these questions, under the chairmanship of a third person who would act as mediator; if no settlement were reached before July 1st, 1924, this person would decide in the capacity of arbitrator. The Council added that the President of the Upper Silesian Mixed Arbitral Tribunal might be entrusted with this task.

This Council Resolution was approved by both Parties, and negotiations were opened at Vienna on April 28th, 1924. They extended beyond the time fixed and thus, in spite of a prolongation of some weeks, the arbitration procedure came into operation; finally, on August 30th, a protocol was signed in which the two Parties accepted the President's arbitral award. On September 19th, 1924, the Council adopted a Resolution congratulating the Parties on the agreement arrived at; this agreement was ratified at Warsaw on February 10th, 1925. At its thirty-fourth Session, the Council, on June 8th, 1925, took formal note of the exchange of ratifications and approved the clauses of the agreement in so far as, under the Minorities Treaty, they concerned the League of Nations.

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## 8. QUESTION OF JAWORZINA (POLISH-CZECHOSLOVAKIAN FRONTIER)

### Advisory Opinion of 6 December 1923 (Series B, No. 8)

**First Annual Report of the Permanent Court of International Justice (1 January 1922—15 June 1925), Series E, No. 1, pp. 215–220**

*Conference of Ambassadors—Contractual character of decisions—Its competence to interpret its decisions—The fixing of a frontier line—Powers of delimitation commissions*

*History of the question*

No sooner had the Polish and Czechoslovak Republics been constituted than disputes arose between them regarding three territories situated on their borders, namely, Teschen, Orava and Spisz.

The Supreme Council decided on September 27th, 1919, that the allocation of these territories should be determined by a plebiscite and, with this object in view, it defined the limits of the disputed regions. The plebiscite, however, did not take place. The Polish and Czechoslovak Governments agreed on July 10th, 1920, to accept a settlement of the dispute by the Principal Allied and Associated Powers. The Supreme Council then instructed the Conference of Ambassadors to divide the three territories. The Conference, on July 28th following, took a decision regarding the division, which decision the two Governments concerned expressly accepted in a declaration annexed to it. At the same time, the Conference set up a Delimitation Commission with power to mark out the frontier and to propose modifications of the line adopted by the Conference.

Poland, however, considered that the line indicated by this decision for the district of Spisz was contrary to the principles of justice and equity, and formulated proposals for its modification. These proposals were transmitted in July 1921 to the Conference by the President of the Polish-Czechoslovak Frontier Delimitation Commission; whereupon, on December 2nd of the same year, the Conference took a decision which, in the opinion of the Czechoslovak Government, finally confirmed the frontier indicated in the previous whereas, in the opinion of the Polish Government, this decision did not close the door to the possibility of modifying the frontier line as desired by Poland. Attempts to fix a line acceptable to both Parties, by means of an agreement between them, failed, and the question once more came before the Conference of Ambassadors on September 26th, 1922.

A letter from the Conference dated November 13th, 1922, did not succeed in removing the obstacles to the final delimitation of the Polish-Czechoslovak frontier in the region of Spisz, more especially as regards the upper valley of Jaworzina, nor in calming public opinion. At this stage, on July 27th, 1923, the Conference adopted a resolution laying the difficulties encountered before the Council of the League of Nations and requesting it to inform the Conference of the solution which it recommended in the matter. The Conference added that it would have no objection should the Council see fit to ask the opinion of the Court on the legal question raised.

In accordance with the wish expressed in the letter of the President of the Conference of Ambassadors, dated August 18th, 1923, transmitting this Resolution to the Secretary-General of the League of Nations, the question of the delimitation of the Polish-Czechoslovak frontier in the region of Spisz (Jaworzina) was placed on the agenda of the twenty-sixth Session of the Council of the League of Nations. At the Council meeting, the representatives of the two countries concerned both agreed that the question at issue was one upon which an impartial legal opinion based on justice and equity should be obtained, and they laid stress upon the necessity of regarding the matter as one of extreme urgency.

*The Council's Request*

The Council, therefore, on September 27th, 1923, adopted a Resolution succinctly stating the Cases for the Polish and Czechoslovak Governments, as formulated by them, and requesting the Court, in view of the conclusions of these Cases, to give an advisory opinion on the following question:

> "Is the question of the delimitation of the frontier between Poland and Czechoslovakia still open, and, if so, to what extent; or should it be considered as already settled by a definitive decision (subject to the customary procedure of marking boundaries locally, with any modifications of detail which that procedure may entail)?"

Notice of the Request for an opinion transmitted to the Court under this Resolution was given by the Registrar to Members of the League of Nations and to the States mentioned in the Annex to the Covenant.

The Court considered the question at an extraordinary session (fourth Session) convoked for the purpose, which lasted from November 12th to December 6th, 1923.

*Composition of the Court*

The Court for this session was composed as follows:

MM. Loder, *President*; Weiss, *Vice-President*; Lord Finlay, MM. Nyholm, Oda, Anzilotti, Huber, Yovanovitch, Beichmann, Wang.

*Hearings*

The Court heard oral statements which the Polish and Czechoslovak representatives were, at the request of their Governments, authorized to make.

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*Opinion No. 8 (analysis)*

The Opinion of the Court was delivered on December 6th, 1923.

The Court's reply to the question submitted is that the question of the delimitation of the frontier had indeed been settled by the decision of July 28th, 1920, which was definitive, but that the right of the Delimitation Commission to propose modifications in the line thus fixed had not been exhausted. It arrives at this conclusion on the basis of the following arguments:

In the view of the Court, the question concerned the division of a territory the limits of which had been strictly determined, viz. by the decision of September 27th, 1919. This division, effected by the decision of July 28th, was definitive, because it represented the fulfilment not only of a resolution of the Principal Powers who were the authority competent to settle the matter in dispute, but also of an agreement between the Parties concerned who had requested these Powers to undertake this task. This decision had been expressly accepted by the interested Parties, a circumstance which gave it the additional force of a contractual engagement; in this respect, amongst others, the decision has much in common with arbitration. Moreover, its terms prove that not only a final solution was intended, but one which would have immediate effect. Furthermore, the Court does not accept the Polish contention that the decision determined only a part of the frontier, leaving open, amongst others, the question of the frontier line at Jaworzina. For, in the view of the Court, what had to be done was to divide a clearly defined territory; in order to do this it was only necessary to draw the new dividing line. But this is precisely what the decision of July 28th did; it follows therefore that, except as regards the powers conferred on the Delimitation Commission, no question was left open. This conclusion is confirmed by the maps submitted to the Court and by certain documents relating to administrative measures taken following the decision of July 28th.

It was, however, contended that the Conference of Ambassadors had declared in documents dated October and November 1922, that the frontier at Jaworzina was not defined in the decision of July 28th, and that the Conference had power to interpret that decision. The Court does not hold this view. It is an established principle that the right of giving an authoritative interpretation of a legal rule belongs solely to the person or body who has power to modify or suppress it. Now this power was not retained by the Conference of Ambassadors after the decision of July 28th, 1920, by which it fulfilled its task. As already stated, the duties of the Conference had some points in common with those of an arbitrator. Now in the absence of an express agreement between the Parties, the arbitrator is not competent to interpret, still less modify, his award by revising it; and in this case, no such agreements existed.

Nevertheless, there remained the possibility of making, in the frontier thus definitively fixed throughout the whole region of Spisz by the decision of July 28th, any of the modifications of detail which the Delimitation Commission was empowered to propose to the Conference of Ambassadors for adoption. Such modifications, which had to be justified by the interests of individuals or of communities in the neighbourhood of the frontier line and to have regard to special local circumstances, were bound to preserve the character of "modifications" and could not involve a complete or almost complete abandonment of the line fixed by the decision of July 28th. Moreover, they could, in the opinion of the Court, only be made in the new dividing line, the other portions of the line being old international frontiers already long in existence, namely, those between Hungary and Galicia, and the Delimitation Commission being bound under its instructions, as regards frontier lines of this kind, to confine itself to the replacement of posts.

The Court is of opinion that the Delimitation Commission had not exhausted this right of proposing modifications. The Court does not regard the divergent suggestions made by the members of the Delimitation Commission and communicated to the Conference of Ambassadors as real proposals of the nature provided for in the decision of July 28th. Czechoslovakia interpreted a subsequent decision taken by the Conference on December 2nd, 1921, as henceforth excluding the Commission's right to submit proposed modifications; but the Court does not accept this view. The right in question therefore remained intact.

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*Effects of the Opinion*

On December 17th, 1923, at its 27th session held at Paris, the Council adopted the Opinion. In its Resolution to this effect, the Council, taking its stand on the terms of the Opinion, declared that the proposals of the Delimitation Commission dated September 25th, 1922, were not in conformity with the conditions prescribed by the decision of the Conference of Ambassadors of July 28th, 1920; consequently it requested the Governments represented upon the Conference of Ambassadors to be so good as to invite the Delimitation Commission to submit fresh proposals, without prejudice to any changes or arrangements freely agreed to by the Governments concerned.

The Conference of Ambassadors, on receipt of the Court's Opinion and of the deliberations of the Council, transmitted them, on January 12th, 1924, with the requisite instructions, to the Delimitation Commission. On February 11th, 1924, the Delimitation Commission sent fresh proposals to the Conference of Ambassadors which transmitted them to the Council on March 5th, 1924. On March 12th, the Council adopted a Resolution recommending a frontier line based on the proposals of the Delimitation Commission. Furthermore, this Resolution also declared that it would be desirable to draw up, for the regulation of frontier traffic, protocols which should be regarded as an integral part of the territorial settlement.

On March 26th, 1924, the Conference of Ambassadors adopted this recommendation and transmitted it to the Delimitation Commission to be carried into effect. The Conference added that if, within a time to be fixed by the Commission, the negotiations between the interested Parties had not been successfully concluded, the Allied Commissioners should act in place of them.

The protocols the adoption of which was recommended by the Council were eventually signed on May 6th, 1924, thus putting an end to the dispute.

The Committee continued its work throughout April and May 1924, in conjunction with Polish representatives. After arriving at an agreement on the principle of the payment of a round sum by the Polish Government, the Committee instructed an expert of British nationality, whose assistance it

had obtained for this purpose, to proceed to Warsaw in order to fix the amount of this sum by direct negotiations with the competent Polish authorities. On June 3rd, 1924, the Polish Foreign Minister sent a note to the expert proposing the following terms of agreement:

(1) that settlers who could claim Polish nationality on July 14th, 1920 (this date is the most favourable to the interests of the settlers) should participate in the indemnity;

(2) that a round sum should be fixed, to be divided between the settlers, which sum should be increased or diminished according to whether the number of beneficiaries was greater or less than 500, the average payment to each settler being fixed at a minimum of £220 sterling.

These terms were adopted by the Special Committee, which reported the agreement arrived at to the Council. The Council confirmed the agreement by a Resolution dated June 17th, 1924.

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## 9. MAVROMMATIS PALESTINE CONCESSIONS

### Judgment of 30 August 1924 (Series A, No. 2)

## MAVROMMATIS JERUSALEM CONCESSIONS

### Judgment of 26 March 1925 (Series A, No. 5)

**First Annual Report of the Permanent Court of International Justice (1 January 1922—15 June 1925), Series E, No. 1, pp. 169–179**

*Judgment No. 2: Nature of an objection to the jurisdiction of the Court—Negotiations a condition precedent to legal proceedings—The notion of "public control"—International obligations accepted by the Mandatory—What concessions are maintained by Protocol XII of Lausanne—Retroactivity and considerations of form in international law*

*Judgment No. 5: The conditions for the validity of the Mavrommatis Jerusalem Concessions—A partial and transient violation of international obligations suffices to establish responsibility—Indemnity not payable when damage not proved—Protocol XII: right to readaptation of valid concessions*

*History of the case*

In 1914 and subsequently, the Ottoman authorities granted or were on the point of granting concessions for certain public works in Palestine to a Greek subject, M. Mavrommatis. In the first place, these works included the construction of electric tramways and the supply of electricity and drinking water in the City of Jerusalem. The plans and estimates submitted for these works by M. Mavrommatis were approved in January 1914 by the competent authorities, and the contracts were signed and became effective. The carrying out of the projected works, which were to begin at once and to be completed in two years was interrupted by the war, a case of *force majeure*, which, being duly provided for, was accepted as such.

The public works in question included in the second place installations of the same kind (electricity and water supply) in the City of Jaffa, for which the competent department at Constantinople authorized, in January 1914, the local authorities to grant the contemplated concessions. These were

signed in 1916 by the local authorities, but, under the terms of a new Turkish law, they had to be confirmed by imperial firman and this formality was never fulfilled.

In the last place, there was a question of a concession for the irrigation of the Jordan valley. All claims in regard to this concession were, however, withdrawn by the applicant.

After the war, Palestine was detached from Turkey and, after a period under British administration—at first military and subsequently civil—was placed under the so-called mandatory régime, in accordance with the provisions of Article 22 of the Covenant of the League of Nations. Great Britain was selected as the Mandatory Power.

In April 1921, M. Mavrommatis, who had been compelled to leave the country upon Greece's entry into the war, returned to Jerusalem in order to obtain the readaptation of his concessions to the new economic conditions. He had then to address himself to the newly established authorities and, on their advice, to the Zionist Organization and subsequently to the Colonial Office in London. Whilst these negotiations were proceeding, the Colonial Office, in September 1921, granted to a certain Mr. Rutenberg a concession for works which appeared to overlap those granted to M. Mavrommatis. In 1922, the latter not having succeeded in arriving at any settlement, sought the protection of his Government, and the Greek Legation in London undertook to intervene on his behalf.

*Application instituting proceedings*

Such was the position when, in July 1923, the Peace Treaty with Turkey was signed at Lausanne and the question of concessions granted before the war with the Ottoman Empire was dealt with in a special protocol annexed to this Treaty and replacing the corresponding clauses of the Treaty of Sèvres, which was signed on August 10th, 1920, but had never come into force. The provisions of the protocol formed the basis of fresh negotiations which, however, also failed to produce an agreement. Then, as the British Government declined arbitration by a judge of the English High Court, the Greek Government, relying on Article 26 of the Mandate for Palestine, instituted proceedings before the Court by an application dated May 13th, 1924. The Greek Government submitted that the Government of Palestine, and consequently also the Government of His Britannic Majesty, had, since 1920, wrongfully refused to recognize to their full extent the rights acquired by M. Mavrommatis under the contracts and agreements concluded by him with the Ottoman authorities, and that the Government of His Britannic Majesty should make reparation for the consequent loss incurred by M. Mavrommatis.

*Plea to the jurisdiction*

When this application and the Greek Case had been transmitted to the British Government, the respondent in the suit, that Government filed with the Court an objection to the Court's jurisdiction, supported by a preliminary Counter-Case. The Court, therefore, had in the first place to give judgment as to its jurisdiction. It took this question at the fifth (ordinary) Session, which lasted from June 16th to September 4th, 1924.

*Composition of the Court*

The composition of the Court was as follows:

MM. Loder, *President*; Weiss, *Vice-President*; Lord Finlay, MM. Nyholm, Moore, de Bustamante, Altamira, Oda, Anzilotti, Huber, Pessôa.

M. Caloyanni, appointed by the Greek Government as National Judge, was also a member of the Court for the purposes of this case.[1]

*Hearings*

On the conclusion of the written proceedings in regard to the preliminary question, the Court heard statements by the representatives of the two Parties.

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*Judgment on the plea to the jurisdiction (analysis)*

Judgment on the question of jurisdiction was delivered on August 30th, 1924.

The Court begins by defining the question before it. It considers that the problem to be decided is not merely whether the nature and subject of the dispute are such that the Court derives from them jurisdiction to entertain it, but also whether the conditions upon which the exercise of this jurisdiction is dependent are all fulfilled. These conditions are: (a) that the question must constitute a dispute between the Mandatory and another Member of the League of Nations; (b) that this dispute cannot be settled by negotiation, and (c) that it relates to the interpretation or application of the clauses of the Mandate for Palestine (Article 26).

As regards point (a), the Court is satisfied that there exists a dispute and that Greece is a Member of the League of Nations. In the next place, it considers that, though the dispute originated in an injury to a private interest, Greece is asserting a right of its own, namely the right to ensure that the rules of international law are respected as regards its subjects. Moreover, once a State has taken up a case on behalf of one of its subjects before an international tribunal, in the eyes of the latter, the State is sole claimant. For these reasons the Court regards the first condition as fulfilled.

As to the second, concerning diplomatic negotiations, the Court comes to the same conclusion. Whilst recognizing that before a dispute can be made the subject of an action at law, its subject matter should have been clearly defined by means of diplomatic negotiations, the Court lays stress firstly, on the nature of the short diplomatic negotiations which took place and the fact that they were only a continuation of the previous private negotiations, and secondly on the views of the Parties—who are doubtless in the best position to judge as to political reasons which may prevent the settlement of a dispute by diplomatic negotiations.

In the last place, Article 26 lays down that the dispute, which may be of any nature, must relate to the interpretation or application of the clauses of the Mandate. In order to verify that this condition is fulfilled, the Court—seeing that the Statute and Rules of Court are silent as to the procedure to be followed in the event of objections to the Court's jurisdiction being taken *in limine litis*, and bearing in mind that its jurisdiction is limited, is invariably based on the consent of the respondent and only exists in so far as this consent has been given—cannot content itself with the provisional conclusion that the dispute falls or does not fall within the terms of the Mandate. It must, before giving judgment on the merits of the case, satisfy itself that the suit before it, in the form in which it has been submitted and on the basis of the facts hitherto established, falls to be decided by application of the clauses of the Mandate. For, in this case, the objection made relates to a limited jurisdiction and tends to assert the rule that States may or may not submit their disputes to the Court at their discretion.

[1] Article 31 of the Statute.

In this connection, Article 11 of the Mandate, which is the root of the matter, must be examined; the question is whether the dispute before the Court should be dealt with on the basis of this clause, which states that the Administration of Palestine "shall have full power to provide for public ownership or control of any of the natural resources of the country or of the public works, services and utilities established or to be established therein."

The Court is of opinion that as the French version has a wider bearing than the English version, it is bound to adopt the interpretation which can be made to harmonize with both versions and which, as far as it goes, is doubtless in accordance with the common intention of the Parties. In accordance with this principle, it arrives at the conclusion in the present case that the English text of the Mandate, which moreover is the original one, should be followed.

It then goes on to observe, on the basis of the interpretation thus arrived at, that the Mavrommatis concessions in themselves are outside the scope of Article 11, but that, on the other hand, the Rutenberg Concessions, the grant of which was effected under the system of "public control" contemplated in the article, might fall within the scope of the article. That they actually do so is deduced by the Court from certain statements made by the British representative. The dispute, therefore, undoubtedly relates to Article 11 of the Mandate.

This article contains a reservation: the powers accorded to the Palestine Administration must be exercised subject to any international obligations accepted by the Mandatory. The Court is satisfied that these obligations affect the merits of the case and that any breach of them would involve a breach of the provisions of Article 11.

What are these obligations? In the view of the Court, they are obligations having some relation to the powers granted to the Palestine Administration under the same article. Amongst them are certainly included those resulting from Protocol XII of Lausanne, which replaces the clauses on the same subject in the Treaty of Sèvres. Since the Rutenberg concessions fall within the scope of Article 11 of the Mandate, if it were established that, by granting them, the Palestine Administration had committed a breach of the obligations accepted under this Protocol by Great Britain which, under Article 12 of the Mandate, is responsible for Palestine's foreign relations, the conclusion would be that there had been an infringement of the terms of Article 11 which could be made the subject of an action before the Court under Article 26. In order to ascertain whether such an infringement has taken place in this case, the first question to be decided is whether the Mavrommatis concessions are in fact covered by the terms of the Protocol which, in principle, maintains concessions granted before October 29th, 1914.

As regards the first group of concessions, those at Jerusalem, it is not disputed that they must be dealt with in accordance with the Protocol. The disputed question whether M. Mavrommatis is entitled to the readaptation of these concessions is, therefore, in accordance with the foregoing argumentation, a question concerning the interpretation of Article 11 of the Mandate, and consequently Article 26 is applicable. As regards the Jaffa concessions, granted after October 29th, 1914, the Court observes that, even if Protocol XII, being silent regarding concessions in this category, leaves intact the general principle of subrogation, it is impossible to maintain that this principle falls within the "international obligations" as interpreted in this judgment. The Palestine Administration would be bound to recognize the Jaffa concessions, not in consequence of an obligation undertaken by the Mandatory, but in virtue of a general principle of international law to the application of which the obligations entered into by the Mandatory created no exception. And though it is true that, for the purpose of the settlement of a dispute of this kind, the extent and effect of the international obligations arising out of Protocol XII must be ascertained, it is equally the fact that the Court is not competent to interpret and apply, upon a unilateral application, that Protocol as such; for it contains no clause submitting to the Court disputes on this subject.

The conclusion of the Court therefore is that the dispute concerning the Jerusalem concessions is one for which the Mandatory has accepted the jurisdiction of the Court; but the dispute concerning Jaffa is not so.

It is, however, possible that, though the Court's jurisdiction under Article 26 of the Mandate is thus partially established, a more recent international instrument may prevent the exercise of this jurisdiction. In the present case, Protocol XII, an instrument later in date and applicable to the question at issue, might do so, for instance if it contained jurisdictional clauses incompatible with those of the Mandate; but this is not the case. It is true that the special jurisdiction (bestowed upon experts) provided for in Article 5 of the Protocol, if it operates under the conditions laid down, will exclude the general jurisdiction given to the Court. In the present case, however, the dispute relates to points preliminary to the application of that article, which concerns the procedure to be adopted in the event of the application of Article 4. Now, a difference of opinion prevails as to whether the Mavrommatis Jerusalem concessions—the only ones which come into question—fall under the terms of Article 4 or of Article 6 of the Protocol. No provision, therefore, relating to the procedure to be followed in one or other of these alternatives can be used as argument against the jurisdiction of the Court.

Again the question arises whether the Court's jurisdiction may be affected by the fact that Protocol XII is only effective as from August 6th, 1924. The Court's reply is in the negative; for that instrument, having been drawn up in order to fix the conditions governing the recognition and treatment by the contracting Parties of certain concessions granted by the Ottoman authorities before its conclusion, is essentially characterized by the fact that its effects extend to legal situations dating from a time previous to its own existence. Does the fact that the Greek application was filed before the Protocol had become applicable affect this conclusion? The Court does not think so: the question is only one of form and the Court, whose jurisdiction is international, is not bound to attach to such matters the same degree of importance which they might possess in municipal law.

There remains one last question: the British Government maintained that if the Court's jurisdiction were based on Article 11 of the Mandate, that clause must be applicable to the dispute not merely *ratione materiae* but also *ratione temporis*. But at the time when the case was brought before the Court, in April 1924, the Mandate was already in force; and the Court is of opinion that, in case of doubt, a jurisdiction based on an international agreement embraces all disputes referred to it after its establishment. The terms of Article 26 itself indicate this interpretation. The reservation made in many arbitration treaties, regarding disputes arising out of events previous to the conclusion of the treaty, seems to prove the necessity for an explicit limitation of jurisdiction and consequently the correctness of the rule of interpretation enunciated above. The fact of a dispute having arisen at a given moment between two States is a sufficient basis for determining whether, as regards tests of time, jurisdiction exists; whereas any definition of the events leading up to a dispute is in many cases inextricably bound up with the actual merits of the dispute. Moreover, in the present case, the act alleged to be contrary to the provisions of the Mandate did in fact take place at a period when the Mandate was in force; for if this act was constituted by the grant of the Rutenberg concession, the consequent breach of the provisions of the Mandate subsists as long as the concession continues. There is, therefore, no doubt that the Mandatory regime was in force when the British Government adopted the attitude which, in the opinion of the applicant, rendered it impossible to continue negotiations with a view to a settlement and imparted to the breach of the Mandate, alleged by Greece to have occurred a definitive character.

It follows that there is nothing in this argument which affects the conclusions arrived at by the Court in regard to the Jerusalem concessions.

*Dissenting opinion by Lord Finlay*

Lord Finlay states that none of the conditions for the Court to exercise its jurisdiction are fulfilled in the present case.

Lord Finlay observes that it is a mistake to suppose that Article 26 can be made applicable to a dispute between an individual and a mandatory State merely by the intervention, as litigant, of the government of which that individual is a subject. To justify proceedings under Article 26, there must have been in existence before the *Requête* was filed a dispute between the Mandatory and another nation Member of the League of Nations.

According to Lord Finlay, there had been a long dispute between M. Mavrommatis and the British Government; there had been no dispute between the Greek Government and the British Government. There was no dispute between the two Powers before the *Requête* was filed and it follows that the first condition required by Article 26 of the Mandate had not been satisfied.

Lord Finlay further observes that the dispute was not one which could not be settled by negotiation, as required under Article 26. Efforts had been made by the agents of M. Mavrommatis to settle his dispute with the British Government; no such efforts were made by the Greek Government. It is quite impossible to say that if the Greek Government had taken up the claim and, as a government, had pressed for a settlement, the negotiations might not have resulted in a settlement.

Lord Finlay also notes that the dispute in the present case can be brought within the compulsory jurisdiction provided for in Article 26 only if it relates to the interpretation or the application of the provisions of the Mandate. With regard to the Greek Government's contention that the case falls under Article 11 of the Mandate in virtue of the words in the first sentence "subject to any international obligation", Lord Finlay expresses the view that those words of reservation apply only to the first head of the powers conferred by Article 11, namely, the power of acquisition of public property or control. In this regard, he notes that, in this case, the Administration of Palestine has not made as to the subjects of the Mavrommatis concessions any provision for public ownership or control within the meaning of the first sentence of Article 11. Article 28 of the Rutenberg concessions for supply of electricity within the Palestine area does not vest the management in the Government to any extent; it merely recognizes the right of the Government to assume control if the public interest demands it.

As for the conditions with regard to the readaptation of concessions which are contained in Protocol XII of the Treaty of Lausanne, Lord Finlay notes that this Protocol is no part of the Mandate for any purpose; it is referred to in the first sentence of Article 11 merely by way of limiting the power of acquiring public property or control there conferred. Therefore, he cannot accept the view that Article 11 of the Mandate is to be read as if it contained *in extenso* the provisions of the Protocol; in his view, the readaptation could not have been compulsorily referred under Article 26.

Finally, Lord Finlay states that the argument that Great Britain could be made liable on the ground that in making the concessions to M. Rutenberg they were entering into an arrangement with the Jewish Agency under paragraph 2 of Article 11 and that the arrangement was in violation of the international obligations referred to in the first sentence of that article is not borne out by the terms of the Mandate.

*Dissenting opinion by M. Moore*

M. Moore observes that one of the elementary conceptions common to all systems of jurisprudence is the principle that a court of justice is never justified in hearing and adjudging the merits of a cause of which it has no jurisdiction. He notes that the requirement of jurisdiction is not less fun-

damental and peremptory in the international sphere. No presumption in favor of the jurisdiction of international tribunals may be indulged.

To the jurisdiction of the Court under Article 26 the concurrence of three conditions is indispensable: first, there must be a "dispute" between the Mandatory and another Member of the League of Nations; secondly, the dispute must relate to "the interpretation or the application of the provisions of the Mandate"; thirdly, it must appear that the dispute "cannot be settled by negotiation". According to M. Moore, none of these conditions is fulfilled in the present case.

He notes, in this regard, that there must be a pre-existent difference between the governments and that when the article speaks of the settlement of such disputes by negotiation, it also necessarily means negotiation between governments. In the international sphere and in the sense of international law, negotiation is the legal and orderly administrative process by which governments, in the exercise of their unquestionable powers, conduct their relations one with another and discuss, adjust and settle, their differences. Prior to the note of the Greek Legation in London to the Foreign Office announcing the intention of the Greek Government to bring a suit in the Permanent Court of International Justice M. Moore finds nothing whatever to indicate the existence of an international dispute. By the very terms of this note, the jurisdiction of the Court was to be invoked, not in order to obtain the adjudication of a dispute between the two governments which they had been unable to settle by negotiation, but to ascertain without negotiation whether there was any basis for a dispute.

With regard to the second condition under Article 26, M. Moore notes that by Article 11, the power the exercise of which is to be "subject to any international obligations accepted by the Mandatory" is the "full power to provide for public ownership or control" of public works, services and utilities. He is unable to concur with the Court's interpretation that the granting of the concession to M. Rutenberg was an exercise of the power to provide for "public ownership or control" of public utilities. M. Moore thus examines the relevant passage of Article 11, in light of the rules laid down by authorities on international law for the interpretation of treaties, including the rule that each clause should be interpreted in the sense which best reconciles the rights and duties of the contracting Parties and that to the effect that, if there is a difference as to the sense which usage gives to the text, preference is given to that of the country which is bound.

M. Moore states that it is admitted that the phrase "subject to any international obligations accepted by the Mandatory" in Article 11 actually refers to the Concessions Protocol of Lausanne, which was understood by the contracting parties to cover the entire subject of concessions. According to M. Moore, the question whether the Jerusalem concessions are entitled to readaptation is solely under the Protocol as such, and therefore not within the compulsory power of the Court. Article 11 could apply to concessions covered by the Lausanne Protocol only in the case the Mandatory should, in the exercise of the power to provide for public ownership or control, disregard an existing concession which the Protocol protects.

M. Moore finally expresses his disagreement with the Court's theory of suspended jurisdiction, whereby "the provisions regarding administrative negotiations and time limits in no way exclude the jurisdiction of the Court", since "their effect is merely to suspend the exercise of this jurisdiction until negotiations have proved fruitless and the times have expired".

*Dissenting opinion by M. de Bustamante*

M. de Bustamante observes that the question put to the Court is not one of interpreting or applying the Mandate but of interpreting the Protocol, which is not within the jurisdiction of the Court.

He observes that the facts on which the Case is based date from before the Mandate. Before the coming into force of the Mandate, Great Britain had no other title to the exercise of public power in Palestine than that afforded by its military occupation. Whatever responsibility might devolve upon it in consequence of its acts whilst in military occupation, a dispute concerning such responsibility cannot be entertained by the Court under Article 26 of the Mandate. That article contemplates the future, not the past.

M. de Bustamante further notes that Great Britain has accepted the Permanent Court's jurisdiction for any dispute arising between her, as Mandatory, and any Member of the League from which she holds the Mandate. He points out that when Great Britain takes action affecting private interests and in respect of individuals and private companies in her capacity as the Administration of Palestine, there is no question of juridical relations between the Mandatory and the Members of the League from which she holds the Mandate, but of legal relations between third Parties who have nothing to do with the Mandate itself from the standpoint of public law. According to M. de Bustamante, acts performed in such circumstances are not subject to the jurisdiction of the Permanent Court under Article 26 of the Mandate.

*Dissenting opinion by M. Oda*

M. Oda observes that since the compulsory jurisdiction of the Court is not the rule and since Article 26 of the Palestine Mandate constitutes an exceptional clause creating such jurisdiction, that article cannot be interpreted extensively.

Examining the three conditions provided from under Article 26 of the Mandate, M. Oda observes that the dispute, in the first place, was only between the Colonial Office and a private person, and after the intervention of the Greek Government to protect this person, there was only a single exchange of views between the Foreign Office and the Greek Legation in London. Furthermore, the dispute, which relates to the validity of certain concessions and to the vindication of certain rights which, in the contention of the concessionnaire, have been prejudiced, has nothing whatever to do with either the interpretation or the application of the terms of the Mandate.

M. Oda states that the Protocol of Lausanne is neither a special statute nor a set of rules to be regarded as the complement of the Mandate. Its provisions are entirely distinct and cannot in any sense form part of the terms of the Mandate. It follows therefore that the dispute regarding the concessions granted under the Ottoman Empire has nothing to do either with the interpretation or the application of the terms of the Mandate and is not by its nature within the Court's jurisdiction.

With respect to Article 26, M. Oda asserts that an application by a Member of the League of Nations under this provision must be made exclusively with a view to the protection of general interests. An action in support of private interests is excluded under Article 26, and precisely from this standpoint, the Court has no jurisdiction in the case of the Mavrommatis concessions.

*Dissenting opinion by M. Pessôa*

M. Pessôa observes that in order that it shall be legitimate for the Court to deal with a question, it is not sufficient that it be one relating to the actual interpretation and the application of the Mandate; it is further necessary, as follows from Article 26, that the dispute shall have arisen between two States and that it cannot be settled by diplomatic negotiations. For M. Pessôa, neither of these two conditions is fulfilled by the suit submitted to the Court.

M. Pessôa questions whether there was a dispute between Greece and Great Britain in regard to the Mavrommatis concessions, and that, for the purpose of settling it, negotiations took place between

the two Governments. He notes that, while international law lays down no protocol or formulae for negotiations, in order that the existence of negotiations may be recognized, it naturally requires that they shall have taken place in some form or other. In the present case, M. Pessôa is of the view that no negotiations have taken place in any form whatever.

In addition, M. Pessôa considers that, even if it were admitted that negotiations have taken place, the impossibility of settling the dispute through diplomatic channels has in no way been proved.

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*Proceedings on the merits*

The Court having thus reserved the question of the Mavrommatis concessions at Jerusalem for judgment on the merits, the Parties filed the subsequent documents of the written procedure within the times fixed by the President for this purpose, and the Court having met on January 12th, 1925, for an extraordinary session (which had been convoked for the purpose of giving an advisory opinion concerning the exchange of Greek and Turkish populations), decided to add the case to the list for that session.

*Composition of the Court*

The Court was composed as follows:

MM. Huber, *President*; Loder, *Former President*; Weiss, *Vice-President;* Lord Finlay, MM. Nyholm, Altamira, Oda, Anzilotti, Yovanovitch, Beichmann, Negulesco, *Judges;* M. Caloyanni, *National Judge*.

*Hearings*

The Court heard the statements and replies of Counsel for the respective Parties, and gave its judgment on the merits of the case on March 26th, 1925.

*Judgment on the merits (analysis)*

In the first place, the Court states the points submitted for decision and the basis of its jurisdiction to deal with them.

The questions to be decided are three in number:

*(a)* the validity of the Jerusalem concessions;

*(b)* the relations between these and the Rutenberg concession;

*(c)* whether the Mavrommatis concessions fall under Article 4 or under Article 6 of the Lausanne Protocol.

As regards *(a)* and *(b),* the Court's jurisdiction rests on the premises of its judgment of August 30th, 1924; on the other hand, in regard to *(c)* the Court considers that it has jurisdiction only in virtue of a special agreement between the Parties resulting from the documents of the written proceedings.

The validity of the concessions in question had been denied by the British Government, which contended that their grant was based on an error, since the beneficiary was described in them as an Ottoman subject, whereas his real nationality was Greek. The Court considers, however, that the onus of proof rests with the Party raising this contention, for the Turkish authorities never considered the concessions as invalid; but the British Government has not produced any proof in regard to this point. Moreover, the Ottoman nationality of M. Mavrommatis was not a condition of the contract, so that

the fact that he did not possess that nationality did not even render the contract liable to cancellation. Again, from another point of view, when Article 9 of Protocol XII lays down that the beneficiary must be the national of a contracting State other than Turkey, it contemplates his real nationality, and M. Mavrommatis' real nationality is Greek.

The Court therefore arrives at the conclusion that the Mavrommatis concessions were valid.

It next proceeds to consider the relation existing between these concessions and the agreement concluded in September 1921 between the High Commissioner for Palestine and Mr. Rutenberg regarding a concession to be granted to the latter. Under this agreement, the beneficiary has the option of requesting the cancellation of any valid pre-existing concessions covering the whole or any part of his concession. During the proceedings the respondent produced documentary evidence of the renunciation by those concerned of their right to exercise this option, this renunciation being guaranteed by the British Government; all therefore that remains of the clause in question is the alternative to the exercise of this option, namely an obligation to respect the Mavrommatis concessions. It remains, however, to be decided whether, so long as Mr. Rutenberg had the right to require the expropriation of the Mavrommatis concessions, this clause was contrary to the obligations entered into by the Mandatory. The Court is of opinion that such is the case. Mr. Rutenberg's right, which right could have been exercised at any moment during the existence of his concession and at the initiative of a private individual, interfered with the right of holders of pre-existing concessions to utilize their concessions as such, and seriously impaired the safeguard against ill-considered expropriation, which exists when the initiative is in the hands of a State which can only expropriate for reasons of public utility. A breach therefore of the obligation accepted by Great Britain under Article 9 of Protocol XII to maintain the Mavrommatis concessions existed; and that in spite of the fact that the Protocol only came into effect on August 6th, 1924; for Article 9 antedates the subrogation to October 30th, 1918, as regards the rights and duties of Turkey.

Nevertheless, the Court is of opinion that no compensation is due on this ground. For, after examining the evidence put forward on this point by the respondent, it arrives at the conclusion that it has not been proved that, as a result of the facts thus established, any prejudice has been caused to M. Mavrommatis which would justify a claim on his behalf for compensation in these proceedings.

By agreement, the Parties put to the Court the question whether M. Mavrommatis' concessions should be readapted in accordance with the economic conditions created by recent events, or whether the beneficiary merely has the right, should he be unable or unwilling to proceed with them as they stand, to request that they may be dissolved, receiving, if there is ground for it, an indemnity in respect of survey and investigation work undertaken; in other words, are these concessions covered by Articles 4 and 5 or by Article 6 of Protocol XII? The Court considers that Articles 4 and 5 are the applicable articles: in the Court's opinion, the condition precedent for readaptation, namely, the existence of a beginning of operation, is fulfilled in this case. For, whilst admitting that the projected works have not been begun, the Court considers that, within the meaning of the Protocol, any act performed under the contract, even if unconnected with the carrying out of the works, constitutes an act in fulfilment of the contract. And it is indisputable that M. Mavrommatis had performed several such acts.

The Court adds that though it has been enabled to affirm the concessionnaire's right to readaptation, it cannot itself fix the method of such readaptation. This must be done by the Parties in accordance with the procedure laid down for this purpose in the Protocol.

The Court, therefore, declares M. Mavrommatis' concessions at Jerusalem to be valid, decides that M. Rutenberg's right to require their cancellation was not in accordance with the international obligations accepted by the Mandatory for Palestine, but dismisses the Greek Government's claim for an indemnity, because no loss to M. Mavrommatis has been proved, and, finally, decides that the latter may claim the readaptation of the aforesaid concessions.

*Declaration by M. Altamira*

M. Altamira declares that he is unable to concur in the judgment delivered by the Court, as regards paragraphs 3 and 4 of the operative part.

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## 10. QUESTION OF THE MONASTERY OF SAINT-NAOUM (ALBANIAN FRONTIER)

### Advisory Opinion of 4 September 1924 (Series B, No. 9)

**First Annual Report of the Permanent Court of International Justice (1 January 1922—15 June 1925), Series E, No. 1, pp. 221–225**

*Conference of Ambassadors—Definitive character of certain of its decisions—Its competence to revise them—Existence of a material error or new fact*

*History of the question*

After the second Balkan War, under the Treaty of London of May 17th/30th, 1913, the task of settling the frontiers of Albania, which was made an independent State, was reserved to the Great Powers. The Conference of Ambassadors of London, with a view to the fulfilment of this task, took certain decisions, known as the Protocol of London. Under one of these decisions a Delimitation Commission was set up, whose task was to mark out locally the southern frontiers of Albania, i.e. those from Lake Ochrida to the Ionian Sea. The Commission proceeded with its task in 1913 and terminated it by the Protocol signed at Florence on December 17th of the same year. It had then successfully completed the mission entrusted to it, except that it had not marked out the portion of the frontier between Serbia and Albania immediately south of Lake Ochrida, where the Monastery of Saint-Naoum is situated. The Great War then supervened and prevented the complete fixing of the frontiers of the new State, which was moreover invaded by the armies of the belligerents.

In 1920, Albania was admitted a Member of the League of Nations subject to the settlement of her frontiers. She thereupon laid before the Council the question of the evacuation of her territory—as fixed by the Conference of London of 1913—by Serbian and Greek troops. Thus the question of the settlement of the frontiers became urgent. The Assembly of the League of Nations, by a unanimous vote on October 2nd, 1921, declared that it was for the Principal Powers to settle this question and recommended Albania to accept beforehand the decision to be given by them.

The Conference of Ambassadors then, on November 9th, 1921, took a decision confirming, save as regards certain rectifications of no importance for the present question, the tracing of the frontiers of Albania, as determined in 1913 by the Conference of Ambassadors of London and as marked out locally by the Delimitation Commission which drew up the final Protocol of Florence. Furthermore, it formed a new Delimitation Commission which it instructed to mark out on the spot the northern frontiers; this Commission was also to fix the portion of the southern frontiers not marked out by the 1913 Commission. The two Governments concerned—namely the Albanian and Serb-Croat-Slovene Governments—accepted this decision.

The Delimitation Commission, however, which had commenced work, was confronted with difficulties in the region of Saint-Naoum; both States concerned claimed the Monastery of that name. These

difficulties were brought to the notice of the Conference of Ambassadors by Great Britain, whereupon the Conference decided on December 6th, 1922, to allocate the Monastery of Saint-Naoum to Albania. Five months later, the Yugoslav Government asked for the revision of this decision. An exchange of notes with the Albanian and Yugoslav delegations followed, after which the Conference considered it necessary to submit the question to further examination, and to this end instructed a small Committee to prepare a report. Since no agreement could be arrived at in the Committee, the Conference asked its juridical Committee, the so-called Drafting Committee, for an opinion.

*Resolution of the Conference of Ambassadors*

As, nevertheless, divergent opinions with regard to the allocation of the Monastery of Saint-Naoum continued to prevail, the Conference then decided to submit to the Council of the League of Nations the following questions:

> "Have the Principal Allied Powers, by the decision of the Conference of Ambassadors of December 6th, 1922, exhausted, in regard to the Serbo-Albanian frontier at the Monastery of Saint-Naoum, the mission which was recognized as belonging to them by the Assembly of the League of Nations on October 2nd, 1921?"
>
> "Should the League of Nations consider that the Conference has not exhausted its mission, what solution should be adopted in regard to the question of the Serbo-Albanian frontier at Saint-Naoum?"

The Council then decided on June 17th, 1924, to ask the Court for an advisory opinion on the first point referred to it by the Conference of Ambassadors.

*Composition of the Court*

The Court considered the question at its fifth (ordinary) Session which extended from June 16th to September 4th, 1924. It was composed as follows:

MM. Loder, *President*; Weiss, *Vice-President;* Lord Finlay, MM. Nyholm, Moore, de Bustamante, Altamira, Oda, Anzilotti, Huber, Pessôa.

The Request was communicated to the Members of the League of Nations through the Secretary-General of the League and to the States mentioned in the Annex to the Covenant. The Conference of Ambassadors, at the Court's request, furnished certain information in addition to that contained in the dossier annexed to the Request, and the Albanian and Serb-Croat-Slovene Governments, which had each filed a memorandum, were at their request allowed to make oral statements.

*Hearings*

Furthermore, the Greek Government, considering that it was in a position to furnish information likely to be of use in the preparation of the Opinion, expressed a desire to be allowed to state its views. The Court acceded to this request and heard a statement by the Greek representative.

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*Opinion No. 9 (analysis)*

The Court delivered its Opinion on September 4th, 1924.

In the first place, it observes that the decision of the Conference of Ambassadors of November 9th, 1921, which was taken in execution of the mission which the Supreme Council, the Assembly of the

League of Nations and also the States concerned had recognized as belonging to the Conference, and which, moreover, Albania and the Serb-Croat-Slovene State had accepted, was definitive as far as it went. As regards the decision of December 6th, it was given because the Protocol of London did not, in the opinion of the Conference, explicitly state to whom the Monastery should be attributed, and the Conference, therefore, found itself compelled to pronounce on the question. Furthermore, by a reference to Advisory Opinion No. 8 (Jaworzina), the Court makes it clear that it considers that the former of these decisions, having been expressly accepted by the Parties, was in the nature of a contract, and it expressly states that, since both decisions were based on the same powers, the second also partook of that nature.

The next question therefore to be considered was whether the Conference of Ambassadors was justified in holding that the frontier at Saint-Naoum had not been fixed in 1913. The Court answers this question in the affirmative. The documents submitted to it did not suffice to prove the contrary; and the only text referring to the point in question contained the words "as far as the Monastery of Saint-Naoum", which were ambiguous. The Court admits that there are forcible arguments in favour of the possible alternative interpretations of this expression as regards Saint-Naoum; but, in the circumstances, it considers that it is not possible to say that this text is sufficiently precise to indicate how the frontier at Saint-Naoum should run. In the Court's opinion, no definite line was fixed until the decision of December 6th, 1922.

The Court next proceeds to deal with the Yugoslav claim for revision of that decision on the ground that it was based on erroneous information or adopted without taking into account certain new and essential facts, subsequently brought to light. Without giving an opinion on the question whether such decisions could be revised were these conditions fulfilled, the Court confines itself to observing that in this case these conditions are not present. For this reason there is no ground for the application of a revision of the decision of December 6th.

The Court, therefore, replies to the question submitted in the affirmative.

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*Effects of the Opinion*

On October 3rd, 1924, the Council of the League of Nations, in the presence of the representatives of Albania and of the Kingdom of the Serbs, Croats and Slovenes, adopted a report by the Spanish representative and decided to communicate the Opinion to the Conference of Ambassadors. It also decided to transmit to that body, under cover of a note dated October 6th, 1924, the Minutes of the sitting, since the Yugoslav representative had once more brought up and discussed the merits of the case.

On April 27th, 1925, the Conference of Ambassadors, having been disappointed in its hopes of a friendly settlement of the question between the two countries and having due regard to the Opinion given by the Court, communicated to their representatives at Paris, a decision fixing the line of the Albanian frontier. This decision leaves the Monastery of Saint-Naoum in Albanian territory.

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**Second Annual Report from the Permanent Court of International Justice (15 June 1925—15 June 1926), Series E, No. 2, pp. 137–138**

*Effects of the Opinion*

In the Court's first Annual Report it was stated that on October 3rd, 1924, the Council of the League of Nations, in the presence of the representatives of Albania and the Kingdom of the Serbs, Croats and Slovenes, decided to communicate to the Conference of Ambassadors the opinion given by the Court on September 4th, 1924. On April 27th, 1925, the Conference communicated to the representatives at Paris of the two Powers concerned a decision fixing, having due regard to the Court's opinion and failing the friendly settlement which it had hoped would be effected in regard to this matter between the two Parties, a frontier line leaving the Monastery of Saint-Naoum in Albanian territory. On May 6th of the same year, the Serb-Croat-Slovene Minister at Paris sent to the President of the Conference of Ambassadors a note submitting a new fact "which the Royal Government was now in a position to advance" and which dissipated the fundamental doubt which had led to the Court's decision of September 4th.1 This new fact, on which the Serb-Croat-Slovene Government's appeal was based, consisted in a circular letter from Count Berchtold to the Austro-Hungarian Ambassadors at Berlin, Rome, St. Petersburg and Paris, dated Vienna, September 30th, 1913. In this letter it was said, amongst other things, in connection with the frontier forming the subject of the dispute, that that frontier "would leave the western bank of Lake Ochrida near the village of Lin and, crossing the lake, proceed towards its southern bank to a point situated between the Monastery of Saint-Naoum, which would remain outside Albania, and the town of Starova."

Following upon the production of this fact, now mentioned for the first time, the delegations of the two Parties concerned entered in negotiations and decided, by a joint declaration dated July 28th, 1925, to draw the frontier line so that, on the one hand, the Monastery of Saint-Naoum would be left to Yugoslavia and, on the other hand, the village of Pichkoupiya would be left to Albania.

In a note dated August 6th, 1925, the Conference of Ambassadors approved the "rectification adopted by the two delegates" and the frontier lines indicated by them "which were clearly defined by the declaration of the two delegates dated July 28th, 1925".

On November 11th, 1925, the Albanian and Serb-Croat-Slovene Governments having approved the line defined by their delegates, the President of the Conference of Ambassadors noted their acceptance and recorded that the line of the Serbo-Albanian frontier was henceforward finally fixed. He also expressed the Conference's satisfaction "at the agreement so happily reached between the Governments in regard to their common frontier".

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[1] It will be remembered that the Court had stated that the documents submitted to it and the arguments advanced did not suffice to prove that the Conference of Ambassadors had been mistaken in holding that the Albanian frontier at Saint-Naoum had not been fixed in 1913. "In short," added the Court, "an analysis of the texts emanating from the London Conference leads to no definite conclusion." The terms of the texts concerning the Monastery of Saint-Naoum might be interpreted in different ways. "In these circumstances, it is impossible to say that their terms are sufficiently precise to indicate how the frontier at Saint-Naoum should run."

## 11. TREATY OF NEUILLY, ARTICLE 179, ANNEX, PARAGRAPH 4 (INTERPRETATION)

### Judgment of 12 September 1924 (Series A, No. 3)

### INTERPRETATION OF JUDGMENT No. 3

### Judgment of 26 March 1925 (Series A, No. 4)

**First Annual Report of the Permanent Court of International Justice (1 January 1922—15 June 1925), Series E, No. 1, pp. 180–184**

*Relations between said paragraph and Reparations—Attempt to obtain interpretation under Statute, Art. 60*

*History of the case*

In paragraph 4 of the Annex following Article 179 of the Treaty of Neuilly, it is provided that: "All property, rights and interests of Bulgarian nationals within the territory of any Allied or Associated Power . . . may be charged by that Allied or Associated Power . . . with payment of claims growing out of acts committed by the Bulgarian Government or by any Bulgarian authorities since October 11th, 1915, and before that Allied or Associated Power entered into the war." It is added that the amount of these kinds of claims may be fixed by an arbitrator appointed by M. Gustave Ador.

M. Gustave Ador having consented to undertake this appointment, the arbitrator nominated prepared his rules of procedure and submitted them to the Governments concerned. The Bulgarian Government made certain objections, denying the arbitrator's competence in the case of acts committed outside Bulgarian territory and claims relating to damages incurred by claimants as regards their person; that Government also considered that the question of competence thus raised was not for the arbitrator to deal with.

*Special Agreement submitting the case to Chamber for Summary Procedure*

In these circumstances, the latter adopted an attitude of reserve and suggested that, failing an agreement between the two Governments on the merits of the question, they should jointly submit the dispute to the Court. This latter course was adopted. In March 1924, the two Governments signed a special arbitration agreement requesting the Court, sitting as a Chamber for Summary Procedure, to determine the precise meaning of the last sentence of the text, replying in particular to the questions as to whether it authorizes claims for acts committed outside Bulgarian territory and for personal damages. This agreement was ratified on May 29th, 1924, and the Court was informed accordingly in June of the same year.

*Composition of the Chamber.*

The Court sitting as a Chamber for Summary Procedure was composed as follows:

M. Loder, *President of the Court, President;* M. Weiss, *Vice-President of the Court;* M. Huber.

The exchange of Cases provided for in the rules concerning summary procedure took place and, as an exception to these rules, the Court authorized the submission of a Reply by each Government.

The Court gave judgment on September 12th, 1924, without having made use of its right to call for oral explanations.

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*The Judgment (analysis)*

In the judgment, the Court states that the purpose of the paragraph in question is to determine the claims with which an Allied Power may, as security, charge certain Bulgarian property, and also that there is nothing to indicate that this paragraph creates any fresh obligations incumbent on Bulgaria. In order, therefore, to decide the question before the Court, it must be ascertained what, according to the Treaty, is the nature of the claims for the "acts committed" in question.

In the view of the Court, a definition of the claims enumerated in paragraph 4 is not to be found in Article 177, because they are only connected with that article by reason of the security by which they may benefit under it. Moreover, that article only contemplates the laws of war, whereas the claims in question relate to acts committed by Bulgarian troops who occupied Greece before June 27th, 1917, the date on which the latter Power entered the war on the side of the Allies. Consequently, it has to be ascertained in what other part of the Treaty the corresponding responsibility as regards "acts committed" has been established. The Court considers that this can only be in the part relating to reparations; for the expression "acts committed" refers to acts contrary to the law of nations and involving an obligation to make reparation.

The first article, however, of this Part VII (*Reparations*) is drawn up in such general terms, both *ratione materiae* and *ratione temporis*, that it quite naturally includes reparation for losses and sacrifices involved by military operations previous to the declaration of war. But since the obligation imposed on Bulgaria to make reparation is limited to a total capital sum, which is definitely fixed in Part III, any indemnities due in respect of "acts committed" are included in this total capital sum.

In conclusion, the Court observes that the view taken by it in this case is also indicated by the general principles of interpretation; since an obligation imposed on one contracting Party cannot be based on the fact that it is mentioned in the annex to a section of a treaty dealing with a different matter.

The Court, therefore, decides that claims in respect of acts committed outside Bulgarian territory and in respect of personal damages are authorized; but indemnities due on these grounds are included in reparations and consequently in the total capital sum fixed.

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*Application for an interpretation of the judgment*

On November 26th, 1924, the Greek Minister at The Hague informed the Registrar that his Government wished to have an interpretation of the Court's judgment. Exact information in regard to this application was received on December 30th. It related to the three following points:

(1) the possible existence, according to the terms of the judgment, of Bulgarian property in Greece which might be used to realize sums awarded by the arbitrator;

(2) the possibility, under the terms of the judgment, of liquidating Bulgarian landed property in Greece with a view to realizing such sums;

(3) the right of Greece, under the terms of the judgment, to apply to the Reparation Commission with a view to obtaining a redistribution between the Allied Powers of the total capital sum at which the obligation to make reparation imposed upon Bulgaria was fixed.

The application was communicated to the Bulgarian agent who sent his observations to the Court. The Chamber for Summary Procedure sat during the sixth (extraordinary) Session of the Court which lasted from January 12th to March 26th, 1925. It was composed of MM. Loder (former President of the Court), Huber (President of the Court) and Weiss (Vice-President). It should be observed that M. Loder presided for the purposes of this case, since he had directed the Chamber's deliberations in the previous year, when the judgment of which an interpretation was sought had been given.

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*The Judgment (analysis)*

In its judgment, which was given on March 26th, 1925, the Court, in the first place, indicated the basis of its jurisdiction to deal with the application for an interpretation; this jurisdiction rests on the tacit consent of the Parties, since the Bulgarian Government does not oppose the Greek request. For this reason, there is no need in this case to consider whether, in the absence of a definite dispute on the subject, the requisite jurisdiction to give an interpretation could have been based on the unilateral request of one of the Parties.

The Court goes on to observe that the applicability, as between the Parties, of the clause of which an interpretation was sought by the special agreement of March 18th, 1924, between Bulgaria and Greece, was taken for granted in that agreement, which only related to the basis and extent of the obligations referred to in the clause. The Greek request is clearly based on a different conception unknown to the special agreement, in so far as it seeks an interpretation in regard to the question whether the Court's judgment sanctions the liquidation by Greece of Bulgarian property in Greek territory with a view to realizing sums which may be awarded by the arbitrator appointed by M. Ador.

Again, the Greek Government, in seeking an interpretation of the judgment of September 12th on the question whether, under that judgment, the claims in question can be satisfied only from the proceeds of the sale of Bulgarian property situated in Greek territory, though adopting as regards the applicability of the sentence in dispute the same standpoint as the special agreement, envisages a matter other than the determination of the basis and extent of the obligations referred to in the clause in question.

Finally, the same observation applies with regard to the question concerning the right of Greece, under the judgment, to apply to the Reparation Commission with a view to obtaining a redistribution amongst the Allied Powers of their claims on Bulgaria in respect of reparation.

In these circumstances, the Court, being of opinion that an interpretation of the judgment of September 12th, 1924, cannot go beyond the scope of that judgment, which is fixed by the special agreement, declares that the Greek Government's request cannot be granted.

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## 12. EXCHANGE OF GREEK AND TURKISH POPULATIONS (LAUSANNE CONVENTION VI, JANUARY 30TH, 1923, ARTICLE 2)

### Advisory Opinion of 21 February 1925 (Series B, No. 10)

**First Annual Report of the Permanent Court of International Justice (1 January 1922—15 June 1925), Series E, No. 1, pp. 226–230**

*Establishment and domicile—National legislation as a means for the interpretation of international instruments—Mixed Commission: concurrent jurisdiction of national courts*

*History of the question*

In the course of the negotiations for the establishment of peace with Turkey, conducted at Lausanne during 1922 and 1923, amongst other diplomatic instruments, was concluded a Convention concerning the exchange of Greek and Turkish populations. This Convention, which was signed at Lausanne on January 30th, 1923, by the Greek and Turkish delegates, came into effect after the ratification by Greece and Turkey of the Peace Treaty of July 24th, 1923, *viz.* on August 6th, 1924.

Article 11 of this Convention provided for the setting up, within one month from its coming into force, of a Mixed Commission composed of four members representing each of the High Contracting Parties and three members chosen by the Council of the League of Nations from amongst nationals of Powers which did not take part in the war of 1914–1918. The neutral members were appointed by the Council on September 17th, 1923, and the Mixed Commission entered upon its task.

The Mixed Commission's duties under Article 12 were, amongst other things, to supervise and facilitate the emigration provided for in the Convention and to settle the method to be followed. Generally speaking, it had full power to take the measures necessitated by the execution of the Convention and to decide all questions to which the Convention might give rise.

Difficulties arose between the Greek and Turkish delegations to the Commission in connection with Article 2 of the Convention, which is as follows:

"The following persons shall not be included in the exchange provided for in Article 1:

"(a) The Greek inhabitants of Constantinople.

"(b) The Moslem inhabitants of Western Thrace.

"All Greeks who were already established before the 30th October, 1918, within the areas under the Prefecture of the city of Constantinople, as defined by the Law of 1912, shall be considered as Greek inhabitants of Constantinople.

"All Moslems established in the region to the east of the frontier line laid down in 1913 by the Treaty of Bucharest shall be considered as Moslem inhabitants of Western Thrace."

The Delegations agreed to ask the Mixed Commission to settle their dispute, which related chiefly to the meaning and scope of the expression "established". After consideration, the Commission referred the matter to its legal section, which made a report on October 1st, 1924. Meanwhile, and up till October 21st, the authorities of Constantinople had proceeded to expel certain Greeks. These measures were stopped after representations had been made to the Vali by the competent international authority; but they had already given rise to representations on the part of the Greek Delegation to the Mixed Commission and subsequently to a letter sent by the Greek *Chargé d'affaires* at Berne to the Secretary-General of the League of Nations, dated October 22nd, 1924. In this letter, the Greek Government, in virtue of Article 11 of the Covenant, appealed to the League of Nations to include the question raised by the measures referred to, upon the agenda of the session of the Council to be held on the 27th of the same month. The Greek Government, though chiefly relying on Article 11, also, according to this letter, considered that Article 14 of the Covenant was subsidiarily applicable.

The Council granted this request and included the question on the agenda of its 31st Session and, in agreement with the representatives of the two interested Governments, adopted a report on the subject, inviting the Mixed Commission to hold a plenary meeting as soon as possible, in order that the points at issue with regard to the Convention might be finally settled. At the same time the Council observed that it was open to the members of the Commission to cause the question to be referred to the Court of International Justice, one of whose special duties was the interpretation of treaties.

The Mixed Commission reopened the discussion on November 15th; on the following day the President declared that the full Commission was unanimously agreed to request the Council of the League of Nations to obtain from the Court an advisory opinion on the matter.

*Council's Request*

On receipt of this request, the Council decided on December 13th, 1924, to ask the Court for its opinion on the following points:

(1) The meaning and scope of the word "established" contained in Article 2 of the Convention of Lausanne regarding the exchange of Greek and Turkish populations.

(2) The conditions to be fulfilled by the persons described in that article as "Greek inhabitants of Constantinople", in order that they may be considered as "established" and exempt from compulsory exchange.

*Composition of the Court*

The Court held an extraordinary session (sixth Session) lasting from January 12th to March 26th, 1925, in the course of which it considered the question. It was composed as follows:

MM. Huber, *President*; Loder, *Former President*; Weiss, *Vice-President;* Lord Finlay, MM. Nyholm, Altamira, Oda, Anzilotti, Yovanovitch, Beichmann, Negulesco.

Notice of the request was given to the Members of the League of Nations through the Secretary-General, to the States mentioned in the Annex to the Covenant, and also to Turkey, as being a State likely to be able to furnish information on the question, and to the Mixed Commission for the exchange of populations.

*Hearings*

The two States directly concerned each filed a memorandum and made oral statements at a public sitting of the Court.

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*Opinion No. 10 (analysis)*

The Court delivered its Opinion on February 21st, 1925. It is to the following effect:

(1) that the purpose of the word "established" is to indicate the conditions in point of time and place on which depends the question of liability to exchange; that this word refers to a situation of fact, constituted in the case of the persons in question by residence of a lasting nature;

(2) that the persons referred to in the second question, in order to be exempt from exchange, must reside within the boundaries of the Prefecture of the city of Constantinople as defined by the Law of 1912; must have arrived there, no matter whence they came, at some date previous to October 30th, 1918, and must have had, prior to that date, the intention of residing there for an extended period.

The Court's reasoning is as follows: The conception of 'establishment' in its general sense embraces two factors: residence and stability. Is this conception the same as the conception of domicile, which is to be found in certain legal systems? No; for in order to ascertain its meaning in the present case, there is no need to consider it in the light of any particular national legislation, in the first place because the Convention makes no reference to such legislation, and in the second place because the result might

be that different criteria would be applied in Thrace and in Constantinople. Moreover, the Convention contemplated a mere situation of fact, sufficiently defined by the Convention itself. Again, contrary to the Turkish contention, no infringement of Turkey's sovereign rights is involved by the fact that the Convention thus takes precedence of national legislation; for the right of entering into international engagements (which may involve a derogation from national legislation) is—as the Court has already pointed out in the case of the "Wimbledon"—an attribute of sovereignty.

In the next place, the scope of the conception of establishment having been fixed, is it for the municipal courts to determine the status of the persons concerned? No; for the Convention sets up a Mixed Commission with full powers to take the necessary measures and to decide disputed questions. Moreover, this Commission has never had any doubt as to its jurisdiction in this matter, and the Parties themselves have not disputed it. The Commission therefore is alone competent to decide whether a given person is or is not exchangeable.

As regards the second question, the Court points out that the degree of stability required is incapable of exact definition and that it cannot settle beforehand all the difficulties which may arise in the future. It considers as established the categories of persons enumerated by way of example in a resolution of the legal committee of the Mixed Commission and characterized by: the permanent exercise of a profession, commerce or industry, or the acquisition of a practice; the conclusion of a contract for work of considerable duration, etc.; and observes that the Mixed Commission can find an equitable solution for any disputed point, using its discretion in regard to the evidence laid before it.

It should be added that, in the motives of the Opinion, the Court states that it does not consider that it has cognizance of the question of the Œcumenical Patriarchate at Constantinople. For this question, though raised by the Greek representative in his speech before the Court, was not included in the request for an opinion submitted by the Council.

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*Effects of the Opinion*

The Court's Opinion was laid before the Council on February 25th, 1925. Viscount Ishii read a report recommending that the Council should note the opinion and instruct the Secretary-General to communicate it officially in the name of the Council to the President of the Mixed Commission. Viscount Ishii also said he hoped that the Commission would find its task greatly facilitated as a result of the Opinion given by the Court; for he had no doubt that the Commission would attribute to that Opinion the same high value and authority which the Council had always attributed to the Court's Opinions.

The Greek and Turkish representatives before the Council associated themselves with the remarks of the Rapporteur and a resolution was adopted to this effect. It was also decided that, at the same time, Viscount Ishii's observations should be transmitted to the President of the Mixed Commission.

Subsequently, an agreement was concluded between the two Governments concerned on the basis of the Court's Opinion.

## 13. INTERPRETATION OF JUDGMENT NO. 3

### Judgment of 26 March 1925 (Series A, No. 4)

**First Annual Report of the Permanent Court of International Justice (1 January 1922—15 June 1925), Series E, No. 1, pp. 180–184**

For the summary of No. 13 (Series A No. 4), see No. 11.

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## 14. MAVROMMATIS JERUSALEM CONCESSIONS

### Judgment of 26 March 1925 (Series A, No. 5)

**First Annual Report of the Permanent Court of International Justice (1 January 1922—15 June 1925), Series E, No. 1, pp. 169–179**

For the summary of No. 14 (Series A, No. 5), see No. 9.

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## 15. POLISH POSTAL SERVICE IN DANZIG

### Advisory Opinion of 16 May 1925 (Series B, No. 11)

**First Annual Report of the Permanent Court of International Justice (1 January 1922—15 June 1925), Series E, No. 1, pp. 231–236**

*Final character of a decision under international law—Binding effect of motives and of operative part of an award—Relative value of the text of an award and the intention of the arbitrator—Restrictive interpretation of a text: conditions*

*History of the question*

In accordance with Article 104 of the Treaty of Versailles, a Convention between Poland and the Free City of Danzig was concluded at Paris on November 9th, 1920, by which it was recognized amongst other things that Poland was entitled "to establish in the Port of Danzig a post, telegraph and telephone service communicating directly with Poland". Furthermore, the Convention provided for the conclusion between the Parties of a further agreement designed to complete its provisions and settle the details of its execution. This agreement was signed at Warsaw on October 24th, 1921; but it did not settle all outstanding questions, some of which were reserved for decision by the High Commissioner.

The Convention of Paris gave Poland the right of hiring or purchasing the buildings necessary for the establishment and working of her postal service; accordingly, premises in the Heveliusplatz were allotted to her for this purpose in 1922. On January 5th, 1925, in the exercise of rights which she claimed to derive from the above-mentioned instruments, Poland set up letter-boxes at various points in Danzig. These boxes were intended to receive postal matter to be sent to Poland by the Polish postal

service. The Polish Government also contended that it was entitled to deliver, outside the Heveliusplatz premises, postal matter brought from Poland by its postal service. The Senate of the Free City protested to the High Commissioner of the League of Nations at Danzig, asking him to give a decision to the effect that the rights thus claimed were excluded by a decision or decisions of his predecessor, General Haking, given in conformity with the Agreement of Warsaw, which decision or decisions precluded the Polish postal service from operating outside the Heveliusplatz premises and from being used for correspondence other than that of Polish officials.

*The Council's Request*

On February 2nd, 1925, the High Commissioner gave a decision in the main favourable to the contentions of Danzig. The Polish Government, however, appealed against this decision to the Council of the League of Nations, which decided to request the Court for an advisory opinion. The Council's Resolution, which was dated March 14th, 1925, requests the Court to state (1) whether there is a decision in force, as maintained by the Senate of the Free City, and (2) if this is not the case, whether the sphere of operation of the Polish postal service is as claimed by the Warsaw Government, or, on the other hand, as maintained by the Free City.

At the request of the Council, the Court dealt with the question at an extraordinary session (seventh Session) held from April 14th to May 16th, 1925.

*Composition of the Court*

The Court was composed as follows:

MM. Huber, *President*; Loder, *Former President*; Weiss, *Vice-President;* Lord Finlay, MM. Altamira, Oda, Anzilotti, Yovanovitch, Beichmann, Negulesco, Wang.

Notice of the Council's Request was given to Members of the League of Nations through the Secretary-General of the League and to the States mentioned in the Annex to the Covenant. It was also communicated to the Senate of the Free City of Danzig as being in a position to furnish information on the question. The Court allowed each of the two Governments directly concerned to submit written documents within specified times. No public hearing was held for the submission of oral statements as the Court ultimately had before it no request to that effect.

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*Opinion No. 11 (analysis)*

The Court delivered its Opinion on May 16th, 1925.

It begins by dealing with the first question: have the points in dispute already been decided; in other words, does the doctrine of *res judicata* apply? In this connection, the Court, in the first place, observes that the problem regarding the existence of *res judicata* does not specifically refer to the points relating to the merits of the case which are raised in the second of the questions put to the Court. No question of *res judicata* however arises as regards the limits of the port of Danzig, since neither Party claims that the territorial limits of the port for postal purposes have been defined by a definitive decision. In fact, the only lines which have been drawn are those contained in a decision of the High Commissioner dated August 15th, 1921; but these merely indicate the area within which are to be found the railway lines which (with certain exceptions) are to be considered as principally serving the port. It cannot be deduced from this that this area as a whole belongs to the port. Moreover, the decision of August 15th, 1921, has no bearing on the postal service.

Having established this point, the Court proceeds to consider whether there is in force any decision by General Haking, the predecessor of the present High Commissioner, restricting the Polish postal service in the port of Danzig to operations performed within its premises in the Heveliusplatz and limiting the use of this service to Polish authorities and offices.

The High Commissioner gives his decisions in accordance with the procedure laid down in Article 103, paragraph 2, of the Treaty of Versailles and Article 39 of the Convention of Paris of November 9th, 1920. The principles enunciated by the Court, in its Opinions on the Jaworzina and Saint-Naoum questions (Nos. 8 and 9), in regard to the final character of decisions under international law, undoubtedly apply to any final decision under the above-mentioned provisions. But the question is whether a decision of this kind really exists in the present case.

On May 25th, 1922, the High Commissioner gave a decision, which he himself interpreted on August 30th of the same year; this decision is final. It is relied on by the Free City as one of its strongest arguments, but it does not cover the points in dispute. In the questions then put by them the Parties do not refer to the present matter and there is no reason to suppose that the decision went beyond those questions. Any interpretations given therein are binding only in so far as dealing with the questions submitted by the Parties; and it cannot be maintained that it is the right and duty of the High Commissioner to examine on his own initiative and independently of the Parties, the situation both in point of fact and of law, and to decide any dispute, either patent or latent, that may have come to his notice. The functions of the High Commissioner, being of a judicial character, are limited to deciding questions submitted to him and his decisions should, if possible, be construed in conformity with the powers conferred upon him. In the present case, moreover, the High Commissioner has not overstepped his powers. The operative part of his decision does not go beyond the points submitted by the Parties and has nothing to do with the subject matter of the present dispute. It has, however, been contended that the real intention of the High Commissioner was to go further; but no personal opinion that General Haking may have expressed can alter the meaning and scope of his decision; once it is given, only its contents are authoritative.

There is a second decision of December 23rd, 1922, which is also cited by Danzig. The operative part thereof has nothing to do with the points in dispute; but in the motives the High Commissioner construes the decision of May 25th, 1922, and the subsequent agreement between the Parties in a manner favourable to Danzig's standpoint. Following an appeal by the Polish Government against the decision of December 23rd, an agreement was concluded between the Parties on April 18th, 1923; in this agreement, it is said that the decision of December 23rd is "replaced" by it, but that this "does not in any way alter the legal position". This agreement, however, assuming that the decision remains in part effective, cannot be construed as incorporating any particular opinion expressed therein. It is certain that the reasons contained in a decision, at least in so far as they go beyond the scope of the operative part, have no binding force as between the Parties concerned. Of course, all the parts of a judgment concerning the points in dispute explain and complete each other, and are to be taken into account in order to determine the precise meaning of the operative portion. But it by no means follows that every reason given in a decision constitutes a decision. The Court arrives at the conclusion that the opinion expressed by the High Commissioner in the grounds of his decision of December 23rd is irrelevant to the point actually decided in that decision and therefore has no binding force.

The third document cited by Danzig is a letter written by the High Commissioner on January 6th, 1923, in response to a request for a decision made by the Senate of the Free City. In this letter the High Commissioner expressed an opinion in accordance with the views of the Free City. The Court, however, does not regard this letter either as a decision or as an authoritative interpretation; to endow it with this effect the essentials of judicial procedure must have been complied with. It is merely a personal opinion which, moreover, has not been accepted by Poland.

It follows, therefore, from an examination of the High Commissioner's decisions that none of them deals either with the question whether the Polish postal service is limited to operations which can be effected within its premises, or with the question whether the use of this service is confined to Polish authorities and offices. The second point which must be dealt with in the opinion is whether these restrictions follow from the international instruments on which Poland's postal rights in Danzig are based.

In order to ascertain this, the Court proceeds to consider the Convention of Paris and the Agreement of Warsaw by which the former was executed and completed. It finds no trace of any restrictive provision. The postal service, which Poland is entitled to establish in the port of Danzig, must be interpreted in its ordinary sense, so as to include the normal functions of a postal service as regards the collection and distribution of postal matter outside the post office. Any limitations or restrictions would be of so exceptional a character that they cannot, in the absence of express reservations, be read into the text of the treaty stipulations. Nor is there anything to justify the conclusion that the use of the postal service is to be confined to Polish authorities and offices, and, in the absence of an express provision to the contrary, the post, telegraph and telephone communication must be taken to be intended for the use of the public in the ordinary way. Moreover, it may be inferred from certain clauses of the Warsaw Agreement that such operations are allowed.

This view is not affected by the argument to the effect that Poland's rights constitute a grant in derogation of Danzig's postal monopoly, and that this grant must be strictly construed in favour of Danzig. For, in the Court's opinion, the rules as to a strict or liberal construction of treaty stipulations can be applied only in cases where ordinary methods of interpretation have failed. It is a cardinal principle of interpretation that words must be interpreted in the sense which they would normally have in their context, unless such interpretation would lead to something unreasonable and absurd. In the present case, the construction which the Court has placed on the various treaty stipulations is not only reasonable, but is also supported by reference to the various articles taken by themselves and in their relation to one another.

In short, the Polish postal service may operate outside the premises at the Heveliusplatz, and its use is not confined to Polish authorities; but it should be observed that its operations are confined to the port of Danzig. This port is a territorial entity, the limits of which, however, as the sphere of operation of the Polish postal service, have not been defined. The Court observes that it has not been asked to define and delimit the port of Danzig, but that, in its opinion, the practical application of the answers given by it to the Council depends on the question of the limits of the port of Danzig within the meaning of the treaty stipulations.

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*Effects of the Opinion*

On June 11th, 1925, the Council had before it the Court's Opinion. Following a report made by M. Quiñones de Léon, a Resolution was passed by the Council, adopting the Court's Opinion and forming a committee of four experts, one being a jurist, to fix the limits of the port in accordance with the considerations set out by the Court, after investigating the question on the spot. The experts appointed are: MM. Hostie, Secretary-General of the Central Commission for the Navigation of the Rhine, former legal adviser of the Marine Department at Brussels, Montarroyos, former President of the water transport sub-committee of the Commission of Communications and Transit, Colonel de Reynier, former President of the Danzig Harbour Board, and Schrœder, Director of the Amsterdam Post Office.

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**Second Annual Report from the Permanent Court of International Justice (15 June 1925—15 June 1926), Series E, No. 2, p. 139**

*Effects of the Opinion*

In the Court's first Annual Report it was stated that on June 11th, 1925, the opinion delivered by the Court on May 16th was submitted to the Council and that the latter had appointed a committee of four experts, including one jurist, for the purpose of tracing the limits of the port in accordance with the considerations brought out by the Court. The experts appointed were: MM. Hostie, Secretary-General of the Central Commission for the navigation of the Rhine, former legal adviser of the Marine Department at Brussels; Montarroyos, former President of the sub-committee for water transport of the Commission of Communications and Transit; Colonel de Reynier, former President of the Danzig Harbour Board; and Schreuder, Director of the Post Office at Amsterdam.

On August 3rd, 1925, the experts handed their report to the High Commissioner of the League of Nations at Danzig who, in his turn, submitted it to the Council under cover of a note dated August 17th. The experts unanimously reported that the port, in the postal sense, should include not only the area occupied by technical installations but also that in which were concentrated the elements which constituted the port from an economic standpoint. Further, they said that the portion of the City to be included in the port must be limited to what was strictly necessary, and that the Polish Postal area should, in fairness, be restricted to those portions of the actual town of Danzig where establishments whose work is connected with the use of the port were concentrated in such numbers that they would seem to acquire a significance entitling them to inclusion. A map annexed to the report showed the line proposed by the Committee.

On a report by M. Quiñones de Léon, the Council adopted the conclusions of the report of the experts on September 19th, 1925, during its 35th session.

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## 16. CERTAIN GERMAN INTERESTS IN POLISH UPPER SILESIA

### Judgment of 25 August 1925 (Series A, No. 6)

### CERTAIN GERMAN INTERESTS IN POLISH UPPER SILESIA (MERITS)

### Judgment of 25 May 1926 (Series A, No. 7)

**Second Annual Report from the Permanent Court of International Justice (15 June 1925—15 June 1926), Series E, No. 2, pp. 99–136**

A. The so-called Case of the Factory at Chorzów

B. The Large Rural Estates

(1) Case of Count Nikolaus Ballestrem.

(2) Case of the Giesche Company.

(3) Case of Christian Kraft, Prince of Hohenlohe-Oehringen.

(4) Case of the Vereinigte Königs- und Laurahütte Company.

(5) Case of the Baroness von Goldschmidt-Rothschild.

(6) Case of Karl Maximilian, Prince of Lichnowsky.

(7) Case of the City of Ratibor.

(8) Case of the Godulla Company.

(9) Case of the Duke of Ratibor.

(10) Case of Count Saurma-Jeltsch.

(Judgment No. 6 on the objections taken by the Polish Government and Judgment No. 7 on the merits.)

I.

## Judgment No. 6

*Diplomatic negotiations as a condition precedent to the institution of proceedings—Interpretation of Article 23 of the Upper Silesian Convention—Power of the Court to base its judgment on objections upon elements belonging to the merits of the suit—Its competence incidentally to construe for the same purpose instruments other than the Convention relied upon—Litispendency: The Court and the Mixed Arbitral Tribunals—Notice of intention to expropriate constitutes a restriction on rights of ownership*

*History of the cases*

In 1915, the German Government concluded with the *Bayerische Stickstoffwerke* Company of Trostberg, Upper Bavaria, a contract, the object of which was, amongst other things, the construction of a nitrate factory at Chorzów (Upper Silesia). The necessary lands were to be acquired on behalf of the Reich, which was to exercise a certain control over the Company, to share in the profits and to have the right on certain conditions to terminate the contract. The machinery and equipment were to be installed by the Company which undertook the management of the factory and for this purpose to make use of all its patents, experiments and improvements. On December 24th, 1919, a new Company was formed called the *Oberschlesische Stickstoffwerke*, to which the German Government sold the Chorzów factory, that is to say the lands, buildings and installations belonging thereto, with all accessories, stocks, etc.; the management and working of the enterprise were to remain, as before, in the hands of the Bayerische which had been a Party to the 1915 contract. On February 29th of the following year, the new company was duly entered in the land register at the *Amtsgericht* at Königshütte as owner of the landed property of the factory.

On July 1st, 1922, however, this tribunal, which had become Polish, gave a decision annulling the entry in the register, declaring that the situation prior to the sale by the Reich was restored and transferring the property rights to the name of the Polish Government. This decision cites, firstly, Article 256 of the Treaty of Versailles, where it is said that Powers acquiring German territory are to receive all property and possessions belonging to the German Empire situated in such territory and, secondly, the Polish law of July 14th, 1920[1], which lays down that if, since November 11th, 1918, the German State has been entered in the land registers of the former German territories as owner, the Polish Courts are automatically to enter in its place the name of the Polish Treasury. Not long afterwards, a duly empowered representative, appointed by a decree of the Polish Ministry, took possession of the factory including movable property, patents and licences and assumed the management of it. The Oberschlesische Stickstoffwerke Company then brought an action before the Germano-Polish Mixed Arbitral Tribunal

[1] Extended to Polish Upper Silesia by the law of June 16th, 1922.

at Paris, for restitution, in reply to which the defendants filed a plea to the jurisdiction; the Company also brought a similar action before the Civil Court of Kattowitz.

In May 1925, when proceedings at Paris were still pending and the action brought before the Court of Kattowitz had not yet been notified to the *Procurature générale* at Warsaw, the German Government took the matter up and by an application filed with the Registry on May 15th, 1925, brought the case before the Court, together with other cases arising out of the following circumstances:

At the end of the year 1924, the Polish Government, following the procedure provided for in No. 1 of § 1 of Article 15 of the Germano-Polish Convention concerning Upper Silesia[2] had given notice to certain persons possessing large rural estates situated in Polish Upper Silesia of its intention to expropriate them. The properties in question were those of Count Nikolaus Ballestrem, of the Georg Giesche's Erben Company (lands at Kattowitz, estate of Mała Dabrowka, estate of Zaleze, estate of Jedlin, estate of Mokre, estate of Baranowice and estate of Gieschewald), of Christian Kraft, Prince of Hohenlohe-Oehringen, of the Vereinigte Königs- und Laurahütte Company, of the Baroness von Goldschmidt-Rothschild, of Charles Maximilian, Prince of Lichnowsky, of the City of Ratibor, of Frau Gabriele von Ruffer, née Countess Henckel von Donnersmarck, of the Godulla Company and of Frau Hedwig Voigt.

The German Government regarded these notices as contrary to Articles 6–22 of the Germano-Polish Convention and, in support of its contention, it submitted the following arguments: The rural estates of Count Ballestrem, of the Giesche Company, of Prince Hohenlohe-Oehringen, of the Vereinigte Königs- und Laurahütte, of the Baroness von Goldschmidt-Rothschild and of the Godulla Company were devoted principally to serving the needs of large industrial undertakings. But, according to the terms of the second paragraph of § 3 of Article 9 of the Convention in question, and of paragraph 2 of Article 13 of the same Convention, the provisions regarding the expropriation of rural property did not apply to agricultural lands, which, in so far as they were devoted principally to serving the needs of large industrial undertakings (timber producing estates, etc.) must be regarded as forming part of such undertakings. As concerns Frau von Ruffer and Prince Lichnowsky, it submitted that the former had, *ipso facto*, acquired Polish nationality and the latter Czechoslovak nationality, so that Article 17 of the Germano-Polish Convention was applicable to them, according to which "German nationals who have *ipso facto* acquired the nationality of an Allied or Associated Power, by application of the Peace Treaty of Versailles, or who, *ipso facto*, acquire Polish nationality by application of the present Convention, shall not be regarded as German nationals for the purposes of Articles 6 to 23". Again, that Frau Hedwig Voigt was entitled to retain her domicile in Polish Upper Silesia. Lastly, that the City of Ratibor could not be regarded either as a German national or as a Company controlled by such nationals, within the meaning of Article 12 of the Convention which indicates that owners may be expropriated by the Polish Government. Furthermore, the German Government argued that the Vereinigte Königs- und Laurahütte was not controlled by German nationals; that the description of the estates to be expropriated was not always sufficiently clear and that the size of some of these estates was less than 100 hectares of agricultural land (the minimum figure fixed by Article 12 of the Geneva Convention).

Six of the owners mentioned above had brought before the Germano-Polish Mixed Arbitral Tribunal actions the object of which was to obtain the suspension of expropriation proceedings and a declaration of their illegality. When the Court received the German Application, two of these actions were pending, but in the other four notice of proceedings had not yet been served on the defendant.

The German Application of May 15th, 1925, therefore relates, firstly, to the Chorzów factory and, secondly, to the large rural estates above mentioned. It was based on Article 23 of the Germano-Polish Convention regarding Upper Silesia, signed at Geneva on May 15th, 1922, which provides for recourse

[2] This clause is as follows: "If the Polish Government wishes to expropriate a large estate, it must give notice of its intention to the owner of the large estate before January 1st, 1922."

to the Court in the event of a difference of opinion as to the interpretation and application of the provisions defining the conditions in which Poland may carry out expropriations in Upper Silesia, and, in the absence of which, German property, rights and interests may not be expropriated. The Application contended that the measures taken by the Polish Government in regard to the Chorzów factory and certain of the owners of large estates had contravened these provisions which form the subject of Articles 6–22 of the Convention and submitted that judgment should be given: (1) that (*a*) Article 2 of the Polish law of July 14th constituted a measure of liquidation as concerned property, rights and interests acquired after November 11th, 1918, and Article 5 of the same law constituted a liquidation of the contractual rights of the persons concerned; that (*b*) in applying this measure, the Polish Government had contravened the Treaty of Versailles; (2) that (*a*) the attitude of the Polish Government in regard to the companies interested in the Chorzów factory was not in conformity with Article 6 and the following articles of the Germano-Polish Convention of Geneva; (*b*) the Court was asked to state what attitude should have been adopted by Poland; (3) that the liquidation of the rural estates enumerated was also not in conformity with the above-mentioned articles of the Germano-Polish Convention.

In the course of the month of June, 1925, the Polish Government informed the Court that it felt obliged in this suit to make certain preliminary objections of procedure and in particular an objection to the Court's jurisdiction. It set out these objections in a Case, dated June 26th, in which it was submitted that the Court had no jurisdiction to deal with the two suits, or, in the alternative, that the Application could not be entertained.

*Composition of the Court*

The Court considered the Polish objections at its Eighth (Ordinary) Session held from June 15th to August 25th, 1925. The following of the Court judges were present:

MM. Huber, *President*; Loder, *Former President*; Weiss, *Vice-President*; Lord Finlay, MM. Nyholm, de Bustamante, Altamira, Oda, Anzilotti, Pessôa, Wang.

Count Rostworowski and Professor Rabel, respectively appointed by the Polish and German Governments for the purposes of the suit as national judges, also formed part of the Court.[3]

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*The Court's judgment (analysis)*

The judgment on the Polish preliminary objections was given on August 25th, 1925.

Before proceeding with its judgment, the Court states that it will follow the division adopted by the Polish Government for the purposes of the objections to which it is about to reply: Affaire 1—the Chorzów factory; Affaire 2—the large rural estates; and the Court states that a declaration that it has jurisdiction to deal with Affaire 1 must in no way prejudice the question of the extent to which it may see fit to deal with the questions contemplated by Submission No. 1 of the German Application in the proceedings on the merits. This submission, indeed, as drafted, appears to the Court to be indefinite in scope and to relate, in its terms, not to Articles 6–22 of the Germano-Polish Convention, but to the Polish law of July 14th, 1920, and the relation between that law and the Treaty of Versailles.

The first chapter of the judgment is, therefore, devoted to the Chorzów factory. The Court first of all disposes of certain preliminary points. The fact that, before the application, there had been no negotiations between the Parties and no definite dispute does not prevent the suit from being duly brought before the Court: for firstly the Germano-Polish Convention does not lay down that there must

[3] Article 31 of the Statute of the Court.

be any previous procedure and, secondly, either of the Parties may at any time make good, by unilateral action, the defect of form constituted by the absence of a definite dispute. Nor can the Court attach any importance to the argument drawn from the wording of Article 23 to the effect that a dispute, in order to be submitted to it, must relate both to the interpretation and application of one of the provisions in question. The conjunction *et* which connects these two terms in the article may, in ordinary language and according to circumstances, equally have an alternative or a cumulative meaning. Moreover, the present case, as the Court will show, concerns both construction and application.

The first question which arises is whether the Court derives from Article 23 of the Convention jurisdiction to deal with the suit before it and, in particular, whether the clauses upon which the decision on the application must be based are amongst those in regard to which the Court's jurisdiction is established. The enquiry which the Court now proceeds to make in order to reply to this question may involve touching upon subjects belonging to the merits of the case. It cannot refrain from doing so, for this would enable a Party to make an objection to the jurisdiction—which could not be dealt with without recourse to arguments taken from the merits—have the effect of precluding further proceedings, simply by raising it *in limine litis*; but it is to be clearly understood that nothing in the judgment on the question of jurisdiction can be regarded as restricting the Court's entire freedom to estimate the value of any arguments advanced by either side during the proceedings on the merits.

The statement of the points in regard to which the Parties disagree shows that the difference of opinion between them relates to the extent of the sphere of application of Articles 6–22 of the Geneva Convention. Now, Article 6 defines Poland's powers in regard to expropriation; it follows that amongst the differences of opinion contemplated by Article 23 are also included those relating to the extent of the sphere of application of these articles and, consequently, the difference of opinion existing between the Parties in the present case. Yet another fact supports this view: Whereas the German Government maintains that the applicable provisions are those contained in Articles 6–22, the Polish Government contends that the question is one of vested rights, a question governed by Articles 4 and 5; these conflicting contentions strikingly emphasize the fact that the difference of opinion relates to the sphere of application of Articles 6–22.

Can, however, the Geneva Convention be set aside by arguing that the Chorzów factory belonged not to German private persons but to the Reich, and that consequently Article 256 of the Treaty of Versailles is the applicable provision? It would seem that this is not so. For—subject to the reservation indicated above—it does not appear either from the documents submitted to the Court or from the statements of the Parties, that the industrial undertaking ever belonged, in its entirety, to the German Government. It included property, rights and interests of an indisputably private character and thus constituted an entity entirely distinct from the lands and buildings necessary for its working. Now, as Article 6 of the Geneva Convention, the purpose of which is to ensure the continuity of economic life, refers to large industrial undertakings, the Chorzów factory must be regarded as a whole, and, in the Court's opinion, the undertaking as such falls under the terms of Articles 6 and the following articles of the Geneva Convention. It is true that when the suit is dealt with on its merits, the interpretation of Article 256 may be recognized to be indispensable, but then it will merely be a question preliminary or incidental to the application of the Geneva Convention; and the interpretation of other international agreements is indisputably within the jurisdiction of the Court, if such interpretation must be regarded as incidental to a decision on a point in regard to which it has jurisdiction.

Again, the Bayerische Stickstoffwerke A.-G. which operated the Chorzów factory is a German private company; the taking over by Poland of the factory put an end to this operation and consequently affected private rights. And, at the time when the Geneva Convention came into operation, the real property, the ownership of which Poland claims, was entered in the land register as the property of

a German company which, as such, falls within the scope of Article 6 of that Convention and whose German character is not disputed.

The jurisdiction possessed by the Court under Article 23 in regard to differences of opinion between the German and Polish Governments respecting the construction and application of the provisions of Articles 6–22 concerning the rights, property and interests of German nationals is not affected by the fact that the validity of these rights is disputed on the basis of texts other than the Geneva Convention.

The Polish Government does not confine itself in respect of the Chorzów factory to raising an objection to the Court's jurisdiction: it also submits that the application cannot be entertained until the Germano-Polish Mixed Arbitral Tribunal at Paris has given judgment. But there is no question of two identical actions: that brought at Paris seeks the restitution to a private Company of a factory of which the latter claims to have been wrongly deprived; at The Hague, the interpretation of certain clauses of the Geneva Convention is sought. Moreover, the Parties are not the same. Lastly, the Mixed Arbitral Tribunals and the Permanent Court of International Justice are not courts of the same character, and this is *a fortiori* true as regards the Court and the Polish Tribunal at Kattowitz. The fact that Article 23 of the Geneva Convention contains a paragraph stipulating that the jurisdiction of the Germano-Polish Mixed Arbitral Tribunal derived from the stipulations of the Treaty of Versailles shall not be prejudiced, assists to bring out the distinction between the two spheres of jurisdiction. Articles 6–23 of the Convention, indeed, relate in several respects to matters dealt with in Part X of the Treaty of Versailles in regard to which no jurisdiction is provided corresponding to that subsequently conferred by Article 23 of the Geneva Convention upon the Court. It was therefore essential to state that the right of appeal to the Court in no way affected the right to bring an action before the Mixed Arbitral Tribunal contemplated in the Treaty of Versailles.

In the last place, the Polish Government has argued that one of the submissions of the German Application sought to obtain from the Court an advisory opinion, which would be contrary to the provisions of Article 14 of the Covenant. This is not, in the Court's opinion, the intention of the applicant Government, which doubtless intended to leave for its Case on the merits the exposition of the facts which would be laid before the Court at that stage of the proceedings. The interrogative form in which the submission is formulated does not suffice to establish a construction which would place that submission outside the scope of Article 23 of the Convention, on which the whole German Application is based.

The Court then proceeds to examine the case of the large rural estates. After referring to the view already expressed by it in connection with the Chorzów factory, regarding the absence of necessity for any procedure previous to recourse to the Court and for a formal recognition of the existence of the dispute, the Court observes that the Polish Government does not attempt to deny that the subject matter of this part of the German Application is governed by the provisions of Articles 6–22 of the Geneva Convention. That Government contends that, hitherto, there has been neither expropriation nor a decision to expropriate, and therefore that the application is premature. Nevertheless, the Court has jurisdiction: it is clear that the dispute which has arisen regarding the question whether notice has or has not been given in accordance with the provisions governing it, namely Articles 6–22 of the Convention, is a difference of opinion respecting the construction and application of those articles and therefore falls within the scope of Article 23. Notice is not merely an invitation to those concerned to submit their observations, it is the first step towards expropriation; as it places serious restrictions on rights of ownership, it can only be given in respect of property liable to expropriation under the relevant provisions of the Geneva Convention. What has to be ascertained is whether the property in question may or may not form the subject of notice of expropriation, and the answer to this question depends on the provisions of Articles 6–22 of the Convention.

The Polish Government has also contended as regards the large rural estates that the application could not be entertained because six of the twelve owners enumerated had already brought actions before the Mixed Arbitral Tribunal at Paris. The reply to this argument is the same as that already given by the Court in the case of the Chorzów factory. Moreover, only in two of the six actions has notice of proceedings been given; so that the Court would in any case retain jurisdiction to deal with the suit in so far as it concerns the other proprietors. Furthermore, the provisions of Article 19 of the Convention which provides for recourse to the Mixed Arbitral Tribunal, contemplate a situation entirely different from that which the Court has to consider. For that article only applies to cases in which the Polish authorities are of opinion that an undertaking or an estate really belongs to a German national, or that a company is really controlled by German nationals and in which the interested Party contends that this is not so.

For these reasons, as regards both cases, the Court dismisses the Polish objections, declares the German Application to be admissible and reserves it for judgment on the merits. Further, it instructs its President to fix, in accordance with Article 33 of the Rules of Court, the times for the deposit of further documents of the written proceedings.

*Observations by M. Anzilotti on one point in the statement of reasons*

M. Anzilotti states that there is one point upon which he is unable to agree with the Court. He notes that, in order to reach the conclusion that the Court has jurisdiction, it is not sufficient to find that the difference of opinion between Germany and Poland relates to the question whether Articles 6 to 22 of the Geneva Convention are or are not applicable in the case of the factory at Chorzów. The applicability of the above articles is, on the contrary, the very condition of the Court's power to deal with the dispute, for it is only as regards disputes concerning the interpretation and application of these articles that Poland has accepted the Court's jurisdiction. A dispute on the point whether a particular case falls within Articles 6 to 22 is nothing else than a dispute on the extent of the Court's jurisdiction; it is in virtue of Article 36, last paragraph, of the Statute—and accordingly when it considers the question of its competence—and not in virtue of Article 23 of the Geneva Convention—i.e. at the moment when it deals with the merits of the case—that the Court can deal with such a dispute.

*Dissenting opinion by Count Rostworowski*

Count Rostworowski states that the interpretation of Article 23 of the Geneva Convention should be a restrictive one.

Count Rostworowski declares that jurisdiction is conferred on the Court under Article 23, paragraph 1, subject to the fulfilment of the following conditions: (1) the facts must include an actual interpretation and application of specified articles; (2) the only articles the interpretation and application of which can give rise to a difference of opinion suitable for submission to the Court are those exhaustively enumerated, namely, Articles 6 to 22 of the same Convention; and (3) there must be a difference of opinion arising between the German and Polish Governments. Count Rostworowski observes that it is sufficient but also essential that this disagreement, this contradiction, this opposition of legal arguments derived from practical experience, should in the first place take shape in a controversy which, far from being a mechanical juxtaposition of two individual opinions, constitutes the mutual confronting of these opinions in the form of diplomatic steps taken by the two Governments. He further observes that Article 23, paragraph 2, contains a negative provision, by which the jurisdiction of the Court, which cannot overlap with that of the Mixed Arbitral Tribunal in Paris, must, within the sphere of its activities—a sphere very limited *ratione materiae*—differ from that of the Tribunal as regards its nature.

Count Rostworowski states that the German Government's Application instituting proceedings, as regards its first and second conclusions, does not show that any of these conditions have been fulfilled.

As regards the third conclusion of the Application in the matter of the rural estates, he considers that this is not based on the previous existence of an official dispute between the two Governments and thus does not satisfy one of the essential conditions laid down in Article 23.

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## II.

## Judgment No. 7

*The Court may give declaratory judgments—Compatibility of the Polish law of July 14th, 1920, and the Upper Silesian Convention—Derogations from the principle of respect for vested rights are in the nature of exceptions—Right of Poland to avail herself of the Armistice Convention and the Protocol of Spa of December 1st, 1918—Germany's capacity to alienate property after the Treaty of Versailles*

*Form of notice of expropriation—Interpretation of Article 9 of the Upper Silesian Convention: the conception of "subsidence". The conception of "control" in the Upper Silesian Convention—Proofs of the acquisition of nationality—For questions of liquidation, a municipality may be assimilated to a person—The conception of domicile*

*Additional Application*

On the day on which judgment was given, the German Government filed with the Registry an additional Application regarding two other rural estates belonging to the Duke of Ratibor and Count Saurma-Jeltsch, which estates had also been made the subject of notice of expropriation by the Polish Government. The Court was asked to join their two suits to those submitted by the original Application, and in their case also it was submitted that liquidation was not in conformity with Article 6 and the following articles of the Geneva Convention. On the following September 11th, the Polish Agent agreed to the joinder of these suits, which was confirmed by the Court by a special decision dated February 5th, 1926.

The documents of procedure in regard to the merits of the cases submitted by the two Applications were filed by the dates fixed, which were subsequently, at the request of the Respondent, each postponed by one month.

*Composition of the Court*

An extraordinary session of the Court (Tenth Session) was then summoned for February 2nd, 1926; the Court was composed as follows:

MM. Huber, *President*; Loder, *Former President*; Weiss, *Vice-President*; Lord Finlay, MM. Nyholm, Altamira, Anzilotti, Yovanovitch, Beichmann, Negulesco.

Count Rostworowski and Professor Rabel also sat in the Court, having been once more appointed as national judges by their respective Governments.

*Hearings*

The first public hearing of the session was held on February 5th. From February 5th-11th (the large rural estates) and February 16th-26th (Chorzów case) the Court heard the oral pleadings, replies and rejoinders submitted by the Agents of the Parties.

*Second Order and production of witnesses*

On February 26th, the President declared the oral presentation of the case to be at an end, without, however, declaring the proceedings closed, thus reserving the Court's right to put questions to the Parties. By an Order dated March 22nd, the Court invited the Parties to furnish at a public hearing, by any means which they might see fit, further information on certain points relating to the cases of the large estates, subject to the Court's right, should the evidence thus produced be regarded by it as insufficient, to make good such insufficiency by the means provided for in the Statute. These points were set out in a letter sent by the Registrar to the Parties.

On March 24th the attention of the Parties was drawn to the fact that Article 47 of the Rules of Court applied by analogy in this case and that, consequently, they must inform the Registrar in writing as to the evidence which they intended to produce. Following upon this communication, the German Government stated that it would call several expert witnesses and would submit documents and plans. The Polish Government, for its part, announced that it intended to call a single witness. The hearings for the evidence of these witnesses were held from April 13th-16th. In accordance with Articles 50 and 51 of the Rules of Court, the President proceeded to call the names of the witnesses and caused them to make a declaration to the effect that they would speak the truth, the whole truth and. nothing but the truth. Then, under Article 46 of the Rules, the following order was adopted: the representative of the Applicant was called upon to put questions to his witnesses, who were subsequently cross-examined by the other Party and by judges. The same procedure was then applied as regards the witnesses called by the Respondent. The evidence of each witness was translated into one of the Court's official languages by the Party which had called him. Translation into the other official language was effected by the Registry; the French version, provided by the Parties, being authoritative.

At the conclusion of the evidence, the authoritative version of it was communicated to the Agents for transmission to the witnesses in order to enable the latter to make any observations. The evidence was read out in order of date at a public sitting, the witnesses being allowed, if they so desired, to submit further observations before signing their depositions in token of approval. Then the President declared the hearings contemplated in the Order of March 22nd to be at an end, still, however, subject to the Court's right to supplement the information given by the means authorized by the Statute.

The Court did not avail itself of this right and delivered its judgment on May 25th, 1926.

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*The Court's Judgment (analysis)*

Before approaching the examination of the case, the judgment defines the submissions of the Parties as they appear after the modifications made in them in the course of the written or oral proceedings. Finally, and without any objection on the part of the Respondent to the modification, Submission No. 1 of the Applicant is formulated as follows:

(1) The application of Article 2 and of Article 5 of the law of July 14th, 1920, in Polish Upper Silesia, decreed by the law of June 16th, 1922, constitutes a measure of liquidation within the meaning of Article 6 and the following articles of the Convention of Geneva in the sense that, in so far as the above-mentioned articles of the Convention of Geneva do authorize liquidation, that application must be accompanied by the consequences attached to it by the said Convention, in particular the entry into operation of Articles 92 and 297 of the Treaty of Versailles prescribed by the said Convention, and that, in so far as those articles do not authorize liquidation, that application is illicit.

Submission No. 2 remained in the form in which it was stated in the Application instituting proceedings.

As regards Submission No. 3, the Applicant "subsidiarily" formulated it so that it was not *liquidation* which was alleged to be contrary to the provisions of Article 6 and the following articles of the Geneva Convention, but the *notices of an intention to liquidate*. The Respondent at first said that the new formula implied the withdrawal of the other and took its place, and that, further, it was essentially different from it, and he argued that, as a modification of the kind was inadmissible at that stage of the proceedings, the original submission should automatically be regarded as withdrawn by the Applicant. The latter, however, having argued that it amounted in reality merely to a slight modification in the mode of expression, the Respondent said that in order to simplify the argument, he would leave aside all these questions of form and agree to argue the matter on the basis of the subsidiary German submission.

Modifications also took place in regard to the estates mentioned in Submission No. 3. The suit regarding the estate of *Frau Hedwig Voigt* had been withdrawn by the German Agent at the hearing of July 18th, 1925, and this had been duly placed on record by the Court. A similar statement was made at the hearing of February 5th, 1926, in regard to the estate of *Frau Gabriele von Ruffer*, and to one of the estates of the *Giesche's Erben Company*, namely that of *Mała Dabrowka*. As regards the estates of *Baroness von Goldschmidt-Rothschild*, the Agent of the Polish Government stated, at the hearing of February 8th, 1926, that they would not be liquidated. On February 10th, the Agent of the German Government noted this statement, but did not withdraw his application. In regard to the lands situated at Katowice and belonging to the *Vereinigte Königs- und Laurahütte*, the Agent of the German Government confined himself to noting a statement by the Respondent to the effect that notice had been withdrawn.

To resume, the submissions of the Applicant therefore cover the large estates enumerated in the Application (except the estates of Frau Hedwig Voigt, Frau Gabriele von Ruffer and the Mała Dabrowka estate belonging to the Giesche Company) and those which formed the subject of the additional Application (cases of the Duke of Ratibor and Count Saurma-Jeltsch). In their final form these submissions are to the effect that the notices of an intention to liquidate were not in conformity with Article 6 and the following articles of the Geneva Convention.

To the submissions of the Applicant, thus amended, the Respondent opposes the following submissions: (1) that the Applicant should be non-suited as regards his submission No. 1; (2) that, no measure of liquidation having been taken by the Polish Government, there is no ground for a decision as to the conformity with the provisions of Article 6 and the following articles of the Geneva Convention of the attitude of the Polish Government in regard to the Oberschlesische Stickstoffwerke and the Bayerische Stickstoffwerke; (3) that the Applicant should also be non-suited as regards the claims set out in his submission No. 3.

The judgment does not, properly speaking, contain a statement of the facts. For the Chorzów case, the Court confines itself to referring to the history of that case contained in Judgment No. 6; as regards the cases of the large estates, it sets out the facts as it proceeds with the legal argument.

The portion of the judgment devoted to this discussion is subdivided into two sections, of which the first relates to the Chorzów case, whilst the second deals successively with the ten individual causes of action belonging to the cases of the large estates.

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## Section A

### The so-called case of the Factory at Chorzów

The Court, in the first place, gives the reasons for which it intends to deal separately with submissions Nos. 1 and 2, although in Judgment No. 6 it had taken them together under the heading "The Chorzów case". On analysis only submission No. 2 really concerns the Chorzów case. It is true that submission No. 1 which, originally, did not seem to relate to Articles 6–22 of the Geneva Convention, in its new form directly bears upon certain general relations between the Polish law of July 14th, 1920, and the Geneva Convention. For this reason, in so far as in taking over the Chorzów factory, the Polish Government relied on the law of July 14th, 1920, submission No. 1 plays the part of a question preliminary to submission No. 2. As, however, according to the Applicant, the application of that law in Upper Silesia was in itself not in conformity with the provisions of Articles 6–22 of the Geneva Convention (submission No. 1) and the attitude of the Polish Government in regard to the Oberschlesische Stickstoffwerke and the Bayerische Stickstoffwerke was in itself not in conformity with the above-mentioned articles (submission No. 2), submission No. 1 must be recognized as possessing the character of a principal and independent submission.

Proceeding, then, to consider the latter submission, in regard to which, in Judgment No. 6, a reservation had been made as regards the Court's jurisdiction to deal with it, the Court, in the first place, examines and overrules the objections raised by the Polish Government in regard to its jurisdiction. One of these objections was based on the abstract character of the decision asked for, a character which—it was argued—made it incompatible with Article 59 of the Statute. In regard to this point the Court decides that the article referred to does not exclude declaratory judgments which are expressly provided for by Articles 36 and 63 of the Statute and constitute one of the most important functions of the Court.

Proceeding next to define the import of submission No. 1, the Court arrives at the conclusion that it raises in a general way the question of the compatibility of Articles 2 and 5 of the law of July 14th, 1920, with Articles 6–22 of the Geneva Convention, and that therefore the question whether these two groups of provisions are or are not compatible must first be considered.

The latter of these two groups constitutes Heading III of the first part of the Geneva Convention. This Heading establishes a right of expropriation on the part of Poland in Polish Upper Silesia under certain conditions. This right constitutes an exception to the principle of respect for vested rights recognized by international law and confirmed as regards Upper Silesia generally under Heading II of the Convention; the derogation is therefore strictly in the nature of an exception and, for this reason, exclusive. Any measure affecting the property, rights and interests of German subjects covered by Heading III of the Convention, which would overstep the limits set by the generally accepted principles of international law and were not justified on special grounds taking precedence over the Convention, would be incompatible with the régime established under the Convention.

Again, one of the formal conditions for the exercise of the right of expropriation is that previous notice of an intention to expropriate should be given; this notice must only cover property liable to expropriation and therefore presupposes a preliminary enquiry as to the existence of the necessary conditions. The Court infers from this that there may be no dispossession of property except in the form intended by the Convention, unless it be first established that the Convention is not applicable.

Considering next the law of July 14th, 1920, in the light of these principles, the Court observes that Article 2 of the law treats as null and non-existing rights which private persons may have acquired by deeds of alienation executed by the Crown, the German Reich, etc., if such deeds were drawn after November 11th, 1918. And, by authorizing the Polish Treasury to demand the eviction of any persons who, after the coming into force of the law, remain, in virtue of a contract of the kind contemplated

in Article 5, in occupation of one of the landed properties in question, this article, in the Court's view, recognizes a right to disregard even private rights derived from contracts previous to November 11th, 1918. These articles, therefore, may affect private property and withdraw it from the protective régime instituted by Heading III, subjecting it to measures prohibited by the Convention; and they are applied automatically, without any investigation as to the title of ownership or validity of each transfer or contract. No means of redress is given to interested Parties and no indemnification is provided for. The Court arrives at the conclusion that both in form and in substance the application of Articles 2 and 5 of the Polish law is not compatible with the system established by Heading III of the Geneva Convention.

The Respondent, however, has contended that the provisions of the law of July 14th have no connection with the Geneva Convention; for they merely give effect to rights which Poland derives from other international instruments, namely, the Armistice Convention, the Protocol of Spa of December 1st, 1918, and the Treaty of Versailles. In the second place, he has argued that the measures taken in application of the law of July 14th, 1920, do not constitute liquidation within the meaning of Heading III which is not therefore applicable to them.

Before approaching the first of these two arguments which constitute the crux of the dispute, the Court recalls that it can only consider the interpretation of the above-mentioned instruments as a question preliminary or incidental to the application of the Geneva Convention.

As regards the Armistice Convention and the Protocol of Spa, Poland is not, in the Court's opinion, a contracting Party. At the time when these two conventions were concluded, she was not recognized as a belligerent by Germany with whom she was not in a state of war; that, moreover, is the reason why she is not entitled to benefit under the reparations' régime. The Court also discards the notion that Poland subsequently tacitly adhered or acceded to these instruments. A treaty only creates law as between the States which are parties to it: in case of doubt, no rights can be deduced from it in favour of third States.

As regards the Treaty of Versailles, and in particular Article 256 on which the Respondent mainly relies, the Court observes firstly that, according to Article 4 of the Geneva Convention, which takes precedence of the Peace Treaty, the decisive date for the purposes of the recognition of vested rights is the date of the transfer of sovereignty over Upper Silesia. It is true, however, that that article makes a reservation in regard to Article 256 of the Treaty, but the latter contains no prohibition of alienation and does not give the State to whom territory is ceded any right to consider as null and void alienations effected by the ceding State before the transfer of sovereignty. Article 92, paragraph 3, of the same treaty, confirms this construction with particular reference to Poland, for it speaks of property and possessions of the Empire or German States "which pass to Poland with the territory transferred". The same conclusion is also arrived at, namely, that in the case of territories changing hands by cession, the decisive date is that of the transfer of sovereignty, if Article 75 of the Treaty be taken into consideration according to which, as regards Alsace-Lorraine, the decisive date is, as an exceptional case, November 30th, 1918.

Whilst it is therefore clear that the Treaty of Versailles cannot have the effect of rendering illegal acts of alienation contemplated by the Polish law of 1920 and executed before the coming into force of the Treaty, the Court also considers that the abandonment by Germany of her rights and titles under Article 88 of the Treaty of Versailles which merely contemplates the possible renunciation of sovereignty over the territories in question, cannot involve the immobilization of all property belonging to the State during the period from the day of the coming into force of the Treaty until the transfer of sovereignty over Upper Silesia. Germany retained until the actual transfer of sovereignty the right to dispose of her property, and, in the Court's opinion, only a misuse of this right or a failure to observe the principle of good faith could endow an act of alienation with the character of a breach of the Treaty.

Such misuse cannot be presumed, and it rests with the Party who states that there has been such misuse to prove his statement.

As regards the second Article of the Treaty of Versailles, adduced by Poland—Article 248—the Court observes that it establishes a first charge on the property and resources of the Empire, but does not imply a prohibition of alienation. Moreover, the rights reserved by it are, at all events, exercised through the Reparation Commission and it in no way authorizes a Power on its own account to treat an alienation as null and void, even in the case of a Power entitled to reparations, which Poland is not.

Having shown by means of the arguments set out above, which relate exclusively to Article 2 of the law of July 14th, 1920, that there is no title of international law which justifies that article, the Court states that the position is the same as regards Article 5, in spite of the fact that Poland claims to have acquired, free from all charges, the property mentioned in Article 256 of the Treaty of Versailles. In Advisory Opinion No. 6, the Court has already said in this connection that Article 5 cannot be regarded as based on Article 256 of the Treaty of Versailles, because that Treaty clearly recognizes the principle of respect for private rights in the event of a change of sovereignty, though it does not expressly enunciate it. And nothing has been advanced in the course of the present proceedings calculated to alter the Court's opinion on this point.

The argument advanced by Poland, in the second place, in order to deny the applicability of Heading III of the Geneva Convention to the law of 1920, was based on the contention that the application of the law did not constitute a measure of liquidation within the meaning of Articles 6–22 of the Convention. According to the Respondent, the conception of liquidation only contemplates measures taken against German private property as such, whereas the law in question relates to a suppression of private rights affecting certain property without regard to the nationality of the owners. On the other hand, in the view of the German Government, "liquidation" embraced all cases in which a private right of a German national was set aside by a measure contrary to generally accepted international law.

Confronted with these conflicting arguments, the Court, without disputing that the liquidation régime instituted by the Treaty of Versailles, and the actual measures of expropriation allowed by the Geneva Convention, apply to German property as such, observes that expropriation without indemnity is certainly contrary to Heading III of the Convention, and a measure prohibited by the Convention cannot become lawful under that instrument by reason of the fact that the State applies it also to its own nationals.

In the last place, the Respondent argued, in order to prove the inapplicability of Heading III of the Geneva Convention to the law of July 14th, 1920, that abrogations of rights of the nature of those effected under that law would come under Heading II of the Convention which provides for recourse to the Upper Silesian Tribunal. The Court, however, observes that the fact that any infraction of Heading III, which constitutes an exception to the general principle of respect for vested rights, is at the same time an infraction of Heading II, does not make such infraction any the less an infraction of Heading III. Moreover, the provision made in Heading II for the jurisdiction of the Upper Silesian Tribunal, to which corresponds in Heading III the jurisdiction conferred on the Germano-Polish Mixed Arbitral Tribunal, only contemplates an action for compensation brought by the interested Party against the State, whereas the Court's jurisdiction relates to disputes between the German Government and the Polish Government. Article 23 definitely establishes the Court's jurisdiction which is to take cognizance, as regards the two Governments concerned, of measures contrary to Heading III of the Convention, regardless of whether any claim for compensation on the part of the interested Party in consequences of these same measures must be submitted to the Mixed Arbitral Tribunal, or to the Upper Silesian Tribunal.

The Court is therefore of opinion, as regards submission No. 1, that the application in Upper Silesia of Articles 2 and 5 of the Polish law of July 14th, 1920, is not in conformity with Articles 6–22 of the Geneva Convention, in so far as it affects the persons or companies referred to in Heading III of the Convention.

### Submission No. 2

The Court next proceeds to consider submission No. 2 which, as will be remembered, is divided into two parts, *(a)* and *(b)*. The reason why the Court did not at once declare in Judgment No. 6 that it had no competence to deal with submission 2 *(b)*, in spite of the fact that it was couched in the form of a question, was that it recognized that this submission was intended (as part *(a)*) to obtain a decision and supposed that the Applicant would, in his Case on the merits, formulate properly set out claims in respect of it. No such data having been furnished, the Court does not consider itself in a position to give a decision: it cannot substitute itself for the Parties and formulate submissions in their name simply on the basis of arguments and facts advanced by them. The Court therefore will only deal with submission 2 *(a)*.

In regard to this submission, the Court observes that, having already established that the application of the Polish law of July 14th is contrary to the Geneva Convention in so far as it affects the property of the persons contemplated in Heading III of the Convention, it will suffice, in order to be able to give judgment on this submission, to ascertain whether the Oberschlesische and the Bayerische—the two Companies mentioned by the Applicant—are really the owners of the rights which together constitute the Chorzów enterprise.

The Court first takes the case of the Oberschlesische, a Company controlled by German nationals to which the Reich had ceded the Chorzów factory founded by it with the co-operation of the Bayerische. The Applicant, on the basis of the various contracts concluded in connection with this cession, argues that the Chorzów enterprise lawfully belonged to the Oberschlesische and possessed the character of property of German nationals or of companies controlled by German nationals. The Respondent replies that this is not so because he himself possesses a better title based on international agreements. In the second place, he disputes the validity in municipal law of the contracts in question.

The Court here remarks that, for the reasons given in connection with submission No. 1, the only point which it has to consider as regards the first argument is the following: by parting with the factory, did the Reich misuse its right to alienate property situated in the plebiscite area, before the transfer of sovereignty? In the Court's opinion the sale of the factory appears to have been a legitimate act of administration: the Reich abandoned an enterprise showing a serious deficit by selling it under conditions offering a reasonable guarantee that the capital invested would eventually be recovered. Moreover, the Reich had, at all events, a contractual right to abandon the enterprise.

In the same connection, there are not sufficient grounds for regarding this transaction as other than genuine. Again, it cannot be regarded as calculated to prejudice Poland's rights. For, at the time when it took place, the Geneva Convention did not exist and could not be foreseen; the question of the good faith of the Government of the Reich must therefore be considered in the light of the Treaty of Versailles alone and an examination of the alternative which presented itself under the Treaty leads to the conclusion that there is no justification for the view that the alienation was contrary to obligations arising under the Treaty, or even null and void, or again contrary to the principles of good faith. This conclusion is not affected by the fact that at the time when the contracts in regard to the alienation of the factory were concluded, the Treaty, though not yet in force, was already signed. For since the Treaty did not impose on Germany an obligation to refrain from alienation, it is impossible to regard as an infraction of the principle of good faith, Germany's action in alienating the property before the coming

into force of the Treaty which had already been signed. There is therefore, in the Court's opinion, no instrument of international law which can be adduced to prevent the application of the Geneva Convention to the rights of the Oberschlesische in respect of the Chorzów factory.

As regards the Respondent's subsidiary objection adduced from German municipal law, it was based on the contention that the contract of December, 1919, and the ensuing transfer were fictitious or fraudulent.

In this connection, the Court has already observed that from the point of view of international law, the transaction must be regarded as effective and entered into in good faith. The arguments of the Respondent contain no reasoning calculated to modify, from the standpoint of municipal law, the conclusion at which the Court has arrived on the basis of international law. The Court holds that the Oberschlesische's right of ownership must be regarded as established from this standpoint, its name having been duly entered as owner in the land register. In any case, the entry can only be annulled in pursuance of a decision of the competent tribunal. This follows from the principle of respect for vested rights, a principle which forms part of generally accepted international law which, as regards this point amongst others, constitutes the basis of the Geneva Convention.

In the last place, the Court has to consider whether the situation resulting from the cession by the Reich to the Oberschlesische Stickstoffwerke of the Chorzów factory, though valid in municipal law and compatible with Germany's international obligations, does not nevertheless evade the application of Heading III of the Geneva Convention. The Court here examines the question whether, having regard to the contractual relations which continued to subsist between the Reich and the Oberschlesische Stickstoffwerke, the factory did not continue, in fact, to belong to the Reich within the meaning of Article 256 of the Treaty of Versailles. The Court arrives at the conclusion that this is not so. Even granting that the position of the Reich, in virtue of these relations, were equivalent in fact and from an economic standpoint to that of owner of the shares, the application to the Oberschlesische of that article would not be justified. That article contemplates property of the Reich and not private concerns in which the Reich has a preponderant interest. In accordance with the principles governing State succession, the article must be construed in the light of the law in force at the time when the transfer of territory took place. Now, at that time, the ownership of the Chorzów factory undoubtedly belonged to the Oberschlesische and not to the Reich.

As the Respondent has not contended that the Oberschlesische was controlled by the Reich and not by German nationals, the Court need not go into the problems raised in a similar connection, by such a contention.

In the last place, the Court approaches the question of the rights of the Bayerische, a company controlled by German nationals. If, as the Court holds, the Oberschlesische is to be regarded as lawful owner of the Chorzów factory, the contracts concluded by it in regard to that factory—more especially with the Bayerische—must likewise be regarded as valid. Now it is clear, in the Court's view, that the rights of the Bayerische have been directly prejudiced by the taking over of the Chorzów factory by Poland. As these rights related to the factory and were, so to speak, concentrated there, the prohibition of liquidation, contained in the last sentence of Article 6 of the Convention, applies in respect of them. Poland should have respected the rights held by the Bayerische under its contracts and her attitude in regard to the Bayerische, like her attitude in regard to the Oberschlesische, has therefore been contrary to Article 6 and the following articles of the Geneva Convention.

## Section B

## The Large Rural Estates

The Court then proceeds to deal with the so-called cases of the large estates (Submission No. 3 of the Applicant) to which Section II of the Judgment is devoted. These cases, which originally numbered twelve, were reduced to ten owing to circumstances already described. Certain of them embrace several separate causes of action.

All these cases and causes of action contain certain common factors, and, before examining one by one each of them individually, the Court considers the common factors in order to lay down a number of general principles applicable to all the cases or to certain groups of them.

First of all, however, a preliminary point has to be settled: should the Court give judgment on the original submission, as worded by the Applicant in his Applications, or upon the so-called subsidiary submission?

The Court decides in favour of the latter; for, as the question of its admissibility does not arise, having been disposed of by the agreement between the Parties described above, it only remains to ascertain whether the subsidiary submission is substantially equivalent to the submission in the Applications. This latter question, however, is closely bound up with the question whether the notices contemplated in Article 15 may only be served in respect of estates liable to expropriation under the terms of the Convention. For in that case, the notification of an intention to expropriate would only be in conformity with the Convention if the expropriation itself were so. Now, in the opinion of the Court, as stated in Judgment No. 6, which opinion, moreover, has been accepted by the Respondent's Agent, the giving of notice cannot be regarded as in conformity with the Convention, except in respect of estates in regard to which the conditions requisite for expropriation exist; it is the first step in the procedure of expropriation which constitutes a whole governed by the same principles.

Since, therefore, the two forms of the third submission are equivalent, the Court may, for the purposes of its judgment, base itself on the so-called subsidiary submission.

The Court next considers an objection of a general nature raised by the Applicant in regard to the validity of certain notices served by Poland. This objection, which arose in the course of the written proceedings, is based on the inaccurate description given in the notices of the estates covered by them. Even if this objection had not been subsequently abandoned, the Court could not admit it. Of course, it follows from the very nature of the notice that it must embody the indications necessary for the identification of the large estates which the Polish Government intends to expropriate, but no hard and fast form for this purpose is laid down. The nullity of inaccurate notices is not provided for in the Convention and cannot be presumed. There can be no question of nullity except in so far as a notice covers property not liable to expropriation. If the notice also applies to property liable to expropriation, it remains effective as regards such property.

After observing that the causes of action under consideration relate in some cases to estates, the exclusively agricultural character and use of which have not been disputed, and in others to estates principally devoted to serving the needs of industrial enterprises, the Court proceeds to consider from a general standpoint the interpretation of the clause of the Germano-Polish Convention applicable in every case falling under the second of the categories, namely: Article 9, § 3, paragraph 2. This clause forms part of the chapter of the Convention dealing with large-scale industry, whilst large rural estates form the subject of a following chapter. It would not therefore be correct to interpret it limitatively, regarding it as an exception to the principle of the liability to expropriation of the large rural estates. Since it is included in the system of rules relating to large scale industry, it must be construed having regard above all to the relation in which it stands to those rules, the object of which is to maintain

industrial enterprises. For this reason its intention is to cause rural estates principally devoted to serving the needs of large industrial enterprises to share the same treatment as these enterprises.

The essential factor to be considered in connection with the interpretation of the clause is the *purpose* to which these estates are devoted, that is to say, a situation of fact established by the will of man. It is in no way essential that the subserviency of the estate should be in the nature of a necessity, nor need the estate exclusively serve the needs of the enterprise. It is sufficient that this service should be the principal one, that is to say, that the principal purpose of the estate should be to serve the needs of the enterprise; moreover, this principal purpose may result from an accumulation of different uses. It is unnecessary to say that these needs must not be fictitious or imaginary, but it would be inadmissible only to take into account needs on which the very existence of the enterprise is dependent, or to exclude temporary needs and future needs, since it is necessary for every industrial enterprise to provide in good time for such needs. These needs may differ widely in nature, as is shown by the examples given in the Convention: "dairy farming estates, timber raising estates, etc." The economic and social needs of the workers are also to be taken into account as well as the technical requirements of the enterprise as such. On the other hand, it would not be justifiable to argue from the examples (given within brackets in the text of the Convention) that the mere possession of the surface above mines, without devoting it to agriculture, cannot enter into account. The decisive words in this connection are: "rural estates which are principally devoted", etc. Uncultivated or uncultivable lands are certainly rural estates; if in actual fact they are devoted to the required purpose, they also fall within the scope of Article 9.

The Court feels called upon expressly to state that an opinion can only be formed concerning the needs defined above in relation to the conditions peculiar to Upper Silesia.

It is in the light of the foregoing considerations that the Court is enabled to form an opinion on one of the points in dispute: the so-called question of subsidence, a question which plays a predominant part in some of the cases of the large estates. The Applicant has pointed out that mining enterprises in Upper Silesia secure ownership of the surface in order to protect themselves from the economic consequences of mining operations: the collapse and subsidence of the surface; and he regards this circumstance as constituting a devotion of the surface to the needs of the mining industry. The Respondent has not disputed that mine-owners in Upper Silesia actually do proceed in this way, but he has argued that, at the present day, ownership of the surface is not absolutely necessary for this purpose, because modern technical knowledge has introduced processes which enable any damage to the surface to be avoided; that is to say, that possession of the surface is not in the nature of a necessity. Even if that were true, says the Court, it does not affect the fact that Article 9 does not require that the subserviency of a rural estate to the needs of an undertaking should be in the nature of a necessity. The choice between several possible methods of satisfying the same need must be left to the owner of the enterprise himself. The Court also observes that it is expedient for mine-owners to possess the surface in order to avoid the possible consequences of speculation on compensation to be obtained.

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The second chapter of Part II is devoted to the individual cases.

The Court first of all takes the case of Count Ballestrem's estates, belonging to the category of estates devoted to serving the needs of industry.

*(1) Case of Count Nikolaus Ballestrem*

The Applicant's objections to the notice in respect of the properties of Count Ballestrem, a German national, are as follows: in the first place, the estates completely cover mines belonging to Count Balles-

trem himself or to associations of which he is a member; in the second place, the estates are farmed as a dairy farm for the benefit of the workers.

As regards the first of these objections, the Applicant argues that the topographical coincidence of the surface and the mining concessions show that, owing to subsidence, the possession of the surface is necessary to the working of the mines underneath. In regard to this point, the Court says that, having already stated its views on this question in general, it only remains for it in this case to ascertain whether the principal purpose served by the estates is really that alleged by the Applicant, and, secondly, whether the fact that Count Ballestrem, owner of the surface, is not sole owner of all the mines covered by it, can deprive the objection of its force.

In regard to the first of these points, the Court has been able to deduce the following considerations from information furnished by the Parties: the land in question is geologically identical with the Upper Silesian mining district as a whole and consequently the general reasons set out above also apply to it; subsidence has already occurred; the coal seams are situated at a short distance below the surface; the estates exactly coincide with the mining concessions. Again it has been proved that the purchase of a part of the area covered by the notice has been effected precisely in order to avoid the economic consequences of subsidence.

In regard to the second point, the Court states that Count Ballestrem, though not sole owner of three of the mines situated on his estate, nevertheless holds the majority of shares in them, and these are included in his entailed property as well as the estates in respect of which notice has been given. The Court infers from these facts that Count Ballestrem is not in the position of a third Party in regard to these companies; for he will be the first and greatest sufferer from any injury done to the concerns in which he is a shareholder. As regards certain of them also, Count Ballestrem is, under contract, solely responsible for damage by subsidence.

These considerations induce the Court to the conclusion that the principal objection to expropriation raised by the Applicant is well-founded. There is therefore no need for the Court to consider in detail the subsidiary objection based on the fact that dairy farming is conducted on the Ballestrem estates, which farming is moreover, as the Court observes, devoted to serving the needs of the working population.

*(2) Case of the Giesche Company*

The Court next takes the cases of the Georg von Giesche's Erben Company. It observes, in the first place—a fact which is not disputed—that this Company must be regarded as a company controlled by German nationals within the meaning of the Geneva Convention; that it possesses this character is shown by the fact that the general manager is German, as also five out of seven members of the Board of Control, and that all the shares of the Company belong to a company whose registered offices are at Breslau and the German character of which has not been disputed. After observing that there is some uncertainty as to the identification of the portions subjected to expropriation, the Court proceeds to consider separately the case of each of the estates under notice belonging to the Company.

Properties at Katowice

It has been stated above that the Agent of the Respondent stated that the notice had been withdrawn in respect of the properties situated at Katowice, but that the Agent for the Applicant asked the Court to give judgment in regard to these properties, in conformity with the Applicant's submission and the declaration of the Respondent. The Court therefore records that withdrawal of the notice is henceforth an established fact and that the properties above mentioned are once and for all immune from any possible expropriation under Article 15 of the Geneva Convention.

### The Zaleze Estate

The Respondent has raised a principal objection to the expropriation of the Zaleze estate and also a subsidiary one. The former is that, as is shown by the maps, the whole of the estate is situated above the Company's mines. In accordance with the principles already established by the Court, the latter therefore may base its judgment on this established fact. Further, the so-called subsidiary objection is to the effect that most of the cultivable part of the estate is leased to workmen, the remainder being farmed directly by the Company; this farming, which is carried on at a loss, is devoted to supplying the workers with foodstuffs and to the production of hay and straw for the pit-ponies. These facts must be regarded as established since they have not been disputed by the Respondent; and they suffice to prove that the properties are principally devoted to serving the needs of the mining undertaking. Both objections are therefore well-founded.

### The Jedlin Estate

The Applicant has contended in support of his objection to expropriation that, in the first place, this estate was acquired with a view to the use of the sand found upon it for the requirements of the mines. The sand is not yet being worked, but it must be regarded as certain that the estate will be effectively devoted to the needs of the enterprise, having regard to the fact that sand is used for the hydraulic filling of mines and since, according to the principles already established, a future use falls within the scope of Article 9, § 3, of the Geneva Convention. In these circumstances, says the Court, it is superfluous to devote attention to the present purpose served by the part of the estate utilized for agriculture.

### The Mokre Estate

The Applicant, in objecting to the expropriation of this estate which is situated over mines or coal seams and a part of which is devoted to dairy farming, relies mainly on the contention that it serves the purpose of safeguarding the mining concern against the consequences of subsidence; subsidiarily he argues that the estate is in part devoted to dairy farming for the supply of the needs of workmen dependent on the concern. The situation therefore is similar to that of the Ballestrem estate.

The statements of the expert witnesses show that these objections are well-founded; it has in fact been proved that a serious danger of subsidence exists, more especially owing to the fact that the seams worked are only a short distance below the surface; in the portions not yet worked, borings have shown the existence of new scams; furthermore, a document dated October 10th, 1901, proves that, at that time, steps were being taken for the acquisition of the Mokre estate for these two reasons.

As regards the second objection, the Court refers to the case of Count Ballestrem.

### The Baranowice Estate

The Baranowice estate is composed of interdependent portions—wooded and agricultural. The Respondent at first said that the timbered portions employed for industrial purposes were not covered by the notice, but later he took the standpoint that these portions were inseparable from the agricultural part, so that the whole estate was liable to expropriation.

The Court, however, regards it as proved that the estate was acquired for the exploitation of the timbered portions for the production of pit-props. As regards the agricultural parts, they are devoted to the provision of foodstuffs for the workers and hay and straw for the pit-ponies. The Court therefore regards as well-founded both the Applicant's principal objection to the notice, based on the preponderating importance of the timber production which is devoted to the needs of the concern, and his subsidiary objection in regard to the agricultural portions.

This estate coincides throughout its extent with mining concessions belonging to the Giesche Company and was at one time for the greater part wooded. The timber has been destroyed by fire, but this fact does not deprive the land of its essential character as a timber-growing estate which has been advanced by the Applicant, a character upon which no appreciable influence can be exerted by the circumstance that a small portion of the land is under cultivation. Moreover, this cultivated portion is utilized for the workers, and this use undoubtedly comes within the conception of devotion to the needs of the enterprise as established by the Court. This estate therefore fulfils the conditions of Article 9, § 3, of the Geneva Convention.

*(3) Case of Prince Hohenlohe-Oehringen*

The rural estates belonging to Christian Kraft, Prince of Hohenlohe-Oehringen, a German national, form part of his entailed property; but he has leased them to the Hohenlohe-Werke Company. The Application mentions them amongst those principally devoted to serving the needs of industrial undertakings and for this reason immune from expropriation. During the proceedings, however, no information has been furnished as to these needs. The mere assertion of the existence of a contract of lease, the object and duration of which are unknown to the Court, does not enable it to decide whether in this case the Applicant's objection is sound. The terse reference, without any details, to subsidence made by the Applicant in the oral proceedings is insufficient by itself, quite apart from the question whether it was put forward in sufficient time. The Court therefore can only dismiss the Applicant's claim for lack of sufficiently substantiated statements.

*(4) Case of the Vereinigte Königs- und Laurahütte Company*

After recording that, in consequence of a declaration made by Respondent, the notice has been withdrawn in respect of the Laurahütte property of the Vereinigte Königs- und Laurahütte Company at Katowice, the Court proceeds to consider the position as regards the Company's other landed properties. These coincide with mines owned by the Company and are composed of timbered lands and agricultural lands the produce of which is, at least in part, used to provide foodstuffs for the workers and to supply the needs of the industrial undertakings.

In order that an estate may be liable to expropriation, Article 12 of the Geneva Convention lays down that it must belong on April 15th, 1922, and on the date of the notice, to a company controlled by German nationals. Are these conditions fulfilled in the case of the Vereinigte Königs- und Laurahütte Company? Its registered offices are at Berlin. Three of the five members of the Committee of Management are Polish nationals; the Board of Control, consisting of eighteen members, includes eleven of German nationality; lastly, 80% of its shares were, at all events on one of the decisive dates provided for in the Treaty, in the hands of four nationals of countries other than Germany.

The Geneva Convention does not, any more than the Treaty of Versailles, define the factors constituting control. The Court is of opinion that the conception of control in the Convention is an essentially economic one and that it contemplates a preponderant influence over the general policy. The liquidation régime is based on the nationality of the citizens of the State subjected to liquidation who are owners and beneficiaries of the property, rights and interests liable to liquidation. It follows that decisive importance cannot be attached to the functions performed by certain organs, such as, for instance, the Boards of Control of limited companies. What has to be ascertained is the nationality of the physical persons who exercise control. Now in German law, as well as under other systems of legislation, the supreme power in a company is held by the general meeting of shareholders. From that body emanate the very extensive powers of the Board and, also, those of the management. It is, moreo-

ver, a well-known fact that the acquisition of the majority of shares is precisely the means by which an interested person or group of persons seeks to obtain control over a concern. Therein lies the power; and in the present case, it must therefore be concluded that the Company is not controlled by German nationals within the meaning of the Convention.

In the second place, the Respondent argued that the Company should be regarded as a German national. Since the Convention has adopted for companies the criterion of "control", the Court feels that it must also reject this line of argument, without however denying that it is possible that other criteria, which might be applicable in respect of the nationality of juristic persons, may possess importance, for instance, from the standpoint of the right of diplomatic protection.

The Court having thus rejected the applicability of Article 12, it is not necessary to consider the other arguments put forward by the Applicant with a view to proving that the estates in question may not be liquidated.

*(5) Case of the Baroness von Goldschmidt-Rothschild*

At the hearing of February 18th, 1926, the Polish Agent reiterated the written statement of his Government to the effect that the estates belonging to the Baroness von Goldschmidt-Rothschild would not be expropriated. The Agent for the Applicant noted these declarations. The Court therefore records the agreement between the Parties as regards the legal situation of the estates in question, which have been recognized to be immune from expropriation. On the other hand, however, the Applicant argued that the notice which was published in the *Polish Monitor* but not served on the interested Party, was irregular on that ground, and, before withdrawing his application, he claimed that the Polish Government should officially inform the interested Party that her lands were freed from any measure of expropriation. The Polish Government maintained that notice had not been given and refused to comply with this request.

In regard to this matter, the Court observes that Article 15 of the Convention provides no special form in which notice is to be served. The procedure adopted by the Polish Government includes a notice served on the individual and the publication of an announcement in the *Polish Monitor*. In this case an announcement appeared in the *Polish Monitor*, and an announcement in that organ can hardly be regarded as never having been made, even if, in the absence of other essential factors, it is unable to attain its end. However that may be, the subsequent correction annulling the notice, in so far as it had been given, deprives the German Government's application in respect of these estates of its object. The Court is satisfied that, in these circumstances, these estates are once and for all immune from any possible expropriation under Article 15 of the Geneva Convention.

*(6) Case of the Prince of Lichnowsky*

Article 17 of the Geneva Convention lays down that persons who have, *ipso facto*, acquired the nationality of an allied or associated Power under the Treaty of Peace of Versailles shall not be regarded as German nationals within the meaning of Articles 6–23 of the Geneva Convention. Prince of Lichnowsky, a German national at the time of the conning into force of the Treaty of Versailles, and domiciled in a locality situated in Czechoslovak territory, opted on January 1st, 1922, as he was entitled to do under the relevant international instruments, for German nationality.

Did he, however, *ipso facto*, acquire Czechoslovak nationality? The Applicant maintains that he did, whereas the Respondent denies it, though recognizing that if he did, expropriation would not be possible. The latter maintains that proof of the acquisition of that nationality can only be established by a certificate from the Czechoslovak Government.

The Court does not take this view. Being entirely free to estimate the value of evidence furnished by the Parties, and basing its opinion on the definite facts alleged by the Applicant which have not been disputed by the Respondent (the Prince's domicile in Czechoslovakia; the declaration of option, not objected to by the Czechoslovak Government, which authorized him to reside at the place of his domicile), and also on the Prince's declaration of option, the Court considers it sufficiently proved that the Prince was at the decisive date established in a territory recognized by the Treaty of Versailles as forming part of the State of Czechoslovakia.

Article 17 of the Geneva Convention is therefore applicable in the case of Prince of Lichnowsky.

*(7) Case of the City of Ratibor*

The City of Ratibor possesses certain landed property including a wooded estate used as a place of recreation for its inhabitants. The Respondent declared on several occasions that this estate was not liable to expropriation, and the Court therefore considers that these statements definitively establish that the estate is immune from it. As regards the other landed property, the Applicant's objection to the notice served by the Polish Government is that Article 12 of the Geneva Convention is not applicable to the City of Ratibor which is neither a German national nor a company controlled by German nationals. The Respondent, on the other hand, considers that the City falls within one or other of these categories.

It is not possible, says the Court, to apply the conception of a "controlled company" to every kind of juristic person; it would rather appear that it refers more particularly to associations with an economic purpose; but, in the Court's opinion, the conception of a "national" also covers communes such as the City of Ratibor. It is true that the term "national" in the Geneva Convention generally contemplates physical persons only. But the direct and essential relation between physical persons and a State, which is called nationality, also exists, although in a different form, in the case of corporations of municipal law. A Prussian commune is a corporation on a territorial basis formed by the national inhabitants, upon whom municipal law confers the capacity of members of the commune. Generally speaking, only nationals will take part in the administration of the commune. The commune is subject to the control of the State authorities as regards both the activities which are directly incumbent upon it and those which it undertakes in virtue of powers delegated by the State. An essential and necessary bond therefore unites the commune and the State of which it forms part; consequently it is natural, from the standpoint of the régime of liquidation, to assimilate such a community of nationals of a State to individuals who, precisely by reason of their nationality, are in so far as their property is concerned, subject to the régime established for nationals of this State.

The commune of Ratibor therefore falls within the category of "German nationals" within the meaning of Article 12, paragraph 2, of the Geneva Convention.

*(8) Case of the Godulla Company*

The Godulla Company is to be regarded—and the Parties are in agreement on this point—as a company controlled by German nationals within the meaning of Article 12 of the Geneva Convention. The majority of the members of its Board of Control are German, its general manager is also and the whole of its shares are in the hands of a company whose registered offices are situated at Gleiwitz and the shareholders of which are mostly of German nationality.

The Court first of all makes a general observation. The Applicant has contended that a large proportion of the estates under notice do not reach the minimum size of 100 hectares, indicated in Article 12. The Court holds that this minimum applies to the individual estates and not to all the estates belonging to one and the same person. Moreover, as liability to expropriation is the exception, the relevant clauses must be strictly construed. The Court then goes on to observe that the estates of

the Godulla Company have been dealt with by the Respondent as constituting two groups: that of Orzsegów and that of Orzesze.

The estates in the first group cover mining enterprises of the Company; the lots which are used for agriculture (which are, moreover, leased for the most part to workmen, according to the Applicant) are surrounded by industrial areas and themselves enclose portions the use of which for industrial purposes has been established. As regards the estates of the second group, they coincide exactly with the Company's mining concessions. The latter are not all being worked and, temporarily, the land is used as farms which are devoted to the needs of the concern.

These considerations lead the Court to the conclusion that all the estates of the Godulla Company covered by the notice given by the Polish Government are principally devoted to serving the needs of the industrial undertaking.

*(9) Case of the Duke of Ratibor*

The fact that the Duke of Ratibor is of German nationality is not disputed. He was domiciled before the war on the Ratibor estate which was subsequently divided by the frontier line and of which the portions situated in Poland form the subject of the notice of expropriation.

The Applicant has argued that the Duke, having been domiciled on the Ratibor estate as a whole, that is to say upon the whole of his entailed estates, is one of those German nationals who are entitled to retain their domicile in Polish Upper Silesia (Article 40 of the Convention) and whose property is not liable to expropriation. The Court cannot accept this view. It holds that a certain solid attachment of the owner to the land ceded is not sufficient to protect an estate from expropriation; the owner must have possessed a domicile there. Now, the characteristic feature of domicile is that, from the point of view of law, a person is attached to a particular locality. Article 29 of the Geneva Convention brings out that the domicile is the place where an individual's activities and interests, both personal and economic, are mainly centred, and this centre can only be some fixed spot. As the Applicant has not argued that the Duke of Ratibor was domiciled, in this sense, on the portion of his entailed estate allotted to Poland, the Duke cannot claim under Article 40 to escape the application of Article 12.

*(10) Case of Count Saurma-Jeltsch*

The case of the rural estates of Count Saurma-Jeltsch is the same as that of the Duke of Ratibor. The domicile which it has been submitted that the Count is entitled to retain in Polish Upper Silesia is simply the domicile which, in the German contention, covers the whole estate divided by the new frontier. For the reasons given in connection with the case of the Duke of Ratibor, the Court holds that Article 12 of the Geneva Convention is applicable, because Count Saurma-Jeltsch has no domicile in Polish Upper Silesia which he is entitled to retain.

Finally, the Court's decisions in regard to the whole of the submissions of the Parties are as follows:

(1) That the application both of Article 2 and of Article 5 of the law of July 14th, 1920, in Polish Upper Silesia, decreed by the law of June 16th, 1922, constitutes, in so far as it affects German nationals or companies controlled by German nationals covered by Part I, Heading III of the Geneva Convention, a measure contrary to Article 6 and the following articles of that Convention.

(2) (*a*) That the attitude of the Polish Government in regard to the Oberschlesische Stickstoffwerke and Bayerische Stickstoffwerke Companies was not in conformity with Article 6 and the following articles of the Geneva Convention;

(*b*) that the Court is not called upon to say what attitude on the part of the Polish Government in regard to the Companies in question would have been in conformity with the above-mentioned provisions.

(3) (*a*) That the notice of intention to liquidate the rural estates belonging to Count Nikolaus Ballestrem is not in conformity with the provisions of Articles 6 to 22 of the Geneva Convention;

(*b*) that this also applies in regard to the notice of intention to liquidate the rural estates of the Giesche Company at Katowice;

(*c*) that the Applicant Government's claim in respect of the notice of intention to liquidate the rural estates belonging to Christian Kraft, Prince of Hohenlohe-Oehringen, must be dismissed;

(*d*) that the notice of intention to liquidate the rural estates belonging to the Vereinigte Königs- und Laurahütte Company is not in conformity with the provisions of Articles 6 to 22 of the Geneva Convention;

(*e*) that the Applicant Government's claim in respect of the notice of intention to liquidate the rural estates belonging to Baroness Maria Anna von Goldschmidt-Rothschild, has no longer any object;

(*j*) that the notice of intention to liquidate the rural estates belonging to Karl Maximilian, Prince of Lichnowsky, is not in conformity with the provisions of Articles 6 to 22 of the Geneva Convention;

(*g*) that the Applicant Government's claim in respect of the notice of intention to liquidate the rural estates belonging to the City of Ratibor must be dismissed, except as regards the *Waldpark*;

(*h*) that the notice of intention to liquidate the rural estates belonging to the Godulla Company is not in conformity with the provisions of Articles 6 to 22 of the Geneva Convention;

(*i*) that the Applicant Government's claim in respect of the notice of intention to liquidate the rural estates belonging to the Duke of Ratibor must be dismissed;

(*j*) that the Applicant Government's claim in respect of the notice of intention to liquidate the rural estates of Count Saurma-Jeltsch must be dismissed.

*Observations by Lord Finlay*

Lord Finlay considers that Poland is entitled to the benefit of the Armistice. All Parties to the Armistice must have intended that Poland should be bound by the terms of the Armistice and, when she came into existence as a recognized State, have the benefit of them. This would be a *jus quaesitum*, a right acquired for the new State as soon as it should come into existence. In his view, the Allied States made the Armistice on behalf of Poland, which was about to become a State, as well as on their own behalf.

With regard to the question whether the first clause of the Protocol of Spa nullified the transfer by the Reich of the Chorzów factory, Lord Finlay states that the provision that any measure to the contrary should be considered as *nulle et non avenue* should be read as nullifying such dispositions only so far as the purpose expressed in the earlier part of the clause is concerned, *viz*. the preservation of the Allies' security for the payment of the amounts due for reparation. If this is so, it can have no effect for the purposes of the present case upon the transfer from the Reich to the Oberschlesische Company.

*Dissenting opinion by Count Rostworowski*

Count Rostworowski states that in the present case the dispute between Germany and Poland might and should have been settled without its having been necessary to consider in detail and to give a definite decision on the legality or correctness of the acts with which the Parties charged each other, in so far as these acts were accomplished outside the special sphere delimited by Article 23 of the Convention.

According to Count Rostworowski, the law which determines the question of applicability in the present case is exclusively found in Articles 6 to 22 of the Convention of Geneva and in Articles 92 and 297 of the Treaty of Versailles to which Article 7 relates. Its chief subject is liquidation in Upper Silesia, which forms only a part of the liquidation in its general sense laid down by the Treaty of Versailles. Count Rostworowski considers that the facts mentioned in the German submission and placed before the Court in view of its decision, are not facts of liquidation or of liquidatory expropriation. It follows that these facts cannot be considered or classified in the light of the provisions of Head III of the Convention of Geneva, and therefore cannot be recognized either as in conformity or compatible, or not in conformity and incompatible, with these provisions.

Count Rostworowski also expresses his disagreement with the last part of the Judgment, which is devoted to the consideration of the various international or national legal grounds on which were based the Polish law of 1920 and the contracts concluded on December 24th, 1919, by the Reich.

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## 17. ARTICLE 3, PARAGRAPH 2, OF THE TREATY OF LAUSANNE (FRONTIER BETWEEN TURKEY AND IRAQ)

### Advisory Opinion of 21 November 1925 (Series B, No. 12)

**Second Annual Report from the Permanent Court of International Justice (15 June 1925—15 June 1926), Series E, No. 2, pp. 140–151**

*Council of League of Nations—Nature of its powers under Article 3 of Treaty of Lausanne: arbitral award, recommendation, mediation—The common consent of the Parties, source of competence—In case of doubt, decisions of Council, other than those on matters of procedure, must be unanimous (Art. 5 of Covenant), the votes of interested Parties not being taken into account (Art. 15 of Covenant)*

*History of the question*

During or following the war of 1914–1918 the British troops occupied the Turkish vilayets of Bagdad and Basra and at least a large part of that of Mosul. Great Britain subsequently established a civil administration there. When, in 1920, the Supreme Council distributed the mandates provided for in Article 22 of the Covenant of the League of Nations, Great Britain received, amongst others, that for "Mesopotamia including Mosul".

*The negotiations at Lausanne*

The Peace Treaty signed at Sèvres on August 10th, 1920, fixed as the frontier between Turkey and Mesopotamia the northern limits of the vilayet of Mosul (but not including Amadia). This Treaty was, however, never ratified. Subsequently fresh negotiations took place at Lausanne from November, 1922,

to July, 1923. During these negotiations, the question, amongst others, of the frontier between Turkey and Iraq (which name had been substituted for "Mesopotamia") was reopened.

Thus, on January 23rd, 1923, the British representative, Lord Curzon, said, at a plenary meeting of the Territorial and Military Commission, that "among the matters requiring to be laid down in the form of articles in the Treaty of Peace . . . was the determination of the southern frontier of the Turkish Dominions in Asia", i.e. between these Dominions and Syria and Iraq.

A discussion followed in the course of which the views of the British and Turkish Governments were set out. As agreement appeared impossible, the British representative proposed to refer the question "to independent enquiry and decision"—by the League of Nations—and declared that his Government would abide by the result.

The Turkish representative, Ismet Pasha, stated that he could not accept the proposal in question, adding that "the Delegation of the Government of the Grand National Assembly could not allow the fate of a great region like the vilayet of Mosul to be made dependent upon any arbitration".

Lord Curzon then explained what, in his view, would have been the procedure adopted by the Council of the League of Nations. In this speech, upon which the two Governments directly concerned place different constructions, Lord Curzon was at pains to demonstrate, amongst other things, the perfectly equal treatment which Turkey would have received before the Council. He added that if Turkey persisted in her refusal he would be obliged on behalf of his Government "to act independently" under Article 11 of the Covenant of the League of Nations (according to which it is the right of each Member of the League to bring to the attention of the Council or of the Assembly any circumstance whatever affecting international relations).

Ismet Pasha, having repeated that he could not "concur in the proposal to submit the solution of the Mosul question to arbitration", Lord Curzon stated that he would "take without delay" the action which he had previously indicated. At the request of the British Minister the question was accordingly placed on the agenda of the Council which considered it at a meeting held at Paris on January 30th, 1923. On that occasion, Lord Balfour made a statement on behalf of the British Government to the effect that the proposal unsuccessfully made by Lord Curzon at Lausanne would be renewed, and that only in the event of the failure of this further step, and in order to avert "the dangers which failure might bring in its train", would the British Government "invoke Article 11 of the Covenant" in order that the League might "take any action that might be deemed wise and effectual to safeguard the peace of nations". Lord Balfour took this opportunity to explain that "if the contingency of which he had spoken arose", Article 17 of the Covenant (which deals with disputes between a State which is a Member and one which is not a Member of the League and providing for the action to be taken by the Council's institution of an inquiry, etc.) "would certainly be one of the articles invoked", but that under the very terms of that article Turkey would be received "as a Member of the league on complete and absolute equality with all other Members". The Council noted these statements and on the following day, at Lausanne, Lord Curzon stated that "the decision of this dispute" "had been referred . . . to the enquiry and decision of the Council of the League of Nations".

The conditions of peace, which had in the meantime been communicated to the Turkish representatives by the Allied Powers, stipulated that the frontier with Iraq was to follow "a line to be fixed in accordance with the decision to be given thereon by the Council of the League of Nations". The Turkish Delegation then proposed, with a view to preventing the Mosul question from constituting an obstacle to the conclusion of peace, to exclude it from the programme of the Conference, in order that it might, within the period of one year, be settled by common agreement between Great Britain and Turkey. Whereupon Lord Curzon stated that he was no longer able to consent to any alteration of the wording of the Treaty in regard to Mosul, since the matter had already been referred to the League of Nations

and was now in the hands of that Body. He was, however, prepared to suspend the result of his appeal to the League for a period of one year. This would enable the two Governments to examine the matter by direct and friendly discussion. Should a direct understanding not be reached, recourse to the League would take place in the manner originally proposed.

According to notes taken by the British Secretary, the Turkish representative thereupon accepted Lord Curzon's proposals regarding Mosul, namely (according to the text of a British draft declaration) that the Council should be invited not to proceed "to the determination of the frontier until after the expiration of a period of 12 months from the date of the coming into force of the present Treaty". On the other hand, according to information supplied to the Court during the proceedings by the Turkish Government, Turkey's acceptance only related to the maintenance of the *status quo* during the period allowed for attempts to arrive at a friendly settlement.

However that may be, as no agreement in regard to the Allies' proposals as a whole could be reached, the Conference of Lausanne was interrupted for more than two months.

When negotiations were resumed in April, the Turkish representatives submitted to the Conference counter-proposals to the Allies' peace conditions, which counter-proposals provided, as regards Mosul, that the frontier between Turkey and Iraq should be laid down in a friendly arrangement to be concluded between Turkey and Great Britain within twelve months from the coming into force of the Treaty; and that, in the event of no agreement being reached, the dispute should be referred to the Council of the League of Nations.

On April 24th, the British delegate, alluding to the declaration of this kind already made, said that he was prepared to accept the Turkish proposal on condition that the Parties undertook to respect the *status quo* and subject to the settlement of the exact duration of the time allowed.

*The Treaty of Lausanne*

It was not, however, until the following June 26th that an agreement was reached between the two delegations concerned upon the following clause, which was to form Article 3 of the Treaty signed at Lausanne on July 24th, 1923:

"From the Mediterranean to the frontier of Persia, the frontier of Turkey is laid down as follows:

"(1) *With Syria*:

. . .

"(2) *With Iraq*:

"The frontier between Turkey and Iraq shall be laid down in friendly arrangement to be concluded between Turkey and Great Britain within nine months.

"In the event of no agreement being reached between the two Governments within the time mentioned, the dispute shall be referred to the Council of the League of Nations.

"The Turkish and British Governments reciprocally undertake that, pending the decision to be reached on the subject of the frontier, no military or other movement shall take place which might modify in any way the present state of the territories of which the final fate will depend upon that decision."

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*Anglo-Turkish Negotiations*

The negotiations designed to fix the frontier by friendly arrangement began at Constantinople on May 19th, 1924, and continued until June 9th of that year. They were unsuccessful, and Sir Percy Cox, who had been nominated as its Delegate by the British Government, when their failure was apparent, invited his Turkish colleague to agree upon the terms of a "joint declaration referring the question to the League of Nations". The Turkish Delegate did not, however, feel able to comply with this invitation, "as the instructions of his Government did not authorize him to discuss the terms of the proposed declaration". Whereupon Sir Percy Cox stated that, "failing a joint reference, His Majesty's Government would itself refer the matter to the League of Nations", though it hoped "that the Turkish Government would associate itself with it in taking this step".

It was in these circumstances that the British Government asked the Secretary-General of the League of Nations to place the question on the agenda of the next Council Meeting. The Turkish Government was notified of this request and agreed in principle to the placing of the question on the agenda. The Council invited the Turkish Government to be represented and informed it that consideration of the question would be postponed until the arrival of its representatives.

*Deliberations in the Council*

It was not until September 20th that the Council was able to begin the examination of the question, Fethy Bey, the Turkish representative, taking his seat at the Council table.

As early as this meeting, the Parties used different expressions when describing the role which the Council would have to play in the matter. Whilst, according to the British representative, the Council was to "act as arbitrator", the Turkish representative merely referred to the submission of the question to an "impartial examination" by the Council. Some days later, M. Branting, who had been appointed Rapporteur, stated that the statements of the Parties would seem to show that they were "both willing to recognize the Council's decision, one of them through arbitration and the other under Article 15 of the Covenant". Since, however, there was a difference of opinion as to the subject of the dispute to be settled, he proposed that the discussion should be adjourned in order "to consider the preliminary question of the precise duties of the Council".

*Appointment of a Commission of Enquiry*

Upon the resumption of the discussion, M. Branting gave an account of conversations which he had had with Lord Parmoor and Fethy Bey. The former had reminded him that "his Government accepted in advance the Council's decision regarding the frontier between Turkey and Iraq". The latter, in reply to the question whether "he could, on behalf of his Government, now give an undertaking to accept the Council's recommendation", had replied "that on this point there was no disagreement between his Government and the British Government". On the basis of these statements, the Rapporteur felt able to announce that "the doubts which might have arisen in regard to the . . . rôle of the Council" had been "removed" and suggested, in order that proceedings might be commenced, the appointment of a Commission of Enquiry.

The Council adopted this suggestion (September 30th, 1924). In the Resolution passed to this effect which was accepted by the Parties, the following passage appears:

> "Having heard the statements of the representatives of the British and Turkish Governments, who undertook, on behalf of their respective Governments, to accept in advance the decision of the Council on the question referred to it. . . ."

*Its report*

The Council had to consider the conclusions of the report of the Commission of Enquiry at the session held by it in September, 1925. A discussion ensued concerning the actual line of the frontier. At the conclusion of this discussion, a Sub-Committee was appointed to make a report to the Council, the President of which reminded the Parties that they "had, before the Council, solemnly placed their cause in the hands of the League of Nations, of which the Council formed part, and that they were awaiting from the Council that justice which it would endeavour to grant them".

The Sub-Committee returned to the Council proposing that the Court should be asked for an advisory opinion. On September 19th, 1925, after an exchange of views, in the course of which the British representative maintained that what was intended by Article 3, paragraph 2, of the Treaty of Lausanne was "an arbitral decision given on the broad merits of the case", whilst, according to the Turkish representative, "the only possible procedure was to reach a solution with the consent of the Parties, through the good offices of the Council" and not to resort "to a decision given by the Council without their consent", the Council adopted the Sub-Committee's proposal and put to the Court the following questions:

*The Council's Request*

(1) What is the character of the decision to be taken by the Council in virtue of Article 3, paragraph 2, of the Treaty of Lausanne—is it an arbitral award, a recommendation or a simple mediation?

(2) Must the decision be unanimous or may it be taken by a majority?

May the representatives of the interested Parties take part in the vote?

The Request for an opinion was communicated by the Registry to the Members of the League of Nations, to the States mentioned in the Annex to the Covenant and to Turkey. At the same time, Members of the League were informed that, having regard to the nature of the questions put, and their possible bearing on the interpretation of the Covenant, the Court would no doubt be prepared favourably to receive an application by any Member to be allowed to furnish information calculated to throw light on the questions at issue. The notifications to Great Britain and Turkey were further based on the principle laid down in the Rules of Court, in accordance with which a question referred to the Court for advisory opinion is communicated to governments likely to be able to supply information in regard to it.

As the Council wished to have an answer before its next meeting—which was to take place on December 7th following—an extraordinary session (Ninth) of the Court was summoned which lasted from October 22nd to November 21st, 1925.

*Composition of the Court*

The Court was composed as follows:

MM. Huber, *President*; Loder, *Former President*; Weiss, *Vice-President*, Lord Finlay, MM. Nyholm, Altamira, Anzilotti, *Judges*, Yovanovitch, Beichmann, Negulesco, *Deputy-Judges*.

*Written information and hearings*

Following upon the notification to the Turkish Government, that Government's Minister for Foreign Affairs sent to the Registrar of the Court a telegram, dated October 8th, in which whilst protesting his great esteem and respect for the Court, he declared that there was no occasion for his Government to be represented before it, since the questions on which the opinion of the latter had been asked were of a distinctly political character and could not form the subject of a legal interpretation. He reiterated

the opinion that any possibility of an arbitration was excluded and recalled that the Turkish Government had already clearly and adequately explained its views regarding the Request submitted by the Council and the latter's competence. The British Government, for its part, filed with the Registry, on October 21st, a "Memorial". It also instructed Sir Douglas Hogg, the Attorney-General, to furnish oral information to the Court at the hearings held on October 26th and 27th.

The British and Turkish Governments had furthermore sent to the Court complete collections of the Acts and Documents relating to the Conferences of Lausanne and Constantinople and also other collections. Lastly, the Turkish Government communicated to the Court, subject to the reservations made in its telegram, a reply to certain question which the latter had already seen fit to put to it before the hearings.

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*The Court's Opinion (analysis)*

The Court delivered its opinion on November 21st, 1925.

After retracing the events which induced the Council to approach it, the Court proceeds to examine the two questions referred to it. The first necessitates the interpretation of paragraph 2 of Article 3 of the Treaty of Lausanne. The Court begins by making a detailed analysis of this clause with a view to discovering any factors which may determine the nature of the "decision to be reached" by the Council, and it arrives at the conclusion that the intention of the Parties was, by means of the recourse to the Council provided for in the article, to assure a definitive and binding solution of the dispute, that is to say, the definitive determination of the frontier.

The very purpose of the article, in fact, as indicated in the first paragraph, is to *lay down* the southern frontier of Turkey, and a frontier must constitute a definite boundary line throughout its length. But, failing agreement, there is no means of settling a dispute other than a decision by the intervention of a third Party—in this case, the Council—as a result of which a definitive solution would be reached. Moreover, a decision on which "will depend" "the final fate" of the territories in question can only be a decision laying down in a definitive manner the frontier between Turkey and Iraq and binding upon the two States.

The Court finds that the conclusion at which it has thus arrived is confirmed by a comparison between Article 3 and certain other articles of the Treaty. Again, having been able to base its interpretation on the wording of the article itself, which it regards as clear, the Court need not proceed to make a complete analysis of the preparatory work. It only examines this sufficiently to enable it to state its opinion regarding certain arguments put forward on one side or the other and based on this work. Similarly, the Court only concerns itself with facts subsequent to the conclusion of the Treaty of Lausanne, in so far as they are calculated to throw light on the intention of the Parties at that time, or have been invoked by the Parties. As regards these two groups of factors, the Court arrives at the same result, namely, that they tend rather to confirm the conclusion at which it had arrived on the basis of the actual wording of the article to be interpreted and that, at all events, they do not weaken that conclusion.

What therefore is the nature of the "decision" which the Council must "reach" under that article? In the question put to the Court, the Council has in an explanatory phrase mentioned the three terms "arbitral award", "recommendation" or "simple mediation". The Court observes, in the first place, that if the word "arbitration" is taken in a wide sense, characterized simply by the binding force of the pronouncement made by a third Party to whom the interested Parties have had recourse, it may well be said that the decision in question is an "arbitral award". This term, on the other hand, would hardly be the right one if by it were meant the technical conception of arbitration dealt with in the Hague Convention of 1907. For this reason, the Court does not attach any importance to certain consequences which have been deduced from this conception, which is not in any case applicable to the functions of the Council. In

the second place, it points out that this fact does not prevent the Council from being called upon, by the mutual consent of the Parties, to give a definitive and binding decision in a particular dispute.

It is true that the powers of the Council are dealt with in Article 15 of the Covenant and that this article only contemplates recommendations without binding force. There is, however, nothing to prevent the Parties, by an agreement entered into in advance, from recognizing that, in so far as they are concerned, the recommendations of the Court will have the effect of decisions which, by virtue of their previous consent, compulsorily settle the dispute. The Court cites precedents of cases of this kind, in particular the question of the determination of the frontier in Upper Silesia, in which the Powers solemnly undertook to accept the solution recommended by the Council.

Since the decision which the Council has to take in this case cannot, therefore, by reason of the binding force with which it is endowed, be described as a simple "recommendation", still less can it be a "simple mediation" entrusted to the Council. The Court, however, feels called upon to observe that in agreeing to refer the dispute to the Council of the League of Nations, the Parties certainly did not lose sight of the procedure by mediation and conciliation, which forms an essential part of the functions of that Body. It is in the event of the failure of that procedure that the Council will make use of its power of decision.

The second question put to the Court by the Council is whether the decision to be taken must be unanimous or may be taken by a majority and whether the representatives of the Parties may take part in the vote.

On the basis of arguments drawn from the nature of the Council—for the dispute, though not submitted to that Body under a clause of the Covenant, has nevertheless been referred to the Council with the organization and functions conferred upon it by the Covenant—the Court concludes that the rule of unanimity is naturally and even necessarily indicated. Again this rule is explicitly laid down in Article 5 of the Covenant and it admits of no exceptions other than those expressly provided for, and none of these is applicable in the present case. The Court sees a confirmation of its view in the fact that certain clauses of the Treaty of Lausanne, other than Article 3, make express provision for decisions to be taken by a majority.

In the Court's opinion, however, the strict rule of unanimity is qualified by the principle, which finds expression in several clauses of the Covenant, that votes recorded by the representatives of Parties do not affect the required unanimity. This qualification of the strict rule of unanimity is indicated with peculiar force in the present case, since to require that the representatives of the Parties should accept the Council's decision would be tantamount to giving them a right of veto, which would hardly be in conformity with the intention of Article 3 of the Treaty of Lausanne. From another point of view, however, there is nothing to justify, in the Court's opinion, a further derogation from the essential rule of unanimity; it follows, therefore, that, though their votes must not be counted in ascertaining whether there is unanimity, the representatives of the Parties are entitled to take part in all deliberations of the Council.

The Court states its conclusions as follows: (1) the "decision to be taken" by the Council of the League of Nations in virtue of Article 3, paragraph 2, of the Treaty of Lausanne, will be binding on the Parties and will constitute a definitive determination of the frontier between Turkey and Iraq; (2) the "decision to be taken" must be taken by a unanimous vote, the representatives of the Parties taking part in the voting, but their votes not being counted in ascertaining whether there is unanimity.

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*Effects of the Opinion*

The Council took knowledge of the Court's opinion at Geneva on December 8th, 1925, during the fourth sitting of its 37th session and heard the observations of the representatives of the two interested Governments. The British representative reiterated that his Government had always considered itself,

under the terms of the Treaty of Lausanne, to be bound in advance by the Council's decision. The Turkish representative stated that he could not accept an interpretation of Article 3, paragraph 2, of that Treaty contrary to that which had been placed upon it by the Grand National Assembly of Turkey when that Body ratified the Treaty in question: in his view, the Council could only adopt the Court's opinion by a unanimous vote of its members, including the representatives of the Parties. The Council, having overruled the latter objection, decided unanimously, without counting the votes of the Parties, to adopt the Court's opinion. The Turkish representative, who had voted against this resolution, then stated that, according to his instructions, the powers which he had received ceased to be valid in face of an arbitration.

On December 16th (15th sitting of the same session), upon a report by M. Undén (Sweden), the Council, on the basis of the work of the Commission of Enquiry, fixed as the definitive frontier the line of demarcation which had been adopted at Brussels on October 29th, 1924, for the maintenance of the *status quo*: further it invited the British Government to submit to it a new Treaty with Iraq, ensuring the continuance for 25 years of the mandatory régime defined by the Treaty of Alliance between Great Britain and Iraq and by the British Government's undertaking approved by the Council on September 27th, 1924, unless Iraq were, in conformity with Article 1 of the Covenant, admitted as a Member of the League before the expiration of this period. The decision regarding the frontier was to be regarded as definitive as soon as the execution of this stipulation had been brought to the knowledge of the Council.

On January 13th, 1926, the new Treaty with Iraq provided for in the Resolution was signed at Bagdad and subsequently approved by the Chamber of Deputies and Senate of Iraq and by the British Parliament. At the second meeting of the 39th Session (March 11th, 1926) the Council adopted a resolution declaring its decision of December 16th to be definitive.

On June 5th, 1926, a treaty was concluded at Angora between Great Britain and Turkey designed to constitute a final settlement of the Mosul question: by this treaty the two Parties adopt, except for a slight modification, the so-called Brussels line as the frontier between Turkey and Iraq.

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## 18. CERTAIN GERMAN INTERESTS IN POLISH UPPER SILESIA (MERITS)

### Judgment of 25 May 1926 (Series A, No. 7)

**Second Annual Report from the Permanent Court of International Justice (15 June 1925—15 June 1926), Series E, No. 2, pp. 99–136**

For the summary of No. 18 (Series A, No. 7), see No. 16.

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## 19. COMPETENCE OF THE INTERNATIONAL LABOUR ORGANIZATION TO REGULATE, INCIDENTALLY, THE PERSONAL WORK OF THE EMPLOYER

### Advisory Opinion of 23 July 1926 (Series B, No. 13)

**Third Annual Report of the Permanent Court of International Justice (15 June 1926—15 June 1927), Series E, No. 3, pp. 131–135**

*The International Labour Organization—Its incidental competence in regard to work done by the employer—Parallel with Advisory Opinion No. 3—Discretionary powers of the Organization and their limit; Article 423 of the Treaty of Versailles*

*History of the question*

On the Agenda of the Sixth Session of the International Labour Conference held in 1924, was, amongst other things, the question of night-work in bakeries. The inclusion of this question having given rise to no objection on the part of the States Members of the International Labour Organization, the International Labour Office had prepared a preliminary draft for a convention on the subject, which was designed to serve as a basis for the discussions of the Conference. This draft laid down, in general terms, and subject to certain exceptions, that no night-work might be done in bakeries. It was provisionally adopted by the Sixth Conference, but not without occasioning numerous objections by a minority consisting of delegates belonging to the employers' group of the Conference. These objections concerned the application to the employer himself, in the draft, of the principle of the prohibition of night-work.

At all events, the final adoption of the draft was referred to the Seventh Session of the Conference. When the Conference met for that Session in 1925, there had still been no objections on the part of the Members of the International Labour Organization. The employers' delegates, however, raised the same objections as in 1924, but the draft convention was finally adopted notwithstanding.

*Request for advisory opinion*

The employers' group, nevertheless, persisted in their doubts with regard to the legality of the extension to the personal work of the employer of the prohibition of night-work. At their instance, the Governing Body decided to take the necessary steps to obtain the Court's opinion; and it was in these circumstances that the latter received a Request for advisory opinion in pursuance of a Resolution of the Council of the League of Nations, dated March 17th, 1926.

The question referred to the Court was formulated as follows:

"Is it within the competence of the International Labour Organization to draw up and to propose labour legislation which, in order to protect certain classes of workers, also regulates incidentally the same work when performed by the employer himself?"

*Composition of the Court*

The Court considered this question at its eleventh session (the ordinary session lasting from June 15th to July 31st, 1926); it was composed as follows:

MM. Huber, *President*; Loder, *Former President;* Weiss, *Vice-President;* Lord Finlay, MM. Nyholm, Moore, de Bustamante, Altamira, Oda, Anzilotti, Pessôa.

*Hearings*

The request for opinion was, in accordance with the customary procedure, communicated to Members of the League of Nations and to the States mentioned in the Annex to the Covenant.

It was also communicated to the International Labour Organization and to the following international Organizations which were regarded as in a position to furnish information in regard to the matter:

The International Organization of Industrial Employers;

The International Federation of Trades Unions;

The International Confederation of Christian Trades Unions.

These Organizations were informed that, upon request, they would be permitted to submit to the Court written and oral statements; they all availed themselves of this permission (though the International Confederation of Christian Trades Unions did not send a written statement) and public sittings were held on June 28th and 29th, 1926, for the purpose of hearing the oral statements.

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*The Court's Opinion (analysis)*

In its Opinion which it delivered on July 23rd, 1926, the Court, in the first place, analyses the terms of the question on which its views are requested. The Court is thus led to the conclusion that the question is a general one, not relating to any particular branch of industry. It need not therefore specifically consider the conditions of the baking industry. It goes on to show that it is not called upon to deal with the work of the employer in general. Its opinion is not sought as to the existence of any general power on the part of the International Labour Organization to regulate work done by the employer, a power which, moreover, that Organization does not claim. The terms of the question also show that this phase of the subject has been deliberately excluded from the Court's consideration and that, in the view of the Council of the League of Nations, the employer when performing the same work which is performed by wage-earners, does not normally fall within the competence of the International Labour Organization. In the question put, any proposed regulation of the work of the employer is, by hypothesis, to be regarded as occupying a position purely incidental to regulations for the protection of wage-earners which do fall within the competence of the International Labour Organization.

The question asked—which is whether the International Labour organization may, incidentally and to secure the protection of certain classes of wage-earners, propose regulation of work done by the employer himself—is manifestly a question of law. The answer to it depends on the terms of Part XIII (Labour) of the Treaty of Versailles by which the competence of the International Labour Organization is defined. The Court therefore proceeds to analyse the provisions of this Part, more especially those laying down the programme and aims of the International Organization. The Court is thus led to the conclusion that the competence of the International Labour Organization is exceedingly broad, so far as concerns the investigation and discussion of labour questions and the formulation of proposals, whether for national legislation or for international agreements, but that its competence is almost entirely confined to that auxiliary form of activity. The Organization has no legislative power: moreover the clauses establishing it provide its members with the means of controlling beforehand any attempt to exceed its competence; these means include, in particular, the possibility of formally objecting to the inclusion of any individual subject on the agenda.

Since, however, the High Contracting Parties have conferred on the Organization very wide powers (although restricted within certain limits) of co-operating with them in respect of measures to be

taken to assure the protection of workers, it is not conceivable that they intended at the same time to prevent the Organization from drawing up and proposing measures essential to the accomplishment of that end. But the Organization would be so prevented if it were incompetent to prepare for the protection of wage-earners a regulative measure in which, to attain that object, it was essential to include to some extent work done by employers.

The entire framework of Part XIII justifies this conclusion. Further, the Treaty contains specific provisions, in the application of which, as they are generally understood, it may be assumed that the incidental regulation of the personal work of the employer is potentially involved. Again, the documents before the Court show that, on several occasions, regulations in this sense have been actually applied: this is so in the case of the Convention concerning the prohibition of the manufacture and handling of matches containing white (yellow) phosphorus and in the case of the Convention prohibiting the use of white lead. Yet other instances might be given.

Again, the Court adverts to some of the reasoning employed in its third Advisory Opinion, which also supports this view. When it was asked to render an opinion on the question whether the examination of proposals for the organization and development of methods of agricultural production fell within the competence of the International Labour Organization, it replied, basing its answer on the construction to be placed on Part XIII of the Treaty of Versailles, that, though the examination of the methods of production themselves was outside the Organization's sphere of activity, it did not follow that the Organization must totally exclude from its consideration matters committed to it by the Treaty because that might involve in some aspects the consideration of the means or methods of production, or of the incidental effect which the proposed methods might have upon production.

In practice, however, no sharp line can be drawn between, on the one hand, incidental effects upon production and, on the other, incidental regulation of the personal work of the employer. It therefore also follows from the reasoning cited from Opinion No. 3 that, if it is assumed for the purpose of the argument that the competence of the International Labour Organization is limited to the work of the wage-earner, the Organization is not excluded from proposing regulations for the protection of wage-earners because such regulations may have the effect of regulating at the same time and incidentally the work of the employer.

In the course of the proceedings before the Court, a large number of theories were advanced regarding, amongst other points, national sovereignty and individual liberty. But the Court, which is called upon simply to perform a judicial function, namely, to ascertain what it was that the contracting Parties agreed upon in Part XIII of the Treaty of Versailles, does not intend to express any view upon these points. It confines itself to pointing out that it is entirely in conformity with the terms of this Part of the Treaty that it should be left to the Labour Conference itself to decide if and in what degree it is necessary to embody in a proposed convention provisions destined to secure its full execution. Nor does the Court intend, in view of the bounds set to its competency by the terms of the questions asked, to intimate the limits of any discretionary powers which the International Labour Organization may possess as regards the making of incidental regulations. It realizes that controversy may arise in this connection, but it holds that it will be for the proper authorities to exercise judgment on the circumstances of each case; at all events the Court cannot do so in this Opinion. Which are these authorities? The Court does not say, but confines itself to observing that Part XIII of the Treaty of Versailles lays down in Article 423 that "any question or dispute relating to the interpretation of this Part of the present Treaty or of any subsequent convention concluded by the Members in pursuance of the provisions of this Part of the present Treaty shall be referred for decision to the Permanent Court of International Justice".

## 20. DENUNCIATION OF THE TREATY OF NOVEMBER 2nd, 1865 BETWEEN CHINA AND BELGIUM

### Orders of 8 January, 15 February and 18 June 1927 (Series A, No. 8)

**Third Annual Report of the Permanent Court of International Justice (15 June 1926—15 June 1927), Series E, No. 3, pp. 125–130**

*The document instituting proceedings*

The case between Belgium and China was brought before the Court by the filing on November 25th, 1926, by the Belgian Government of an Application instituting proceedings. This Application is based on the declarations of acceptance by Belgium and by China of the optional clause of paragraph 2 of Article 36 of the Statute of the Court. It is alleged that the Chinese Government claimed to denounce the Treaty of November 2nd, 1865, between Belgium and China, contrary to the provisions of Article 46 of the said Treaty which only provides for a right of denunciation in favour of Belgium. This article provides that should the Belgian Government consider it advisable to modify certain clauses of the Treaty, it should, to this end, be at liberty, subject to certain conditions, to open negotiations; but failing such measures being taken, the Treaty must remain in force unchanged. According to the Application, the Belgian Government, whilst contending that the Chinese Government did not possess the right of unilateral denunciation, had nevertheless shown itself disposed to consider the possibility by mutual agreement of solving the matter by the conclusion of a *modus vivendi*. The negotiations for this purpose having been unsuccessful, the Belgian Government thereupon proposed to the Chinese Government that the dispute should be referred to the Court by special agreement. It was owing to the rejection of this proposal by the Chinese Government, and particularly to the promulgation, which followed, of measures violating the rights conferred by the Treaty of 1865 upon Belgium and her nationals, that the Belgian Government brought the case before the Court by unilateral application.

The conclusions of the Application contain two pleas: the Court is requested to give judgment to the effect that the Government of the Chinese Republic is not entitled unilaterally to denounce the Treaty of November 2nd, 1865; it is requested to indicate, by virtue of Article 41 of its Statute[1], any provisional measures which should be taken for the preservation of rights which may subsequently be recognized as belonging to Belgium or her nationals.

After the subsequent communication by the applicant Party of the documents on which the Application was founded, the President, on December 17th, fixed the time for the filing of the documents in the written proceedings; furthermore, on December 20th, in reply to the request for provisional measures, the President (by virtue of Article 57 of the Revised Rules of Court which confers upon him this power when the Court is in recess) informed the Parties that from the documents so far filed, he was unable to acquire the conviction that the circumstances showed such measures to be required. Consequently, he could not give effect to that part of the conclusions of the Belgian Application. Nevertheless, his decision was given subject to a reservation as regards any different conclusion at which he might arrive, should the Belgian Government see fit in their case on the merits, for example, or at all events within the prescribed limit of time for the filing of their Case, to bring forward circumstances which, in his opinion, would make provisional measures necessary; the considerations which the Belgian Gov-

[1] Article 41 of the Statute is as follows:

"The Court shall have power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either Party.

"Pending the final decision, notice of the measures suggested shall forthwith be given to the Parties and the Council."

ernment might wish to submit with that object in view should refer to the character of the measures it desired should be indicated, and they should be supported by relevant documentary evidence.

On January 4th, 1927 (that is to say, within the time fixed), the Belgian Government filed its Case. It referred to the provisional measures, which were, according to the Applicant, necessary for two reasons: there was a danger, first, of the Chinese Government's applying to merchandise imported from Belgium a differential tariff harmful to Belgian interests, and, secondly, that both in criminal and civil matters judicial decisions might be taken and the first steps towards their execution might confer upon them an irretrievable character. It would be appropriate, speaking generally, if, whilst awaiting the judgment on the merits, the Court were to order that the Treaty of 1865 be continued in force in those cases where its non-application would place Belgium in a less favourable situation than that of other foreign countries; anyhow, and subsidiarily, the judicial clauses of the Treaty should be maintained as well as those clauses which concern most-favoured-nation treatment. In support of its request for provisional measures, the Belgian Government cited the observations of the Extra-territoriality Commission, which sat at Peking from January 12th to September 16th, 1926, in pursuance of the decisions of the Washington Conference.

On the following January 8th the President issued an Order setting out the provisional measures to be taken. Issued in syllogistic form, the Order stated, in the first place, that the denunciation by China of the Treaty of 1865 alters the situation of Belgian nationals in China, whereas it does not in any way modify the position of Chinese nationals in Belgium (and this is the explanation why measures are prescribed exclusively with regard to China); it then stated that the purpose of the provisional measures provided for by the Statute was considered to be the safeguarding of the rights of the Parties as long as the case was pending and that in this case these rights were those which arose as regards Belgian nationals in China from the system of guarantees granted to Belgium under the Treaty of November 2nd, 1865, in so far as that system implied a derogation from the ordinary law. It was true that Belgium and China had accepted the Court's jurisdiction as being compulsory and that such acceptance implied that the Court could give a decision as to the amount of reparation due for the breach of an international engagement; but it was certain that, in the event of the denunciation of the Treaty of 1865 by China being considered by the Court to have been illegal, effective reparation could not in all cases be made for the prejudice caused by any breaches which might have taken place in the interval.

In these circumstances, the President indicated, on a provisional basis, that Belgian nationals should enjoy the following rights:

(1) a right on the part of any Belgian who may have lost his passport or have committed some offence against the law, to be conducted in safety to the nearest Belgian consulate (cf. Treaty of November 2nd, 1865, Article 10);

(2) effective protection of Belgian missionaries who have peacefully proceeded to the interior of the country; and, in general, protection of Belgians against any insult or violence (cf. Treaty of November 2nd, 1865, Articles 15 and 17);

(3) a right on the part of any Belgian who may commit a crime against a Chinese or any other offence against the law, not to be arrested except through a consul, nor to be subjected, as regards the execution of any penalty involving personal violence or duress, to any except the regular action of Belgian law (cf. Treaty of November 2nd, 1865, Article 19).

As regards their property, they should be safeguarded against any sequestration or seizure not in conformity with the generally accepted principles of international law and against non-accidental destruction. Finally, as far as concerns judicial safeguards, physical and juristic persons of Belgian nationality should have any legal proceedings to which they may be Parties before Chinese authorities heard by the modern Courts, in conformity with the modern codes of Law (the Courts and codes

mentioned by the Chinese delegate in his statement of November 25th, 1921, before the Commission for the Pacific and Far East of the Washington Conference and referred to in the above-mentioned report of the Commission on Extra-territoriality in China), with right of appeal, in accordance with the regular legal procedure and with the assistance of advocates and interpreters chosen by them and duly approved by the said Courts.

On January 18th, the Applicant notified the Registrar of the Court that the Belgian and Chinese Governments had decided by mutual agreement to reopen negotiations for the purpose of concluding a new treaty to replace the Treaty of 1865. In order to facilitate the carrying out of these negotiations, the Belgian Government asked for an extension of the time accorded to the Chinese Government for the submission of its Counter-Case, which would have had to have been filed at the latest on March 16th, 1927.

The President acceded to this request whilst, at the same time, stating to the interested Parties that it involved a corresponding extension of the period during which the Order of January 8th relating to provisional measures, would apply.

By a communication, dated the following February 3rd, the Agents for the Belgian Government brought to the notice of the Registrar of the Court that the Chinese Government had expressed its willingness, pending negotiations now in progress, to apply on a provisional basis to the case of Belgium a régime which comprised the following points: adequate protection of Belgian subjects and their property; the application of the tariff applied to other countries to merchandise destined for, or emanating from China or Belgium; judicial safeguards in civil and criminal process in which Belgian nationals might be implicated. The Belgian Minister at Peking having accepted these proposals, the Belgian Government esteemed that the provisional measures indicated in the Order of January 8th ceased to have any purpose; and it therefore asked for the rescission of this Order, adding that a decision to that effect would be in conformity with the wishes of the Chinese Government.

As a result of this new request, the President issued, on February 15th, a second Order rendering the Order of January 8th inoperative. In the new Order, also drawn up in syllogistic form, it is observed that it was the Belgian Government which had asked for the indication of provisional measures and that the Order issued in consequence of this request had, as its sole purpose, the safeguarding of certain of the rights to which Belgian nationals would have been entitled under the Treaty of 1865, if it were recognized as continuing to be in force. But, in accordance with the terms of the communication made by the Belgian Agents, the new agreement replaced the Treaty of 1865, particularly as far as these rights were concerned; consequently, as regards the rights in question, the Treaty had provisionally ceased to have any effect, and, therefore, their violation (as far as it had taken place during the period to which the new agreement applied) could no longer afford a basis for recourse to legal proceedings whatever the tenor of the judgment rendered by the Court on the case might be in the future. Moreover, since the applicant Party was entitled to modify its original conclusions, the time limit granted for the filing of the Counter-Case by the Respondent not having elapsed, it would have been sufficient for the applicant Party to have made a unilateral declaration renouncing the rights safeguarded by the first Order. (The fact that the Belgian request for the revocation of this Order might be interpreted as constituting such a declaration, relieved the Court of the necessity of considering the validity of the agreement notified by one of the Parties only.)

Under these conditions, the indication of provisional measures had become purposeless in this case, there being no circumstances which could make it possible to conclude that the measures were required solely in the interest of the procedure, considered apart from the legal position created by the Parties. Since, on the other hand, measures of protection, indicated by the Court as being, upon purely legal grounds, rendered necessary by circumstances, cannot be dependent as regards their applicability upon the state of negotiations that may be in progress between the Parties, the Order of January 8th,

1927, could only be completely and finally rescinded. The new Order, consequently, declared that the previous one should henceforth cease to be operative.

Since the second Order (i.e. since February 15th), the Belgian Government's Agent has asked for a further extension of the time limits in the case, giving as the reason for his request that such an extension was a condition made by China for the continuation of the negotiations with a view to the conclusion of a new treaty. In reply, the President informed the Applicant, first, that he fixed June 18th, 1927, as the date for the filing of the Chinese Counter-Case, and, secondly, that he did not consider it advisable to fix the other time limits so as to enable the Court, which assembled on June 15th, 1927, to take a decision in this matter.

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## 21. FACTORY AT CHORZÓW (CLAIM FOR INDEMNITY) (JURISDICTION)

### Judgment of 26 July 1927 (Series A, No. 9)

## FACTORY AT CHORZÓW (INDEMNITIES)

### Order of 21 November 1927 (Series A, No. 12)

**Fourth Annual Report of the Permanent Court of International Justice (15 June 1927—15 June 1928), Series E, No. 4, pp. 155–165**

Judgment No. 8

Claim for indemnity relating to the Factory at Chorzów (Jurisdiction)

*Meaning and scope of Geneva Convention and more particularly of Article 23. Discussion of expression "interpretation and application": in international law disputes in regard to application comprise those relating to applicability and to the reparation of the injury suffered as a result of a failure to apply—Conflicts of jurisdiction in the international field: the necessity for avoiding negative conflicts—The principle of "Estoppel"—The jurisdiction of the Court is limited: it does not exist where there is a doubt; it is within the discretion of the Court to decide whether there is a "doubt"*

*Outline of the case*

By a judgment of May 25th, 1926, the Court had decided as between the German Government, Applicant, and the Polish Government, Respondent, that the application of Articles 2 and 5 of the Polish law of July 14th, 1920, constituted in so far as it affected German nationals within the meaning of Part I, Head III, of the Germano-Polish Convention concluded at Geneva on May 15th, 1922, an infraction of Article 6 and the following articles of that Convention, and that the attitude of the Polish Government in applying that law to two industrial enterprises—one being the owner of the land, buildings and installations of the Factory situated at Chorzów (Upper Silesia), and the other carrying out the exploitation of the said Factory—was not in conformity with those articles.

Following upon this judgment, the German Government requested the Polish Government to take steps to bring about a situation which would both in fact and at law be in conformity with the conclusions of the Court; in the opinion of the German Government these steps should have been the reentry in the land registers of the name of the company which was the former owner, the restitution of the

Factory to the exploiting company and the payment to the companies interested of an indemnity, the amount of which would be fixed between the two Governments. Negotiations followed which lasted six months. In the course of the discussions, the German Government came to the conclusion that it was impossible to envisage the restitution of the Factory which, in its opinion, had, under Polish management, undergone alterations which had changed its identity; the question of an indemnity therefore alone remained to be considered. As to the amount of the indemnity, it seemed possible to arrive at an agreement; but irreconcilable differences of opinion were found to exist as to the method of payment, the Polish Government having contended amongst other things that it possessed certain claims upon Germany which should be set off against the amount claimed by the German Government.

In these circumstances, the German Government informed the Polish Government that the points of view of both Parties seemed so different that it appeared impossible to avoid recourse to an international tribunal and that, therefore, the German Minister at The Hague had received instructions to institute proceedings before the Court. The German Government moreover drew attention to the fact that, throughout the negotiations, it had reserved the right of appealing to the Court in the event of failure to agree.

*Public sittings*

After the Applicant had filed an Application on February 8th, 1927, and a Case on March 3rd, the Polish Government, the Respondent, filed, on April 14th, a Preliminary Objection together with a Preliminary Counter-Case. The German Government submitted its Reply to the Polish Objection on June 1st and, the written proceedings in regard to this part of the case being concluded, the case in so far as concerned the question of jurisdiction was entered in the list for the Twelfth Session of the Court (June 15th to December 16th, 1927). In the course of this session the Court held public sittings on June 22nd, 24th and 25th, for the purpose of hearing the pleadings of the representatives of the Parties.

*Composition of the Court*

The Court, on this occasion, was constituted as follows:

MM. Huber, *President*; Loder, *Former President*; Lord Finlay, MM. Nyholm, Moore, de Bustamante, Altamira, Oda, Anzilotti, Pessôa, *Judges,* Yovanovitch, *Deputy-Judge*.

M. Rabel and M. Ehrlich, appointed as judges *ad hoc* by the German and Polish Governments respectively, also sat in the Court for this particular case.

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*Judgment of the Court (analysis)*

The judgment of the Court was given on July 26th. After recalling the facts, the Court, before proceeding with its examination of the case, defines the points of view of the Parties. The sole basis upon which the intervention of the Court must be considered as having been solicited is Article 23 of the Germano-Polish Convention of Geneva. That article stipulates that all differences of opinion arising out of the interpretation or the application of Articles 6 to 22 of the Convention are to be submitted to the Court for decision, but that the jurisdiction of the Germano-Polish Mixed Arbitral Tribunal, arising under the Treaty of Versailles, is to remain unaffected. Articles 6 to 22 regarded from this aspect contain stipulations prohibiting, with certain exceptions, the expropriation (liquidation) of industrial undertakings in Polish Upper Silesia during a period of fifteen years. The objection of the Polish Government—the Respondent—was based on two arguments: on the one hand, it said that the jurisdiction conferred upon the Court under Article 23 to take cognizance of disputes relating to Arti-

cles 6 to 22 did not extend to disputes relating to reparation for injury arising from an infringement of these articles; on the other hand, it contended that there existed tribunals which had jurisdiction in this particular case: the Arbitral Tribunal at Beuthen in Upper Silesia and the Mixed Arbitral Tribunal at Paris; and the jurisdiction of these tribunals, to which the Parties were obliged to have recourse in the first instance, excluded that of the Court.

The Court then proceeds to consider these two arguments submitted by the Respondent, in order to arrive at a conclusion as to its own jurisdiction.

With regard to the first argument, the Court recalls that in the earlier judgments relating to the Chorzów case it has already laid down that its jurisdiction extends not merely to disputes relating to the application of the provisions of Articles 6 to 22, but also to disputes concerning the applicability of those articles. Since in international law the breach of an undertaking imports an obligation to make adequate reparation for the injury sustained, reparation is the indispensable complement of a failure to apply the articles in question; it follows that jurisdiction over disputes relating to the application of these articles implies, generally speaking, a jurisdiction to deal with disputes which relate to reparation due by reason of a failure to apply them.

But the Polish Government contended that Article 23 should be construed as being exclusively confined to the question whether Articles 6 to 22 could or could not in a particular case be properly applied, thus excluding differences of opinion relating to reparation for injury sustained. It supported this contention by reasoning which was general in character: though it was true that originally arbitration clauses could be construed as also covering differences of opinion in regard to reparations, at the present time, in view of the later evolution of International Law, such an extensive construction should be rejected.

In the opinion of the Court this is not so, either generally, or specifically in this particular case. The facts clearly show that in the opinion of the governments which, since the end of the XVIIIth century, have concluded with each other agreements providing for arbitration, whenever reservations have been considered requisite, these reservations have related to disputes regarding legal rights and obligations and not to disputes which specifically contemplate pecuniary reparation. To say that the arbitration clause, whilst confessedly providing for the submission to arbitration of questions of right and obligation, should at the present time be restrictively construed as excluding pecuniary reparation, would be contrary to the fundamental conception which has characterized the movement in favour of general arbitration.

Moreover, on an examination of the particular clause under discussion, the words employed by the authors of the Convention show that they had in view not so much the subject of disputes as their source: and it may hence be concluded that disputes relating to reparation for injury are included amongst those relating to the application of Articles 6 to 22 even if, contrary to what has been set out above, the meaning underlying the actual word application would not bear such a construction.

There is another reason which militates in favour of the Court's opinion. For the purpose of construing the contested provision, not only should account be taken of the historical evolution of International Law in regard to the matter, and of the etymological and logical meaning of the words employed, but also and above all of the aim which the authors of the Convention intended to achieve. Their intention was, by offering to the Parties remedies for substantiating their rights, to prevent the interests which the Convention was to safeguard from being jeopardized by the existence of persisting differences of opinion. That is why in the particular case a construction which would compel the Court to confine itself to merely recording that the Convention had been wrongly applied or not applied at all, without being able to lay down the conditions for the reestablishment of the treaty rights affected, would be contrary to what would, *prima facie*, be the natural object of the clause: for a jurisdiction of this kind instead of definitely settling a dispute, would open the way to further disputes.

The Court is consequently led to reject the first argument relied on by the Polish Government. As to the second, which related to the existence of other competent tribunals, it also arrives at the conclusion that it has not been made out. In support of this second line of argument, the Polish Government based itself in the first place on the general principle that recourse could not be had to the Court, considered as an exceptional form of jurisdiction, unless and until all ordinary means of obtaining redress had been exhausted before other tribunals, i.e. in this case the Arbitral Tribunal at Beuthen and the Mixed Arbitral Tribunal at Paris, the jurisdiction of the latter having been specifically provided for by the second paragraph of Article 23 of the same Convention. The Court in this connection observes that the Polish Government had not maintained that in the particular case its own municipal courts had jurisdiction.

According to the Polish Government, the Beuthen Tribunal had jurisdiction under Article 5 of the Convention. In Judgment No. 6, the Court has already disallowed an analogous argument in regard to this Tribunal: its reasoning was more particularly based upon the want of identity between the Parties to the suit submitted to the Court and the Parties to the case pending before the Beuthen Tribunal. Moreover, the jurisdiction of the Beuthen Tribunal applies in a different sphere: it relates to the provisions of the German-Polish Convention which concerns the safeguarding of vested rights, a subject which is dealt with under Head II of Part I of the Convention. Now, the violation in respect of which reparation is claimed in this particular case is a violation of the provisions of Articles 6 to 22, which are embodied in Head III of Part I of the Convention; and this Head, which constitutes an exception to the general principle of respect for vested rights laid down in Head II, also provides a jurisdiction for differences of opinion which arise in regard to the exceptional provisions above mentioned; this jurisdiction can in these circumstances only be that of the Court. Moreover, the Beuthen Tribunal can only grant damages together with interest to the claimants as compensation, whereas it is clear that compensation for injury resulting from a violation of Articles 6 to 22 should also be capable of taking the form of *restitutio in pristinum*.

As regards the Mixed Arbitral Tribunal, it is true that its jurisdiction is reserved by Article 23 itself. But the Court explains this fact by recalling that the application of Articles 6 to 22 may give rise to cases analogous to those in which the Treaty of Versailles confers jurisdiction upon this Tribunal and that the object of the Geneva Convention is certainly not to diminish the guarantees which the said Treaty confers upon persons subject to liquidation; in this way, Articles 7 and 8 refer to Articles 92 and 297 of the Treaty. But such cases are necessarily cases of expropriation or of liquidation within the terms of Articles 6 to 22, whereas the present case arises from a violation of the obligation to apply those articles: it is a question of special measures which fell outside the normal operation of Articles 6 to 22, whereas the jurisdiction reserved to the Mixed Arbitral Tribunals, under Article 23, on the contrary presupposes the application of those articles; the reparation due in this particular case is the outcome not of the application of Articles 6 to 22 but of acts contrary to the provisions embodied in those articles.—But Article 305 of the Treaty of Versailles—which was also relied on by one of the interested companies in an action brought by it—also confers jurisdiction upon the Mixed Arbitral Tribunal. Should this article be taken as applicable in this particular case? The Court, whilst leaving the interpretation of that article to the Mixed Arbitral Tribunal itself, has doubts as to its applicability in the particular case under consideration and in this respect observes that it cannot allow its own jurisdiction to give way before that of another tribunal unless confronted with a clause sufficiently clear to exclude the possibility of a negative conflict of jurisdiction leading to a denial of justice. Furthermore, the Court makes a general reference to the principle that one Party cannot avail himself of the fact that the latter has not fulfilled an obligation or has not had recourse to some means of redress if the former Party has himself by some illegal act made it impossible for the latter to do so: in this particular case, Poland, having failed to apply the Geneva Convention, could not require the interested companies to seek redress for the injury due to that failure, from the tribunals which would have been open to them, had that Convention been properly applied.

Finally, the Court answers the contention that in case of doubt it should always decline jurisdiction. It is true that the Court's jurisdiction is always a limited one, since it only exists to the extent to which the States have accepted it, and that the Court will only affirm its jurisdiction when the force of the arguments for so doing is preponderant. But the question as to the existence of a doubt nullifying jurisdiction need not be considered when—as in the case under consideration—the intention of the Parties to confer jurisdiction upon the Court can be demonstrated in a manner which it considers to be convincing.

In conclusion, the Court accepts jurisdiction and reserves the suit for judgment on the merits. As to the claims relating to the amount of the indemnities and to the method of payment, the Court, considering them as supplementary to the claim for reparation, also reserves them for consideration upon the merits.

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*Dissenting opinion*

The Court's judgment was adopted by ten votes to three.

The Polish Judge *ad hoc*, M. Ehrlich, availing himself of the right conferred on him by Article 57 of the Statute, delivered a separate opinion.

*Dissenting opinion by M. Ehrlich*

M. Ehrlich states that while the Court has, in principle, jurisdiction to decide on submission No. 1, he does not think that the Court can consider that submission in the present case.

It followed from Judgment No. 7, without the necessity of an explicit statement, that the Polish Government was bound to make reparation for any damage which may actually and unlawfully have been inflicted as a result of the attitude of the Polish Government declared by that judgment not to have been in conformity with certain stipulations or the Geneva Convention. This is a consequence of the principle that the violation of an international obligation entails the duty of reparation, a principle so generally accepted that in the classification of international disputes of a legal character, embodied in Article 13 of the Covenant of the League of Nations, and in Article 36 of the Statute of the Court there is no special class of disputes as to the duty of making reparation for a breach of an international obligation, as distinguished from disputes concerning the existence of a fact which, if established, would constitute a breach of an international obligation: this latter class of disputes obviously includes the former.

M. Ehrlich then states that since the jurisdiction of the Court in the present case is based on Article 23, paragraph 1, of the Geneva Convention, it follows that the Court has no jurisdiction where there is no divergence of opinion. The principle of reparation seems admitted; for there is not even a divergence of opinion as to the further question, what form reparation should take.

Turning to the jurisdiction over the other submissions, M. Ehrlich asserts that in international law jurisdiction to decide, in principle, that a violation of an international engagement has taken place and that, consequently, reparation is due, is distinct from jurisdiction to determine the nature and extent of reparation in general and the amount of a pecuniary indemnity in particular. According to M. Ehrlich, neither can jurisdiction to decide disputes belonging to one class be deduced from jurisdiction to decide disputes belonging to another class.

M. Ehrlich subsequently addresses whether the Parties to the Geneva Convention did not intend to confer upon the Court the jurisdiction to assess the damages and to fix the mode of payment. In his view, Article 23 of the Convention may not be interpreted as conferring such jurisdiction. In particular, he observes that nothing has been brought to the attention of the Court to prove conclusively that the

clause "interpretation and application" was considered in the practice of nations to comprise jurisdiction in the matter of the determination of the nature and extent of reparation for the violation of the treaty in question.

M. Ehrlich also rejects the hypothesis that the general construction of Part I of the Geneva Convention would make it imperative to assume that the Court, and no other tribunal, has jurisdiction in cases like the present.

Finally, M. Ehrlich considers that an intention of the Parties to the Geneva Convention to confer the jurisdiction in question on the Court may not be inferred from the acts of the Parties which preceded, accompanied, and followed soon after the making of the treaty.

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## Order

## Request for interim measures of protection in the case relating to the Factory at Chorzów (Indemnity)

*Request for interim measures of protection and submissions on the merits—Composition of the Court in this case—Rejection of the German request*

On November 15th, 1927, the German Government filed with the Registry an Application dated at Berlin on October 14th, to the effect that a provisional measure of interim protection should be indicated in the case concerning the Chorzów Factory (indemnity), a case in which the Court had declared itself to have jurisdiction by its Judgment of July 26th, 1927, and which was consequently now pending before the Court. The German Application claimed that the objection to the jurisdiction raised by the Polish Government, together with the extension of the time-limits for the filing of the documents in the written proceedings upon the merits of the case—an extension granted at the request of the Polish Government—had increased to an appreciable extent the injury suffered by the interested companies owing to the measures which that Government had taken in regard to the Factory. It claimed moreover that the essential part of the application instituting proceedings was not only the amount of the indemnity claimed but, at least to an equal extent, the date of its payment. If, during the decisive periods of the development of a branch of industry, an industrial enterprise was placed in a position which made it impossible for it to participate in that development, it was not only its own private interests but also national interests which had to suffer injury which no amount of pecuniary compensation could ever indemnify.

Seeing that the principle of compensation was in the present case recognized and that it was only the payment of the indemnity which was at issue, and seeing that the damage arising from further delay would be materially irreparable, the German Government considered that an interim measure of protection whereby the Court would indicate to the respondent Government the sum to be paid immediately as a provisional measure and pending final judgment was necessary for the protection of the rights of the Parties whilst the affair was *sub judice*.

And the Request concluded by asking the Court to invite the Polish Government to pay to the German Government as a provisional measure the sum of 30 millions of Reichsmarks.

The Court gave a decision on this request by an Order, issued on November 21st, 1927.

*Composition of the Court*

On this occasion the following judges sat on the Court.

MM. Huber, *President*; Loder, *Former President*; Lord Finlay, MM. Nyholm, Altamira, Oda, Anzilotti, *Judges,* Beichmann, Negulesco, *Deputy-Judges*.

*Order of Court (summary)*

In the Order the Court recalls that by Judgment No. 8, in which it ruled that it had jurisdiction to adjudicate upon the merits in the case in question, it has reserved for judgment on the merits the claims formulated in the Application instituting proceedings filed by the German Government.

Now the Court considers that the new request of the German Government cannot be regarded as relating to the indication of measures of interim protection but as designed to obtain an interim judgment in favour of a part of the claim formulated in the Application above mentioned, and that consequently the request under consideration is not covered by the terms of the Statute and Rules relating to measures of interim protection.

In these circumstances, considering that there is no reason to invite the Polish Government to submit observations upon the German Government's request, and considering that the Court is entitled as normally composed to indicate, should occasion arise, measures of interim protection without specially obtaining the assistance of national judges, the Court decides that effect cannot be given to the request of the German Government of October 14th, 1927.

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## 22. S.S "LOTUS"

### Judgment of 7 September 1927 (Series A, No. 10)

**Fourth Annual Report of the Permanent Court of International Justice (15 June 1927—15 June 1928), Series E, No. 4, pp. 166–175**

*The principles of international law within the meaning of Article 15 of the Convention of Lausanne—From the sovereignty of States, the basis of international law, a presumption arises in favour of the jurisdiction of any State over its own territory and of its right to legislate as it thinks fit in criminal as well as in civil matters—The territoriality of criminal law is not an absolute principle of international law—In penal matters, in particular as regards manslaughter, international law does not provide that for the purpose of localizing the wrongful act any single theory must be adopted in preference to all others—The principle of the freedom of the seas allows a State, in so far as penal jurisdiction is concerned, to assimilate the ship flying its flag to its own territory without, however, as regards collisions, any more extended rights arising therefrom which would create an exclusive jurisdiction in favour of such State—The inseparability of the elements constituting an offence giving rise to concurrent jurisdictions*

*Outline of the case*

On August 2nd, 1926, towards midnight, between five and six nautical miles to the North of Cape Sigri (Mitylene), a collision occurred between the French mail steamer *Lotus* (during the watch of the first lieutenant of the ship, M. Demons, a French citizen) and the Turkish collier *Boz-Kourt*, commanded by its captain Hassan Bey. Cut in two the Turkish ship sank; ten of the persons who were on board were able to be saved by the *Lotus*, but eight others who were Turkish nationals were drowned. The French mail steamer then continued on its course towards Constantinople where it arrived on August 3rd. The Turkish police proceeded to hold an inquiry into the collision. On August 4th, the captain of the *Lotus*

handed in his master's report at the French Consulate transmitting a copy thereof to the harbour master. On the following day, August 5th, Lieutenant Demons was requested to go ashore to give evidence. The examination, the length of which resulted in delaying the departure of the French steamer, led to the placing under arrest of Lieutenant Demons—without previous notice moreover being given to the French Consul-General—and of the Captain of the *Boz-Kourt*. This arrest was alleged to have been effected in order to ensure that the criminal prosecutions instituted against these two officers, on a charge of manslaughter brought on the complaint of the families of the victims of the collision, should follow its normal course. The case was heard from August 28th onwards by the Criminal Court of Stamboul before which it had been brought; that Court gave judgment affirming its jurisdiction to which Lieutenant Demons had pleaded. The proceedings were resumed on September 11th, when Lieutenant Demons demanded his release on bail; this request was complied with on September 13th, the bail being fixed at 6,000 Turkish pounds. On September 15th, the Court sentenced Lieutenant Demons to eighty days imprisonment and a fine of twenty-two pounds, and the other accused to a slightly more severe penalty.

*Special agreement*

From the outset of the proceedings taken against M. Demons, the French Government had made protest to the Turkish Government and had demanded in particular that the matter should be withdrawn from the Turkish courts and transferred to the French courts. As a result of repeated representations, the Government of Angora declared on September 2nd that it would have no objection to the reference of the dispute as regards jurisdiction to the Permanent Court of International Justice; the French Government having on the 6th of the same month given its full consent to the proposed solution, the two Parties appointed their plenipotentiaries who, on October 12th, 1926, signed at Geneva a Special Agreement. This Agreement, which was ratified on December 27th following, was notified to the Registrar of the Court on January 4th, 1927.

By the Special Agreement, the Court was asked to decide in the first place whether Turkey had "contrary to Article 15 of the Convention of Lausanne of July 24th, 1923, respecting conditions of residence and business and jurisdiction, acted in conflict with the principles of international law—and if so, what principles—by instituting . . . against M. Demons as well as against the captain of the Turkish steamship, joint criminal proceedings in pursuance of Turkish law"; and secondly, "should the reply be in the affirmative, what pecuniary reparation is due to M. Demons".

Both Parties filed a Case on March 1st, 1927, and a Counter-Case on May 24th following. The suit was entered on the list of cases for the Twelfth (ordinary) Session of the Court held from June 15th to December 16th, 1927.

*Composition of the Court*

The following judges sat on the Court when this case was heard:

MM. Huber, *President*; Loder, *Former President*; Weiss, *Vice-President*; Lord Finlay, MM. Nyholm, Moore, de Bustamante, Altamira, Oda, Anzilotti, Pessôa, *Judges*.

Feïzi-Daïm Bey, whom the Turkish Government, availing itself of its right to appoint a national judge *ad hoc*, had nominated for this purpose, also sat as a member of the Court.

*Public sittings*

In the course of public sittings held on August 2nd, 3rd, 6th, 8th, 9th and 10th, the Court heard the arguments of the representatives of the Parties; it delivered judgment on September 7th.

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*Judgment of the Court (analysis)*

After a short recital of the facts brought to its notice, the Court, in the first place, gives an outline, in the light of the record before it, of the situation resulting from the terms of the Special Agreement; and in this respect, it makes the following observations amongst others: First, the collision having taken place on the high seas, no territorial jurisdiction other than that of France or Turkey enters into account. Secondly, a question of a limited nature only has been asked: is the fact of the Turkish criminal court's having exercised criminal jurisdiction in this particular case as such contrary to the principles of international law? This question is distinct more particularly from the following questions: whether the laws and enactments which the Turkish authorities had been able to adduce in support of the criminal proceedings were compatible with international law; whether the manner in which the proceedings had been conducted was such as might lead to a denial of justice and, accordingly, to a violation of international law; and, finally, what was the nature of the wrongful acts, if any, of which M. Demons was accused. Thirdly, on the assumption that there existed a relationship of cause and effect between those acts and the death of the Turkish nationals, the offence of Demons would be that of *homicide par imprudence* (manslaughter).

What are the principles of international law which the proceedings might have violated, principles to which Article 15 of the Convention of Lausanne, cited in the Special Agreement, refers the contracting Parties for the purpose of delimiting their respective jurisdictions? In this respect, the terms of the Lausanne Convention are clear and there is no ground for considering the preparatory work (the argument which it was sought to draw therefrom is moreover double-edged): these principles are the principles of international law as it is applied between all members of the community of nations, which principles accordingly apply equally to all the States parties to the Convention. Indeed the Treaty of Peace of Lausanne decrees the abolition in every respect of capitulations and, moreover, the preamble to the Convention itself states that the intention of its authors is to effect a settlement in accordance "with modern international law".

After stating the above, the Court, having to consider whether there are any rules of international law which might have been violated by the Turkish authorities, is confronted at the outset with a fundamental question of principle: Were the Turkish courts obliged to find some title to justify the exercise of jurisdiction or, on the contrary, was such jurisdiction admissible unless it came into conflict with international law? The Court adopts the latter view. Indeed, in the first place, it appears to be in conformity with the Special Agreement itself, which does not ask the Court to formulate the principles empowering Turkey to institute criminal proceedings but those which prevent her from so doing. Secondly, this view is dictated by the very nature, under existing conditions, of international law, the basis of which is the free will of independent States and which, whilst prohibiting the exercise of the sovereign powers of a State in the territory of another, except by virtue of a permissive rule, does not, on the other hand, prohibit municipal courts from taking cognizance of acts which have taken place abroad—subject to a few prohibitive rules of an exceptional nature—the general principle being that every State is free to adopt the principles which it regards as best. It is moreover this freedom which explains the variety of rules which certain States have been able to adopt without objection on the part of others, a variety from which positive and negative conflicts of jurisdiction have arisen and which attempts have been made in Europe and America to remedy by endeavouring to draw up conventions restricting the freedom of the Parties. In these circumstances, all that can be required of a State is not to go beyond the limits assigned to its jurisdiction by international law; within these limits, the authority for the jurisdiction it exercises rests in its sovereignty. It would be contrary to general international law to demand that a State should have to find a permissive rule of that law in every case over which it claimed jurisdiction before its courts.

Nevertheless, it has to be ascertained whether the situation is the same also as regards criminal jurisdiction.

The Court observes, in the first place, that the territorial character of criminal law is not an absolute principle of international law and by no means coincides with territorial sovereignty: indeed, though it is true that in all systems of criminal law the principle of its territorial character is fundamental, the greater part of these systems none the less extend their scope to cover offences committed abroad and they do so in ways which vary from State to State. According to one of these systems—that supported by Turkey—the situation is identical both in relation to penal and to any other matters: the principle of the freedom of States is alleged to be a generally recognized principle of law. According to another system, upon which the French reasoning was based, the territorial principle is proclaimed as the rule, and any exception to which it might be subject—such for example as the extraterritorial jurisdiction of a State over its own nationals or in regard to crimes against the security of the State—should rest on specific permissive rules. But even if, for the purposes of demonstration, the point of view of the French system be adopted, one is obliged, for logical reasons, to return to a consideration of the same difficulty: that of finding whether any principle of international law restricting the freedom of States in matters relating to criminal law exists, i.e. as regards the case before the Court, any principle which would have prohibited Turkey from taking criminal proceedings against Demons.

In order to solve this difficulty, the Court has to examine those precedents which are closely analogous to the present case, from which precedents alone a general principle might be evolved applicable to the case.

Proceeding to make this examination, the Court then considers the arguments of the French Government in support of the theory of prohibition. The reasoning of the French Government may in substance be said to consist of three main arguments.

The first was that international law did not allow a State to take proceedings against a foreigner who had committed an offence for an act committed by him abroad, solely by reason of the nationality of the victim; and such was the situation in the case under consideration, because the offence must be considered as having been committed on French territory. But the Court observes that the offence produced its effects on the Turkish vessel, that is to say in a place where Turkish criminal law could not be challenged; so that, even if it were found that the restrictive rule invoked by the French Government were well founded in so far as it had in view proceedings based on the nationality of the victim, it would not be relevant to the case, unless another rule existed forbidding States from basing their jurisdiction on some other criterion, such as, for example, the locality where the offence produced its effects. But no argument brought to the knowledge of the Court allows of such a prohibition being inferred. On the contrary, it is well established that a number of municipal courts have assimilated offences committed in the territorial sphere of their jurisdiction to those producing their effects therein; and the Court is not aware of a case in which diplomatic representations have been made in this respect. Moreover, it should be recalled that in the particular case under consideration the special agreement does not contemplate the eventuality of a conflict between the principles of international law and the article of the Turkish Penal Code upon which the Turkish courts founded their jurisdiction, which article is solely based upon the principle of the victim's nationality. However this may be, even if the principle were to be rejected or if the articles were held to be incompatible with international law, it would not be possible to infer that the proceedings should be condemned as being contrary to that law, since the invocation of the impugned article might show a mere error in the choice of the legal provision applicable and another provision compatible with international law might possibly have been cited in support.

The Court therefore concludes that, since the offence produced its effects on the Turkish ship, no rule of international law exists prohibiting the Turkish authorities from taking proceedings against Demons because of the fact that he was on board the French ship. Is the conclusion affected in the

particular case of manslaughter, where a wrongful intent, directed towards the place where the mortal effect is felt, is wanting, and the offence cannot, consequently, be localized in that spot? It is unnecessary for the Court to decide this point, which is one of interpretation of Turkish law; it will suffice to observe that no rule of international law exists which necessitates such an interpretation of manslaughter in preference to one which tends to localize the offence in the place where it produces its effects.

The French Government in the second place argued that the State whose flag was flown had exclusive jurisdiction over acts taking place on board a merchant ship on the high seas. It is quite true, the Court observes, that the freedom of the seas implies that no State may exercise any kind of jurisdiction over acts taking place on foreign ships, which can be assimilated to the territory of the States the flags of which the ships fly; but this is no more than an assimilation and the State whose flag the ship flies cannot claim rights over that ship more extensive than those which it exercises on its own territory properly so-called. Consequently acts which take place on the high seas on a ship must be regarded as having taken place on the territory of the State whose flag the ship flies; and, therefore, if an offence committed on board a ship on the high seas produces its effects on a ship of another nationality, the State under whose jurisdiction the latter vessel falls is no more debarred by international law from taking criminal proceedings against the accused than it would be in the event of the offence producing its effects on its own territory properly so-called. Neither the teaching of publicists nor customary law allow of any other inference; in so far as international precedents are concerned, it would appear to be clear that the principle of an exclusive jurisdiction of the State whose flag is flown is not universally recognized.

The third argument put forward by the French Government was as follows: In so far as collision cases were concerned, criminal proceedings, at all events, would come within the exclusive jurisdiction of the State whose flag was flown. It was alleged—the Court proceeds—in support of this argument, in the first place that in fact States had often refrained from instituting criminal proceedings; but, even if such abstention were an established fact, it could not be classified as an international custom unless it were due to their being conscious of a duty to abstain; and that would still have to be proved. A series of decisions was adduced which, owing to the lack of international decisions, consisted mainly of judgments by municipal courts; but these judgments supported sometimes one view and sometimes the other; in these circumstances the Court cannot take them as indicating the existence of a restrictive rule of international law. On the contrary, the Court deduces from them an argument in favour of rejecting the French contention, since it is able to establish that in the cases in which the courts of a country other than the one whose flag was flown have instituted proceedings, the State which, according to the French argument, should have exclusive jurisdiction to do so, does not appear to have ever made any protest. In the last place, it was contended in support of the theory of the exclusive nature of the jurisdiction that it was explainable by the fact that the punishment which could be imposed as a result of the proceedings, as for instance the temporary cancellation of a master's certificate, was disciplinary rather than penal in character. But in this respect the Court lays stress on the fact that in this particular case the proceedings were in fact instituted for an offence at criminal law and that in general the application of criminal law cannot be considered as being subsidiary to the application of administrative regulations or disciplinary penalties.

These considerations lead the Court to reject the third argument of the French Government and to conclude that, as regards collision cases, there is no exclusive jurisdiction in favour of the State whose flag is flown. And this is easily comprehensible if the manner in which collisions give rise to conflicts between two jurisdictions of different States be taken into account: thus, in this particular case, there was on the one hand an act or an omission on board the *Lotus*; on the other hand, the effects of that act were felt on board the *Boz-Kourt*; these two elements are, juridically speaking, inseparable, so much so that their separation would render the offence non-existent. Neither the exclusive jurisdiction of either

State, nor the limitations of the jurisdiction of each to the occurrences which took place on the respective ships, would appear calculated to satisfy the requirements of justice and effectively to protect the interests of the two States. It is only natural that each should be able to exercise jurisdiction and to do so in respect of the incident as a whole. It is therefore a case of concurrent jurisdictions.

The Court, having arrived at the conclusion that the arguments advanced by the French Government are either irrelevant to the issue or do not establish the existence of a restrictive principle, observes that in the fulfilment of its task of ascertaining what the international law is, it has not confined itself to the consideration of these arguments but that it has extended its researches to all precedents, teachings and facts to which it has had access. Since the result of these researches has not been to establish the existence of such a principle, it must come to the conclusion that Turkey did not act in a manner contrary to the principles of international law in the matters submitted to the Court by the Special Agreement, having regard to the discretion which, in the absence of any specific principles governing the matter, international law allows to every sovereign State.

Having thus given answer in the negative to the first question, there is no need for the Court to consider the second.

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*Dissenting opinions*

The judgment was adopted by the President's casting vote, the Court being composed of twelve Judges, and the votes being equally divided. All the dissenting Judges—MM. Loder, Weiss, Lord Finlay, MM. Moore, Nyholm, Altamira—availed themselves of their right under the Statute to attach to the judgment the statement of their separate opinions. One of the dissenting Judges, Mr. John B. Moore, however, began his opinion by declaring his agreement with the principle laid down in the judgment, according to which there is no rule of international law by virtue of which the penal cognizance of a collision at sea resulting in loss of life belongs exclusively to the country of the ship by or by means of which the wrong has been done. "Thus", he added, "making for the judgment on that question as submitted by the Compromis a definitely ascertained majority of seven to five."

*Dissenting opinion by M. Loder*

M. Loder asserts that the view, held by the Court, that under international law everything which is not prohibited is permitted is at variance with the spirit of international law. This law is for the most part unwritten and lacks sanctions; it rests on a general consensus of opinion; on the acceptance by civilized States, members of the great community of nations, of rules, customs and existing conditions which they are bound to respect in their mutual relations, although neither committed to writing nor confirmed by conventions.

M. Loder notes that these rules may be gradually modified, altered or extended, in accordance with the views of a considerable majority of these States, as this consensus of opinion develops, but it seems incorrect to say that the municipal law of a minority of States suffices to abrogate or change them. He adds that it also appears incorrect to claim that the absence of international disputes or diplomatic difficulties in regard to certain provisions of the laws of some States, which are at variance with generally accepted ideas, can serve to show the development or modification of such ideas.

M. Loder states that the fundamental consequence of States' independence and sovereignty is that no municipal law, in the particular case under consideration no criminal law, can apply or have binding effect outside the national territory. The criminal law of a State *cannot* extend to offences committed by a foreigner in foreign territory, without infringing the sovereign rights of the foreign State concerned,

since in that State the State enacting the law has no jurisdiction. Nor can such a law extend in the territory of the State enacting it to an offence committed by a foreigner abroad should the foreigner happen to be in this territory after the commission of the offence, because the guilty act has not been committed within the area subject to the jurisdiction of that State and the *subsequent presence of the guilty person* cannot have the effect of *extending the jurisdiction of the State*.

M. Loder acknowledges that this consequence can be overridden by some convention to the contrary effect or by some exception generally and even tacitly recognized by international law. However, such an exception must be strictly construed. He finds that a modification to this rule has occurred: This modification tends to except from the strict rule governing the jurisdiction over offences committed by foreigners abroad such offences, in so far as they are directed against the State itself or against its security or credit. However, the alleged offence with which M. Demons is charged by Turkey, namely, involuntary manslaughter, does not fall within the scope of that exception.

M. Loder turns to the Turkish argument according to which the offence in the present case took place on board the *Boz-Kourt* because it was there that the effects of the alleged negligence were felt. According to M. Loder, the assumption that the place where the effect is produced is the place where the act was committed is in every case a legal fiction, which is justified where the act and its effect are indistinguishable. But the case which the Court has to consider bears no resemblance to these instances. The officer of the *Lotus*, who had never set foot on board the *Boz-Kourt*, had no intention of injuring anyone, and no such intention is imputed to him. In these circumstances, the legal fiction whereby the act is held to have been committed at the place where the effect is produced must be discarded.

M. Loder then turns to the Turkish argument that seeks to base her jurisdiction upon an alleged "connexity" between the movements of the two vessels. Turkey claims that the offence of involuntary manslaughter, imputed to M. Demons, is "connected" *(connexe)* with the identical charge against the captain of the *Boz-Kourt* and that the Turkish court has jurisdiction on this ground. M. Loder states that joinder will only be possible if the judge before whom the joined causes are brought has jurisdiction in respect of each of them separately, and that "connexity" does not create *jurisdiction*.

Finally, M. Loder notes that the general rule that the criminal law of a State loses its compelling force and its applicability in relation to offences committed by a foreigner in foreign territory, a rule derived from the basic principle of the sovereignty and independence of States, has indeed undergone modifications and has been made subject to exceptions restricting its scope by the mutual consent of the different Powers in so far as territory properly so called is concerned. However, he emphasizes that, according to a generally accepted view, this is not the case as regards the high seas. There the law of the flag and national jurisdiction have retained their indisputable authority to the exclusion of all foreign law or jurisdiction. M. Loder therefore finds that M. Demons was responsible to his national authorities for the observance of these rules contained in his national regulations. It was solely for these authorities to consider whether the officer had observed these rules, whether he had done his duty, and, if not, whether he had neglected their observance to such a degree as to have incurred criminal responsibility. Turkey has therefore acted in contravention of the principle of international law in this regard.

*Dissenting opinion by M. Weiss*

From an interpretation of the Peace Treaty signed at Lausanne, on July 24th, 1923, between Turkey and the Allied Powers, particularly Article 15, M. Weiss finds that, *in all cases,* that is to say, in criminal cases as well as in cases of civil and commercial law, conflicts of jurisdiction which may arise between Turkey and the other signatory States are to be settled in accordance with the *principles of international law*.

M. Weiss therefore poses the following question: Does international law authorize the application of Turkish law and the intervention of Turkish Courts for the repression of offences or crimes committed by a foreign subject outside Turkey? According to M. Weiss, from the absence of any reference in Article 15 to the jurisdiction of the Turkish Courts to take cognizance of crimes or offences committed by foreigners on foreign territory, it therefore follows that no such jurisdiction was recognized as being a rule of international law.

M. Weiss states that Turkey, being unable to find any support for her claim in treaty law, considerably enlarged the field of discussion, by having recourse to the general principles of international law and pleading the *sovereignty of States upon which this law is based*. This argument would imply for Turkey an absolute right of jurisdiction over the high seas, as well as over such of her nationals as may be upon foreign territory as residents or as visitors, and even over foreigners living abroad who may have been guilty of an offence injurious to Turkey or to one of her subjects.

M. Weiss considers that Turkey has also, with the aid of numerous quotations from authors and judicial decisions, taken from the theory and practice of many countries, brought forward a certain number of considerations or systems which, in her view, demonstrate that the proceedings instituted at Stamboul against the French officer Demons, and the sentence which was rendered against him, not only did not contravene any prohibition in international law, but were besides entirely in conformity with the practice universally followed by States. For M. Weiss, the fundamental error of this contention is its endeavour to find sources of international law in places where they do not exist. International law is not created by an accumulation of opinions and systems; neither is its source a sum total of judgments, even if they agree with each other. Those are only methods of discovering some of its aspects, of finding some of its principles, and of formulating these principles satisfactorily. In reality the only source of international law is the *consensus omnium*. Whenever it appears that all nations constituting the international community are in agreement as regards the acceptance or the application in their mutual relations of a specific rule of conduct, this rule becomes part of international law and becomes one of those rules the observance of which the Lausanne Convention recommends to the signatory States.

According to M. Weiss, by virtue of sovereignty, every State has jurisdiction to sentence and punish the perpetrators of offences committed within its territory. But, outside the territory, the right of States to exercise police duties and jurisdiction ceases to exist; their sovereignty does not operate, and crimes and offences, even in the case of those inflicting injury upon the States themselves, fall normally outside the sanctioning force of their courts.

M. Weiss notes that it is now, by a noteworthy extension of territorial jurisdiction, readily recognized that a person may be prosecuted before the courts of his own country for an offence committed abroad either against a compatriot or against the institutions, security or credit of the State of which he is a national. But this extension, which is not even always confined to nationals, and which has, properly speaking, nothing to do with the principle of the sovereignty of States in criminal matters, which it may rather be said to contradict, is explained by special considerations entirely irrelevant to the *Lotus* case. He concludes that the criminal jurisdiction of a State therefore is based on *and limited by* the territorial area over which it exercises sovereignty.

M. Weiss then asks what happens to this principle when the offence committed takes place on the high seas outside the zone of territorial waters over which it is generally held that a State exercises rights of police and jurisdiction. Here we come face to face with another and equally definite principle of international law: *the principle of the freedom of the high seas*. The high seas are free and *res nullius,* and, apart from certain exceptions or restrictions imposed in the interest of the common safety of States, they are subject to no territorial authority. M. Weiss notes that it has appeared expedient to extend to merchant vessels on the high seas the jurisdiction of the authorities of the State whose flag they fly. These vessels and their crews are answerable only to the *law of the flag*. For M. Weiss, it would

not appear that there is any reason for not applying this principle in the case of the *Boz-Kourt* and *Lotus*.

M. Weiss highlights that the Turkish Government has not denied the jurisdiction of the *law of the flag*, but holds that this jurisdiction is not exclusive. Additionally, it has been argued by Turkey that the jurisdiction claimed by the courts of Stamboul in the *Lotus* case was justified by the *right of protection* possessed by every State in respect of its nationals even beyond its frontiers. M. Weiss finds that this system is not in itself contrary to international law, but it is outside the scope of international law: it does not in itself constitute a principle of international law capable of overcoming the principle of the *freedom of the seas* and that of the *law of the flag* which is the corollary of the former.

M. Weiss turns to other titles to jurisdiction, intended to support the argument based on Turkish sovereignty, which have been put forward by the representatives of that country. They endeavoured to *localize* the offence, which it was sought to punish, upon the vessel which sustained the injurious result. Yet M. Weiss states that it is on the vessel responsible for the collision and not on the vessel run down that the disaster should have been localized, if any importance were attached to such localization from the point of view of jurisdiction; the law and jurisdiction of the flag under which Lieutenant Demons sailed would then apply perfectly naturally.

Finally, M. Weiss turns to the posited theory of "connexity" (*connexité*), making these proceedings dependent upon those taken in pursuance of Turkish law against the Turkish officer of the *Boz-Kourt*. He holds that this conception is completely foreign to international relations, by reason of the modifications which it would involve both as regards the law applicable to offences alleged to be "connected" (*connexes*) and the system of penalties which would be applicable to them. "Connexity" (*connexité*) is a rule of internal convenience applicable in those States which have included it in their codes of procedure; it is ineffective outside their frontiers.

M. Weiss concludes that the Turkish Government, in proceeding against the French Lieutenant Demons upon the basis of acts which had taken place outside Turkish territory on a vessel flying the French flag has disregarded two fundamental principles of international law, namely the *principle of the sovereignty of States* in criminal matters; and the principle of the *freedom of the high seas*, including the application of the *law of the flag* which is its corollary. It has consequently acted in contravention of Article 15 of the Lausanne Convention.

*Dissenting opinion by Lord Finlay*

Lord Finlay states that the practice with regard to crimes committed at sea has been that the accused should be tried by the courts of the country to which his ship belongs, with the possible alternative of the courts of the country to which the offender personally belongs, if his nationality is different from that of the ship. There has been only one exception: pirates have been regarded as *hostes humanis generis* and might be tried in the courts of any country. Therefore, in the ordinary course any trial of Demons on a charge of having by criminal negligence in navigation caused the sinking of the Turkish vessel by collision would have been held in a French court. According to Lord Finlay, the question is whether the principles of international law authorize what Turkey did in this matter.

With regard to Turkey's argument that the offense committed by Demons was committed on board the *Boz-Kourt*, and therefore on Turkish territory, Lord Finlay finds it impossible with any reason to apply the principle of locality to the case of ships coming into collision for the purpose of ascertaining what court has jurisdiction; that depends on the principles of maritime law. Criminal jurisdiction for negligence causing a collision is in the courts of the country of the flag, provided that if the offender is of a nationality different from that of his ship, the prosecution may alternatively be in the courts of

his own country. Lord Finlay cites the *Franconia* case (R. v. Keyn, 1877, 2 Ex. Div. 63) from the English Courts as authority which points to the same conclusion.

Lord Finlay turns to another argument, according to which the trial of Demons before Turkish Courts was justified by the Turkish Penal Code, on the ground that Demons, by his negligent navigation of the *Lotus* resulting in the collision and loss of Turkish lives, had been guilty of an act which, by Turkish law when he came to Turkey, rendered him liable to prosecution. According to Lord Finlay, the passing of such laws to affect aliens is defended on the ground that they are necessary for the "protection" of the national. However, Lord Finlay considers that the Law of Nations does not recognize the assumption of jurisdiction for "protection". In his view, the question for the Court must always be, in the absence of convention, simply whether protection of this sort has been adopted by the common consent of nations as a part of international law.

Lord Finlay concludes that both the grounds on which Turkey has tried to support the conviction are unsound and France is entitled to the judgment of this Court.

*Dissenting opinion by M. Nyholm*

M. Nyholm states that it is necessary in the first place to ascertain whether Turkey's action falls within a domain governed by the Law of Nations and whether there exists not only a principle but a rule of the Law of Nations which would thus represent the positive public law applicable to the particular case.

M. Nyholm posits the existence of two principles in public international law: the principle of sovereignty and the territorial principle. There exists between countries an empty space over which no authority extends. This empty space must be filled up by the creation of rules to solve the problems arising therein. Universal laws adopted by all countries and having as their object the creation or the codification of international law would constitute a solution of the problem, but they do not exist and one can only endeavour to establish international law by *custom*.

M. Nyholm explains that the ascertainment of a rule of international law implies consequently an investigation of the way in which customs acquire consistency and thus come to be considered as constituting rules governing international relations. A series of definitions tend to fix the elements necessary for the establishment of an international custom. There must have been acts of State accomplished in the domain of international relations, whilst mere municipal laws are insufficient; moreover, the foundation of a custom must be the united *will* of several and even of many States constituting a *union of wills,* or a general *consensus of opinion* among the countries which have adopted the European system of civilization, or a manifestation of *international legal ethics* which takes place through the continual recurrence of events with an *innate consciousness of their being necessary*.

Turning then to the present case, which concerns the fact of a nation having extended its jurisdiction to a foreigner in regard to acts committed by the latter in his own country, M. Nyholm observes that it supplies an example of an *actual infringement* of the principle of territoriality. This infringement cannot be legalized by mere tacit acceptance.

M. Nyholm considers that it cannot be maintained—as the judgment sets out—that failing a positive restrictive rule, States leave other States free to edict their legislations as they think fit and to act accordingly, even when, in contravention of the principle of territoriality, they assume rights over foreign subjects for acts which the latter have committed abroad. If the reasoning of the judgment be followed out, a principle of public international law is set up that where there is no special rule, absolute freedom must exist.

M. Nyholm applies these considerations to the case. He observes that, in agreement with the judgment, it must be recognized that Article 15 of the Convention of Lausanne does not constitute a *special* convention between France and Turkey. This provision is merely a statement of a general application of international law. With regard to Turkey's argument that the offence was committed on Turkish territory, that is to say on the Turkish ship, which, according to the accepted international law, constitutes a floating extension of Turkish territory, M. Nyholm considers that the Turkish contention is not made out.

M. Nyholm states that the jurisdiction claimed by Turkey is an extension of the fundamental principles of public international law which establish the territorial system. Applying the criteria for the establishment of a rule of positive law indicated above, M. Nyholm asserts that as regards inter-State relations on *land,* exceptions in respect of criminal law have not been recognized generally or in a manner sufficient to establish a derogation from the territorial principle which is strongly upheld by important nations. As regards the relations prevailing between States *at sea*, the situation is more or less the same. International law recognizes that a vessel is to be regarded as a part of the territory and as subject to the jurisdiction exercised thereon. Cases of concurrent jurisdiction are so rare that one is led to the conclusion that there is a tendency towards recognition of exclusive jurisdiction. But, even as regards relations at sea, this situation cannot be regarded as already established and as thus constituting a principle of international law.

M. Nyholm observes that, as regards collisions cases, they may be assimilated either to relations on sea or to relations on land. According to him, a collision should be dealt with in accordance with the principles applying to relations on land, since it is no longer a question of a vessel at sea proceeding alone, the extraterritorial character of which is derived from this circumstance, but of two vessels in contact just like two nations on land.

M. Nyholm concludes that it follows that the exception to the territorial principle which must be established to provide a legal sanction for the exercise of jurisdiction by Turkey, and which forms the subject of the present dispute, does not exist. It must therefore be concluded that Turkey—in this case—has acted in contravention of the principles of international law.

*Dissenting opinion by Mr. Moore*

Mr. Moore declares that his dissent was based solely on the connection of the pending case with Article 6 of the Turkish Penal Code. In the judgment of the Court that there is no rule of international law by virtue of which the penal cognizance of a collision at sea, resulting in loss of life, belongs exclusively to the country of the ship by or by means of which the wrong was done, he concurs, thus making for the judgment on that question, as submitted by the *compromis*, a definitely ascertained majority of seven to five.

Mr. Moore considers, first, the question of the meaning and effect of Article 15 of the Convention of Lausanne. In his view, Article 15 was intended to recognize the right of Turkey to exercise her judicial jurisdiction as an independent and sovereign State, except so far as the exercise of national jurisdiction is limited by the mutual obligations of States under the law of Nations. The question to be addressed is therefore whether an independent State is forbidden by international law to institute criminal proceedings against the officer of a ship of another nationality in respect of a collision on the high seas, by which one of its own ships was sunk and lives of persons on board were lost. Mr. Moore sets out the following elementary principles.

1. It is an admitted principle of international law that a nation possesses and exercises within its own territory an absolute and exclusive jurisdiction, and that any exception to this right must be traced to the consent of the nation, either express or implied.

2. It is an equally admitted principle that, as municipal courts, the creatures of municipal law, derive their jurisdiction from that law, offences committed in the territorial jurisdiction of a nation may be tried and punished there according to the definitions and penalties of its municipal law, which, except so far as it may be shown to be contrary to international law, is accepted by international law as the law properly governing the case.

3. The principle of absolute and exclusive jurisdiction within the national territory applies to foreigners as well as to citizens or inhabitants of the country, and the foreigner can claim no exemption from the exercise of such jurisdiction, except so far as he may be able to show either: (1) that he is, by reason of some special immunity, not subject to the operation of the local law, or (2) that the local law is not in conformity with international law.

4. All nations have an equal right to the uninterrupted use of the unappropriated parts of the ocean for their navigation, and no State is authorized to interfere with the navigation of other States on the high seas in the time of peace except in the case of piracy by law of nations or in extraordinary cases of self-defence.

5. It is universally admitted that a ship on the high seas is, for jurisdictional purposes, to be considered as a part of the territory of the country to which it belongs.

Mr. Moore asserts that the operation of the principle of absolute and exclusive jurisdiction on land does not preclude the punishment by a State of an act committed within its territory by a person at the time corporeally present in another State. He notes that France, by her own Code, asserts the right to punish foreigners who, outside France, commit offences against the "safety" of the French State. This claim might readily be found to go in practice far beyond the jurisdictional limits of the claim of a country to punish crimes perpetrated or consummated on board its ships on the high seas by persons not corporeally on board such ships. Moreover, it is evident that, if the latter claim is not admitted, the principle of territoriality, when applied to ships on the high seas, must enure solely to the benefit of the ship by or by means of which the crime is committed, and that, if the Court should sanction this view, it not only would give to the principle of territoriality a one-sided application, but would impose upon its operation at sea a limitation to which it is not subject on land.

Mr. Moore declares that there is nothing to show that nations have ever taken such a view. On the contrary, in the case of what is known as piracy by law of nations, there has been conceded a universal jurisdiction, under which the person charged with the offence may be tried and punished by any nation into whose jurisdiction he may come. Acknowledging that piracy by law of nations, in its jurisdictional aspects, is *sui generis*, Mr. Moore considers that, for the purpose of protecting ships on the high seas, the Court must therefore look to a reasonable and equal interpretation and application of the principle of the territoriality of ships.

Mr. Moore turns to an examination and discussion of a number of judicial decisions from several national jurisdictions as support for his position. Referencing Article 38 of the Statute of the Court, he states that these directions merely conform to the well-settled rule that international tribunals, whether permanent or temporary, sitting in judgment between independent States, are not to treat the judgments of the courts of one State on questions of international law as binding on other States, but, while giving to such judgments the weight due to judicial expressions of the view taken in the particular country, are to follow them as authority only so far as they may be found to be in harmony with international law, the law common to all countries.

With respect to Article 6 of the Turkish Penal Code, Mr. Moore is unable to concur in the view that the question of the international validity of the article is not before the Court under the terms of the *compromis*. He concludes that the jurisdictional claim that Turkey has a right to try and punish foreigners for acts committed in foreign countries not only against Turkey herself, but also against Turks,

should such foreigners afterwards be found in Turkish territory is contrary to well-settled principles of international law.

Mr. Moore observes that the claim of concurrent jurisdiction was defended on what is called the "protective" principle. According to Mr. Moore, it is evident that this claim is at variance not only with the principle of the exclusive jurisdiction of a State over its own territory, but also with the equally well-settled principle that a person visiting a foreign country, far from radiating for his protection the jurisdiction of his own country, falls under the dominion of the local law and, except so far as his government may diplomatically intervene in case of a denial of justice, must look to that law for his protection.

Mr. Moore therefore concludes that the criminal proceedings in the case now before the Court, so far as they rested on Article 6 of the Turkish Penal Code, were in conflict with the following principles of international law: (1) that the jurisdiction of a State over the national territory is exclusive; (2) that foreigners visiting a country are subject to the local law, and must look to the court of that country for their judicial protection; (3) that a State cannot rightfully assume to punish foreigners for alleged infractions of laws to which they were not, at the time of the alleged offence, in any wise subject.

*Dissenting opinion by M. Altamira*

In explaining his dissent, M. Altamira first states that it is certain that amongst the most widely recognized principles of international law are the principles that the jurisdiction of a State is territorial in character and that in respect of its nationals a State has preferential, if not sole jurisdiction. Exceptions to these principles, in so far as they allow a foreign jurisdiction to be exercised over the citizens of a given State, have only been recognized in extreme cases where it has been absolutely necessary or inevitable. Therefore, he expresses his difficulty in recognizing as well founded an attempt, on the basis of a municipal law, to exercise jurisdiction over a foreigner, who resided on board a vessel flying the flag of his own country and did not land with the intention of remaining ashore, and that for an alleged offence committed outside the territory of the country which claimed to exercise jurisdiction over him.

According to M. Altamira, exceptions of this nature must necessarily be exceptions recognized by international law, either in the form of a treaty or of international custom. From the precedents considered by the Parties, he finds that in general,either there has been protest against the exercise of any jurisdiction other than that of the nation of the person alleged to be responsible or of the flag under which he sails, or else that the principle of the flag has been applied. M. Altamira therefore has a very strong hesitation to admit exceptions to the territorial principle simply by the will of one State, to extend beyond the limits of those hitherto expressly agreed to in conventions, or tacitly established by means of the recurrence of certain clearly defined and undisputed cases in the majority of systems of municipal law.

In regard to criminal law in general, M. Altamira observes that in municipal law, jurisdiction over foreigners for offences committed abroad has always been very limited: it has either (1) been confined to certain categories of offences; or (2) been limited, when the scope of the exception has been wider, by special conditions under which jurisdiction must be exercised and which very much limit its effects. As regards to categories of disputes contemplated by the exceptions, he further observes that for the most part these comprise offences against the State itself.

M. Altamira next presents examples of municipal legislation of a number of countries, which tend to show the existence of a predominant conception and intention in the field of criminal law which concern cases of an international character. This conception and intention are undoubtedly opposed to simply allowing the application of municipal law which, by claiming too wide a scope, comes in conflict with the territorial principle which protects the rights of the citizens of each State, and seeks to go much further than the exceptions held to be acceptable by the majority of States.

M. Altamira states that every sovereign State may by virtue of its sovereignty legislate as it wishes within the limits of its own territory; but it cannot, according to sound principles of law, in so doing impose its laws upon foreigners in every case and without making any distinction between the various possible circumstances.

Furthermore, M. Altamira expresses the opinion that the freedom which, according to the argument put forward, every State enjoys to impose its own laws relating to jurisdiction upon foreigners is, and must be, subject to limitations. In the case of competing claims to jurisdiction such as those in question, this freedom is conditioned by the existence of the express or tacit consent of other States and particularly of the foreign State directly interested. As soon as these States protest, the above-mentioned freedom ceases to exist.

M. Altamira finds, within the sphere of human rights (the law of Nature) other grounds for being unable to accept the sanctioning of the rule of absolute freedom. These grounds are derived from what, in his opinion, constitutes the basis of the whole social legal system: respect for the rights of the individual. M. Altamira underlines the importance given by men to the application of their own laws and of their own national procedure and the submission of their judicial affairs to judges speaking their own language and having their own nationality. He is therefore unable to accept the application of jurisdictional rights which would result in jurisdictional constraint in the circumstances of the present case.

Finally, M. Altamira brings forward some considerations which deal with the functions of the Court, noting that often in the general process of the development of a customary rule there are moments in which the rule, implicitly discernible, has not as yet taken shape in the eyes of the world, but is so forcibly suggested by precedents that it would be rendering good service to the cause of justice and law to assist its appearance in a form in which it will have all the force rightly belonging to rules of positive law appertaining to that category. However, he does not think it is necessary to lay stress on this side of the question, in view of the conclusion at which he has arrived.

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## 23. READAPTATION OF THE MAVROMMATIS JERUSALEM CONCESSIONS (JURISDICTION)

### Judgment of 10 October 1927 (Series A, No. 11)

**Fourth Annual Report of the Permanent Court of International Justice (15 June 1927—15 June 1928), Series E, No. 4, pp. 176–183**

JUDGMENT NO. 10

*Mandate for Palestine (Article 26)—The necessary and by itself adequate condition for the jurisdiction of the Court over a breach of the Protocol relating to certain concessions, which forms a part of the settlement of the Peace of Lausanne, is that such a breach should be incidental to an exercise of the full powers to provide for public control (Art. 11 of the Mandate)—This condition failing in this particular case, there is no need to examine the other arguments put forward by the Respondent in his plea to the jurisdiction in order to demonstrate that the Court has no jurisdiction to consider the application on the merits*

*Outline of the case*

In Judgment No. 5, rendered as a result of proceedings instituted by unilateral application on behalf of the Greek Government against the British Government—Respondent—proceedings which also gave rise to a judgment as to the Court's jurisdiction (Judgment No. 2), the Court recognized the validity of certain concessions granted in 1914, before or during the war, by the Ottoman authorities to M. Mavrommatis, a Greek national; by virtue of a special jurisdiction conferred upon the Court by agreement between the Parties, it was moreover decided that these concessions fell within the scope of Article 4 of the Protocol of Lausanne of July 23rd, 1923, that is to say, that the concessionaire was entitled to have them put into conformity with the new economic conditions prevailing in Palestine. On the other hand, the Court observed that these concessions had to a certain extent been infringed by the grant of other concessions to a certain Mr. Rutenberg, but that, nevertheless, no damage ensuing to Mavrommatis as a result of this infringement, which had been of a transitory nature, could be proved. The concessions in question referred (1) to the supply of water, (2) to the supply of electricity to the town of Jerusalem.

Following upon this judgment, and as from May, 1925, the two Governments concerned took certain steps with a view to putting the Mavrommatis concessions into conformity with the new conditions or, in other words, to their "readaptation". Experts were nominated in conformity with the procedure provided for under the Lausanne Protocol, and after prolonged negotiations they were able to announce that they had successfully completed the work of readaptation by means of substituting new contracts for the old ones. The new contracts were duly signed on February 25th, 1926, by Mavrommatis and by the Crown Agents for the Colonies acting for and on behalf of the High Commissioner of Palestine. These contracts stipulated that the concessionaire absolutely and irrevocably surrendered and renounced all right and benefit under the agreements of 1914, which were henceforth considered cancelled and annulled; in consideration of such renunciation the High Commissioner granted the new concessions, provided always that within certain specified times the concessionaire had formed the companies for the carrying out of the concessions, had arranged for the subscription of a fixed portion of the share capital and had submitted the plans for the works. Within three months after such submission the High Commissioner was to notify his approval or disapproval or his objections.

The plans were dispatched in April, 1926, by a third person to whom Mavrommatis had ceded his rights and obligations arising under the said concessions, and their receipt was acknowledged on May 5th following; but on July 21st following Mavrommatis was informed that this cession was considered as an absolute assignment of his concessions—an assignment unwarranted under the terms of the contract—and that consequently the deposit of the plans by the cessionnaire was not valid. Whereupon Mavrommatis determined his agreement with the cessionnaire and in September, 1927, requested the High Commissioner to retain the plans in question as having been deposited on his—M. Mavrommatis'—behalf. The High Commissioner accepted them as so deposited on September 5th, 1926.

Meanwhile the Palestine authorities, on March 5th, 1926, had finally granted to M. Rutenberg a concession for the supply of electricity which applied to the whole of Palestine. But this concession—to which M. Rutenberg was entitled under an earlier agreement, which, as has already been observed, contained, according to Judgment No. 5 of the Court, a clause which was incompatible with M. Mavrommatis' rights—did not contain the clause in question but on the contrary reserved certain rights and privileges; this reservation referred to M. Mavrommatis' electricity concession for Jerusalem.

The approval of the High Commissioner which was required under the terms of the concessions was granted on September 23rd (electricity concession) and December 2nd (water concession). But on December 1st, being of the opinion that according to the terms of the contracts, approval should have been given before August 5th—namely, within the three months after the plans had been deposited—and that the delay which had occurred had destroyed his chances of financing the undertaking,

M. Mavrommatis informed the British authorities that in his opinion they had failed to carry out the contracts and that he would seek damages; he moreover stated that with this object in view he was putting himself in communication with his Government.

Subsequently, on the instructions of the Greek Government, the Greek Legation in London intervened as from January 17th, 1927, on behalf of M. Mavrommatis, expressing the earnest hope that His Majesty's Government would examine the matter in a conciliatory spirit. On February 19th, 1927, the Legation hinted at the possibility—failing an amicable settlement—of again instituting proceedings before the Permanent Court of International Justice. The negotiations thus begun did not however lead to an agreement, and on May 23rd, 1927, the Greek Minister in London informed the Foreign Office of his Government's decision once more to have recourse to the Court and to submit to it "the differences which had arisen in the execution of the judgment . . . of March 26th, 1925".

*Application instituting proceedings*

The Application instituting proceedings was filed by the Greek Government with the Registry on May 28th, 1927. The British Government, Respondent, after receiving a communication of that Application, as well as the Case, filed some days later by the Applicant, transmitted to the Registry a Preliminary Objection to the jurisdiction, in which it asked the Court to declare it had no jurisdiction and to dismiss the claim of the Respondent upon this ground.

The Court having thus, in the first place, to take a decision as to its jurisdiction, the Greek Government, in accordance with the terms of Article 38 of the Statute, was invited to submit a written statement of its observations and conclusions in regard to the British objection.

*Public sittings*

The next stage of the proceedings as provided by the article in question being oral, the case was entered on the list of cases for the Twelfth ordinary Session (June 15th to December 16th, 1927) in the course of which the Court held public sittings on September 8th, 9th and 10th, in order to hear Counsel for both Parties.

*Composition of the Court*

The Court on this occasion was composed as follows:

MM. Huber, *President*; Loder, *Former President*; Lord Finlay, MM. Nyholm, Moore, Altamira, Oda, Anzilotti, *Judges,* Beichmann, Negulesco, *Deputy-Judges*.

M. Caloyanni, appointed by the Greek Government as a judge *ad hoc*, also sat as a member of the Court in this case.

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*The judgment of the Court (analysis)*

The judgment of the Court was rendered on October 10th, 1927. The Court in the first place summarizes the submissions and arguments of the Parties. The Greek Application was based on Articles 26 and 11 of the Palestine Mandate, an instrument the terms of which had been approved by the Council of the League of Nations in 1922. According to the first of these articles, any dispute relating to the interpretation or to the application of the provisions of the Mandate can, if not capable of settlement by negotiations, be submitted to the Court. According to Article 11, the Palestine Administration has full powers "subject to any international obligations accepted by the mandatory" to "provide for public

ownership or control" of any of the natural resources or of the public works of the country. According to the first of the judgments rendered by the Court in this matter (Mavrommatis case, jurisdiction, August 30th, 1924), the international obligations in question are those arising under Protocol XII of Lausanne which provides for the maintenance of certain concessions granted by the Ottoman authorities prior to October, 1914. Now the Greek Government considered that it was these international obligations that the British and Palestine authorities had failed to carry out by delaying the approval of the plans for the works provided for under the concessions granted in 1926 to Mavrommatis in substitution for the concessions of 1914.

The Greek Application also put forward a second argument. It alleged that the British authorities had failed to conform to the judgment rendered by the Court on March 26th, 1925; the fact that the British authorities had prevented the carrying out of the 1926 Mavrommatis contracts was equivalent to a failure on their part to carry out the obligation, imposed upon them by the judgment in question, to readapt these concessions.

The British Government replied on the one hand that the Court had no jurisdiction upon a unilateral application to entertain proceedings with regard to the execution of its earlier judgment. And moreover that it could not found its jurisdiction upon the provisions of the Mandate, since the delay in approving the plans did not constitute an exercise of the "full powers" provided for by Article 11; furthermore, even if an exercise of such "full powers" had taken place, it could not be said that there had been a failure in carrying out the obligations accepted by the Mandatory, since the Lausanne Protocol, which solely referred to the concessions granted by Turkey prior to 1914, could not be infringed by a possible breach of the provisions of the contracts relating to the concessions granted in 1926 by the British authorities.

The Applicant having abandoned the argument as to whether the Court might have jurisdiction, upon unilateral application, to decide disputes concerning non-compliance with the terms of one of its earlier judgments, the Court in its judgment leaves aside the submissions relating thereto. The judgment of the Court thus principally bears upon the question of the jurisdiction which it might in this case derive from Articles 26 and 11 of the Mandate.

In this respect the Court observes that it takes as a basis for its decision the interpretation of these articles which it has already given in its earlier judgments in 1924 and 1925; this interpretation, which it then proceeds to summarize, is as follows: The jurisdiction bestowed upon the Court by Article 26 of the Mandate in regard to the interpretation and application of the clauses of the Mandate only covers the interpretation and application of the provisions of the Protocol of Lausanne in so far as the Mandatory, in the exercise of the "full power" bestowed upon him by Article 11, may disregard the obligations which he has accepted in signing the Protocol. The full power in question is a full power to "provide for the public control and the natural resources of the country", and the words "public control" mean an economic policy consisting in subjecting private enterprise to public authority in such a way as to enable the authorities, without acquiring the ownership of the resources or public works in question, to exercise over the enterprises exploiting them certain powers normally inherent in ownership. It follows that the question whether in a particular case there has or has not been an exercise of the "full power. . . . to provide for public control . . ." is essentially a question that can only be decided in each case as it arises. The special circumstances upon which the Court in the two earlier cases founded its jurisdiction were that the grant of the Rutenberg concessions in 1921 constituted (owing to certain features of the contracts which reserved an important role to the official organ of Zionism) an exercise of the full power referred to in Article 11; that these concessions, at least in part, overlapped the Mavrommatis 1914 concessions; that the latter concessions fell within the scope of the Protocol of Lausanne; the grant of a concession involving a right of advice and supervision on the part of the authorities would not in

itself constitute an exercise of the "full power to provide for public control" over the works forming the subject of the said concession.

From this construction, which the Court recalls and reaffirms, it follows, in the case under consideration, that the Court would have no jurisdiction unless the alleged violation of the Mandatory's obligations were incidental to an exercise of the "full power" in question.

The Court then considers the facts of the case from this point of view. The Court observes in the first place that the various steps taken with a view to readapting the 1914 concessions do not constitute an exercise of the "full power to provide for public control"; and it arrives at the same conclusion, with regard to the attitude of the British and Palestine authorities—even assuming that it were legally unjustifiable—an attitude which was said to have been the cause of the delay alleged by Mavrommatis in the carrying out of his plans.

The Court then proceeds to consider from the same point of view the grant of the Rutenberg concession of March 5th, 1926, which grant did constitute an exercise of the "full power" in question. If there had been any incompatibility between these concessions and those of Mavrommatis—the latter being prior to the former—so that M. Mavrommatis' rights would have been violated, the Court would have found itself, as regards its jurisdiction, in a situation analogous to that in which it was placed in the first Mavrommatis case. But the Greek Government has not based its conclusions upon the existence of an incompatibility of this character, and moreover the circumstances are fundamentally different, since the Applicant in this case has not claimed that Mavrommatis' rights have been violated by definite acts, constituting an exercise of the full power referred to in Article 11, but has averred that the British Government adopted a passive and negative attitude which prejudiced the interests of M. Mavrommatis. But even admitting that the full power provided for under Article 11 might equally take the form of acts designed to set aside private ownership and control, thus making possible public ownership and control, there is no need to consider this hypothesis, seeing that even *prima facie* the contentions of the Greek Government do not seem capable of establishing the existence of acts of this nature.

The objection to the jurisdiction put forward by the British Government, in so far as it is based on Articles 11 and 26 of the Mandate, is therefore well founded. Consequently, the Court need not concern itself with the argument advanced by the Respondent referring to the inapplicability of the Protocol of Lausanne to the Mavrommatis concessions of 1926, nor need it examine the points of municipal law raised in this connection by the Parties. It may also leave aside the alternative plea of the British Government to the effect that M. Mavrommatis has not exhausted the remedies open to him before the municipal courts. In regard to this point it confines itself to recording the statements made before it by the representative of the British Government to the effect that it was open to M. Mavrommatis to obtain reparation by process of law either in England or in Palestine for the damage that he claimed to have suffered.

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*Dissenting opinions*

The judgment of the Court was adopted by seven votes to four.

M. Pessôa, Judge, took part in the discussions relating to the present suit but was obliged to leave The Hague before the final draft was accepted; he declared he was unable to agree with the conclusions of the judgment, the Court in his opinion having jurisdiction. On the other hand, MM. Nyholm and Altamira, Judges, and M. Caloyanni, Judge *ad hoc*, declaring that they were unable to concur in the judgment, delivered separate opinions.

*Dissenting opinion by M. Nyholm*

M. Nyholm states that in order to determine the scope of the jurisdiction obtained by the Court from the Mandate for Palestine, which is the sole source of the Court's jurisdiction to consider the Mandate, regard must be had (1) to the character of the Mandate and especially to the reasons which led the League of Nations to insert in the Mandate a clause giving jurisdiction to the Permanent Court of International Justice, and (2) to the structure of the Mandate in order to ascertain in what manner, by which articles of the Mandate and within what limits, this jurisdiction has been established.

As regards the first point, M. Nyholm observes that the Powers did not wish to leave a mandatory at liberty to govern mandated territories entirely at his discretion. The guarantee which offered itself consisted in conferring on the Court jurisdiction to decide any questions regarding the interpretation and application of the Mandate. According to M. Nyholm, when a suit is conducted between a mandatory and another Member of the League of Nations, regarding a question of interpretation or application—which is precisely the case in the present suit—Article 26 of the Mandate gives the Court jurisdiction. Whereas the Judgment seeks to limit this jurisdiction on the basis of Article 11 of the Mandate, it may be shown that this article contains no rule in regard to jurisdiction.

With regard to the second point, M. Nyholm asserts that Article 11 simply lays down the following general indication for the Mandatory: in the first place, it is desirable that the exploitation of public works should be in the hands of the State and that in any case government control should be procured by inserting appropriate articles in the concessions which form the bases of the development of the resources of the country. Contrary to what is asserted in the judgment, the words of Article 11 are certainly not intended here to serve as a basis for a jurisdictional rule.

M. Nyholm concludes by stating that in reality the present case is merely the *continuation* of the former one. If it is to be considered as a new *independent* case, it is, on this assumption, *identical* with the first. In both cases the jurisdiction of the Court should be affirmed.

*Dissenting opinion by M. Altamira*

M. Altamira disagrees both with the conclusions and the reasoning of the judgment. He finds that, according to Article 11 of the Mandate, disregard of international obligations may occur when the power exercised by the Mandatory is that of providing for *public ownership* as well as when it is that relating to *public control,* that is to say, both when the Administration declares a thing or a right forming part of a previously granted and valid concession to be public property, and in so doing means itself to undertake exploitation, and when it grants this thing or right to a person other than the original concessionnaire, in a manner involving the exercise of public control.

M. Altamira sets out the doctrine in regard to public control . . . flowing from Judgments Nos. 2 and 5, which has not substantially changed in the present judgment. The general nature of the terms used only serves to emphasize the great variety of forms which the "powers" and "measures" referred to in Article 11 may assume in practice, and therefore, it would be just as difficult to make a general assumption, covering all possible contingencies. He observes that the line of demarcation between power of advice and supervision constituting "public control" and that which does not do so (since such a line seems desirable), does not allow of a general affirmation which at all events would discard from the conception of "control" the greater proportion of the forms which advice and supervision may take and which are usual in modern concessions, but in a varying degree, and which reserve to the Administration powers normally inherent in ownership.

For M. Altamira, it is an accepted fact that, according to Article 11, the Administration must employ the powers which were conferred upon it in such a way as not to contravene the obligations

which the Mandatory has accepted as regards the maintenance and respect of formerly valid concessions. It cannot end in the accomplishment of a single and formal act, representing the initial stages of respect and maintenance, but on the other hand it must include all the elements which would be necessary for the effacement of any form of contradiction between the application of a measure of public control relating to a concession of that kind and the respect and maintenance of another concession granted under the Protocol. According to M. Altamira, it is thus obvious that every time the Court finds itself confronted with such contradiction, it is entitled to say that the matter comes under the operation of Article 11 and consequently of Article 26 of the Mandate.

Having laid out, from his perspective, the essential facts for the purpose of reaching a decision, M. Altamira ultimately finds that the identity between this situation in 1924 and that existing in the present case seems to be so strong that it would be impossible to justify a decision to the contrary. Therefore, he concludes that the Court possesses jurisdiction in this matter.

*Dissenting opinion by M. Caloyanni*

From a study of Articles 1, 4, and 11 of the Mandate, M. Caloyanni states that the Zionist Organization is so closely connected with the Palestine Administration that for purposes of developing the country as regards economic questions and as regards works of public utility, it appears to be unable to do without this Organization, unless it consented. He notes that the full powers which that Administration exercises are not the full powers of an ordinary public administration; they are powers within the meaning always of public control because the purpose of the Mandate, in conformity with the spirit of Article 22 of the Covenant of the League of Nations, is the development of the country. It follows that the Administration has an *obligation* to exercise these full powers. Further discussing the role of the Administration of the Mandate, M. Cayolanni states that it is obliged, in order to safeguard the interests of the community, to decide whether it has to exercise these full powers by the method of ownership or by that of control; it is obliged to do one or the other. He observes that in regard to concessions, every *positive* or *negative* act which the Administration accomplishes in the exercise of its full powers is an act of *public control*.

By applying the principles relating to the special character of the Mandate, M. Caloyanni arrives at the conclusion that Protocol XII always falls within the scope of Article 11 of the Mandate, because the Administration always exercises its full power to provide for public ownership or control. Therefore, for being always covered by Article 11, the Court would necessarily have jurisdiction.

M. Caloyanni then turns to the relation in law between the preceding cases and the present one. He finds that the contracts of February 25th, 1926, granted to M. Mavrommatis, were granted in the exercise of the full power preserved by the Palestine Administration, because they concern the grant of a concession for works of public utility and also the utilization of natural resources. M. Caloyanni then provides that there was an incompatibility between the Rutenberg concessions and those granted to M. Mavrommatis on February 25th, 1926, owing to the fact that the former conflicted with M. Mavrommatis' interests, and from this very fact arose the international obligation under Article 11 of the Mandate of the Palestine Administration not to do anything which might prevent the application of the Mavrommatis contracts, which consisted in complete and effectual readaptation. M. Mavrommatis' contracts were therefore deprived of the protection to which they were internationally entitled.

M. Caloyanni then explains that the Mavrommatis contracts of February 25th, 1926, were entirely dependent on the fulfillment of two conditions: the approval of the plans and the financing of the concessions, which were both vital to the readaptation. The Palestine Administration, having expressed its full power to provide for public control, has failed to observe its obligations by reason of the fact that it has not readapted the concessions as it was bound to do.

With regard to the contention that Mr. Rutenberg's opposition to the use of the El-Audja source by M. Mavrommatis did not establish incompatibility between the concessions granted to M. Mavrommatis and those granted to Mr. Rutenberg on March 5th, 1926, M. Caloyanni notes that had the British Government not granted the El-Audja concessions to Mr. Rutenberg before approving the plans of M. Mavrommatis, the grant of the concessions to M. Mavrommatis would have constituted a good title as against Mr. Rutenberg for the use of El-Audja. He finds that the Palestine Administration, by its own acts of recognition, had *negatively* in the exercise of its full powers of control prevented the approval of the plans in the appointed time and consequently had prevented the readaptation of the concessions, which it was obliged to readapt.

M. Caloyanni therefore concludes that, *prima facie,* the acts of the Palestine Administration come under Article 11 of the Mandate, which, owing to its relationship with Article 26, confers jurisdiction upon the Court.

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## 24. FACTORY AT CHORZÓW (INDEMNITIES)

### Order of 21 November 1927 (Series A, No. 12)

**Fourth Annual Report of the Permanent Court of International Justice (15 June 1927 – 15 June 1928), Series E, No. 4, pp. 155-165**

For the summary of No. 24 (Series A, No. 12), see No. 21.

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## 25. JURISDICTION OF THE EUROPEAN COMMISSION OF THE DANUBE BETWEEN GALATZ AND BRAILA

### Advisory Opinion of 8 December 1927 (Series B, No. 14)

**Fourth Annual Report of the Permanent Court of International Justice (15 June 1927—15 June 1928), Series E, No. 4, pp. 201–212**

*The law in force on the Danube is contained in the Definitive Statute of that river (1921)—As regards the jurisdiction of the European Commission of the Danube, the Definitive Statute confirms the situation actually existing before the war (The value of preparatory work for the interpretation of a document.)—Ascertainment of this situation: The Commission has identical powers over the whole of the maritime Danube; upstream territorial limit of these powers—The principles of freedom of navigation and of equality of flags, the application of which the Commission has to assume, enable the line of demarcation between the jurisdiction of the Commission and that of the territorial State to be established*

*History of the question*

The European Commission of the Danube was established in 1856.

The Peace Treaty between Austria, France, Great Britain, Prussia, Russia, Sardinia and Turkey, concluded at Paris on March 30th of that year and bringing to an end the Crimean War, stipulated

amongst other things that the principles laid down in the Final Act of the Congress of Vienna and designed to bring about the internationalization of rivers would in future also be applied as regards the Danube and its mouths. In order to secure their application, the Treaty of Paris established two International Commissions. One of these, known as the European Commission of the Danube, was given a task of limited duration, namely, to clear the mouths of the river and the adjoining portions of the sea from Isaktcha to the Black Sea; and, to cover the expenses of these works, the Commission was empowered to establish fixed dues to be collected on shipping under conditions of absolute equality as between flags. The other Commission, known as the "River" Commission, was to be permanent and its mission was, amongst other things, to prepare navigation and river police regulations and, after the dissolution of the European Commission, to ensure that the mouths of the Danube were kept in a navigable condition. It was understood that the European Commission would have completed its work in two years, within which time the River Commission was also to have completed the technical part of the task entrusted to it. This programme did not work out as contemplated; in the first place, the River Commission was unable to carry out the mission allotted to it, and in the second place the European Commission could not complete its task within the time laid down. The Parties to the Treaty of Paris agreed to prolong the existence of the European Commission, the last extension being until 1883, and to bestow upon it power to draw up and apply on the river navigation and police regulations. "Navigation and police regulations applicable to the Lower Danube" were consequently prepared; they were appended to the "Public Act relative to the navigation of the mouths of the Danube" signed at Galatz on November 2nd, 1865, by the Powers which had participated in the Treaty of Paris of 1856. This Act, with its annex, from that time onwards, and until the adoption in 1921 of the "Definitive Statute", defined the powers of the European Commission. (It was revised in 1881 by means of an "Additional Act", the regulations being altered notably in 1883 and in 1911.) The Treaty of Berlin, signed in 1878, once more recognized that the navigation of the Danube was a matter of international concern. It maintained in operation the European Commission, upon which Roumania was to be represented, adding however that this Commission was henceforward to exercise its functions as far as Galatz, in entire independence of the territorial authority; the Powers also pledged themselves, one year before the expiration of the period fixed for the duration of the European Commission, to conclude an agreement as to the prolongation of its powers and as to any modifications thereof which they might see fit to make. This agreement was effected in a Treaty signed at London in 1883 by the States which had been Parties to the Treaty of Berlin; the powers of the European Commission were in fact extended and it was provided that they should be automatically renewed by tacit consent for successive periods of three years; furthermore, this Treaty of London laid down that the jurisdiction of the Commission was extended from Galatz to Braila. Roumania however did not take part in the Conference which prepared the Treaty and did not sign that instrument. The result was a situation of uncertainty as regards the powers of the European Commission upon the sector of the river between Galatz and Braila, a situation which was eventually to lead the States concerned, namely, Roumania, the territorial Power, on the one hand, and the other Powers represented on the European Commission of the Danube, on the other (i.e. since the Peace Treaties of 1919 and 1920: France, Great Britain and Italy) to submit the matter to the Council of the League of Nations and the Court.

Before the war of 1914–1918, nothing was done to clear up this situation. After the war, the international instruments relating to the Danube simply stipulated that the situation existing before the war was to be re-established. For instance, the Treaty of Versailles does so, whilst at the same time prescribing that the definitive statute of the Danube was to be drawn up by a future conference. This Conference was held at Paris in 1920–1921; and it was during the time that it was at work that the question of the powers of the European Commission of the Danube between Galatz and Braila arose in concrete form: a newly appointed inspector of navigation asked the Commission for instructions as to the powers to be exercised by him in the sector.

Even the Definitive Statute of the Danube, however, which was signed on July 23rd, 1921, did not settle the question in a manner entirely eliminating controversy; for, whilst fixing at Braila (and not at Galatz) the upstream limit of the powers of the Commission, it made a reservation in favour of the *status quo ante* by laying down that the European Commission was to exercise without any change the powers which it possessed before the war; and this provision formed the subject of an interpretative Protocol signed by the members of the Commission. This Protocol however, in its turn, gave rise to differences of opinion as to its meaning and scope. The European Commission itself then attempted to establish a *modus vivendi* which would enable the divergent standpoints of the Powers concerned to be reconciled. This attempt however failed, whereupon the Governments of Great Britain, France and Italy embarked on a new course, and, in September, 1924, referred the disputed question to the Secretary-General of the League of Nations, asking him to submit it to the League's Advisory and Technical Committee of Communications and Transit. Following upon this request, which was based on Article 376 of the Treaty of Versailles and on Article 7 of the Rules for the organization of the said Committee, the question was, in accordance with the terms of those Rules, referred to a special committee which proceeded to investigate it on the spot. This Special Committee then formulated in a report a series of conciliation proposals which the Advisory and Technical Committee, being of opinion that it was neither necessary nor opportune for it to give a decision on the question at issue, invited the interested Parties to follow out.

Negotiations were then opened between them under the guidance of the Special Committee, but the only result to which they led was the signature, on September 18th, 1926, by the delegates of the European Commission, of an agreement requesting the Council to submit to the Court for advisory opinion the question of the territorial extent of the Commission's jurisdiction. The proposal to ask the Court for an opinion was merely an alternative to a proposal for the submission of the case to the Court for judgment. The Roumanian Government, however, had only agreed to the reference of the question to the Council and to the Court for the purposes of an advisory opinion, because such opinions had no binding force; on the other hand, the States represented upon the European Commission reserved the right subsequently to submit the question to the Court for judgment in order to obtain from it, in case of necessity, a decision enforceable against Roumania.

*The Request for an opinion*

Accordingly, the question having been referred to it by the French, British, Italian and Roumanian Governments, the Council of the League of Nations requested the Court on December 9th, 1926, in accordance with the conditions of the Agreement, to give an advisory opinion on the following questions which were formulated in the Agreement itself:

"(1) Under the law at present in force, has the European Commission of the Danube the same powers on the maritime sector of the Danube from Galatz to Braila as on the sector below Galatz? If it has not the same powers, does it possess powers of any kind? If so, what are these powers? How far upstream do they extend?

(2) Should the European Commission of the Danube possess either the same powers on the Galatz-Braila sector as on the sector below Galatz, or certain powers, do these powers extend over one or more zones, territorially defined and corresponding to all or part of the navigable channel to the exclusion of other zones territorially defined, and corresponding to harbour zones subject to the exclusive competence of the Roumanian authorities? If so, according to what criteria shall the line of demarcation be fixed as between territorial zones placed under the competence of the European Commission and zones placed under the competence of the Roumanian authorities? If the contrary is the case, on what non-territorial basis is the exact dividing line between the respective competence of the European Commission of the Danube and of the Roumanian authorities to be fixed?

(3) Should the reply given in (1) be to the effect that the European Commission either has no powers in the Galatz-Braila sector, or has not in that sector the same powers in the sector below Galatz, at what exact point shall the line of demarcation between the two régimes be fixed?"

*Composition of the Court*

The Court considered the case during its Twelfth (ordinary) Session which began on June 15th and terminated on December 16th, 1927. For the proceedings in regard to this affair the Court was composed as follows:

MM. Huber, *President*; Loder, *Former President;* Lord Finlay, MM. Nyholm, Moore, Altamira, Oda, Anzilotti, *Judges,* Beichman, Negulesco, *Deputy-Judges*.

Notice of the Request for an opinion was given to Members of the League and to States entitled to appear before the Court. At the same time, the French, British, Italian and Romanian Governments were directly informed by the Registry that the Court was prepared to receive from them written statements and, if necessary, to hear oral statements made on their behalf. The French, British and Roumanian Governments, availing themselves of the opportunity afforded by these communications, filed Memorials within the time specified and, subsequently, the British, Italian and Roumanian Governments filed Counter-Memorials.

*Public sittings*

Furthermore, from October 6th to 8th and 10th to 13th, the Court devoted seven public sittings to hearing the oral arguments submitted on behalf of all the States concerned.

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*Opinion of the Court (analysis)*

The Court gave its opinion on December 8th, 1927.

In this Opinion the Court in the first place gives the history of the matter, including the preliminary conciliation proceedings before the Advisory and Technical Committee of Communications and Transit, and particularly notes the conditions and reservations stipulated by the interested Powers in regard to the request for an opinion made by the Council.

Next approaching the first question put to it, the Court proceeds to ascertain what the law in force is in regard to this point.

The chief source of this law is the Definitive Statute of the Danube of 1921. This instrument, like the Treaty of Versailles, was signed and ratified by the Governments interested in the question, so that these Governments, as between themselves, cannot regard its provisions as otherwise than possessing full and entire validity. Its object is to assure by means of two Commissions—the European Commission and the International Commission of the Danube—the internationalization of the whole of the Danube, uninterruptedly from Ulm to the Black Sea; the zone of the first of these Commissions extends from the mouths of the Danube to Braila; the zone of the second is from Ulm to Braila and cannot be tacitly extended to include other parts of the river. As regards the powers of the European Commission in its sector, the Statute lays down that they shall be exercised "under the same conditions as before".

What is to be understood by this clause? In the Court's opinion, it may be construed as leaving it open to show that the jurisdiction of the European Commission was not exercised in the same

way throughout the whole sector of the river placed under its authority, and more particularly, that whereas it indisputably possesses certain powers between the sea and Galatz, some of these powers do not extend from Galatz to Braila. In other words, the effect of this provision is as follows: whatever the territorial extent of the powers of the European Commission may be, each of these powers shall continue to be exercised within the same limits as had previously been fixed for them. The first point to be determined therefore is what were the conditions which in fact prevailed before the war in the disputed sector; for these conditions are maintained and confirmed by the Statute. This interpretation of the Statute enables the Court to dispense with an examination of the very disputed question of the legal value of the Treaty of London of 1883, which was concluded in the absence of Roumania and which, as has already been stated, expressly extended from Galatz to Braila the powers of the European Commission.

Having thus established the interpretation of the Statute of the Danube as the basis of its opinion, the Court proceeds to analyze the contentions of the interested Governments as to the meaning of the clauses applicable in regard to the question. On the one hand, the French, British and Italian Governments argued that the powers of the European Commission applied in the same way between Galatz and Braila as below Galatz. The Roumanian Government argued on the contrary that a distinction must be made between the *technical powers* of the Commission and its *juridical powers*, the Commission being entitled to exercise both below Galatz but only the former between Galatz and Braila.

The Court successively considers the main arguments advanced by Roumania in support of her contention. They are drawn, in the first place, from the genesis of the relevant provision of the Statute of the Danube, and in the second place from certain documents which, the Roumanian Government holds, constitute an authoritative interpretation of that provision.

In regard to the first point, the Court refers to the principle which it has always applied: preparatory work cannot be used for the purpose of changing the plain meaning of a text. In this case it is impossible to construe the words *dans les mêmes conditions que par le passé* as meaning that the European Commission only possesses certain so-called technical powers in the disputed sector. This expression, in itself, simply refers to preexisting conditions, whatever they may have been, and not to a single and specific condition. Moreover, even if the records of the preparation of the Statute be consulted, they do not furnish anything calculated to overrule the natural construction of these words.

As regards the second point, the Court shows that the first of the documents cited by Roumania—the Interpretative Protocol of the Definitive Statute referred to above—cannot be regarded as an authoritative interpretation of the Statute; for though it is true that it is a document signed by the delegates on the European Commission and is annexed to the minutes of a meeting of the Conference which prepared the Statute, it is also true that this Protocol does not constitute an international agreement between the Parties to the Statute. Moreover, the Commission has no power of its own accord to abandon powers conferred upon it by treaty. As regards the second document cited, it is merely a proposal drawn up by the European Commission and submitted by it upon certain conditions to the Roumanian Government for acceptance; these conditions were not fulfilled, and no agreement therefore was reached.

These arguments advanced by the Roumanian Government therefore do not override the construction placed by the Court upon the Statute; Roumania, however, put forward another argument: she said that this construction was inadmissible because it would involve consequences contrary to the principle of sovereignty—as the extension of the powers of the European Commission above Galatz would amount to a violation of her sovereign rights.

The Court holds that this is not the case. If it were found that the *de facto* situation before the war included the exercise by the European Commission of the same powers between Galatz and Braila as

below Galatz, it would follow that Roumania has accepted that situation, since it is confirmed by the Statute and Roumania has accepted the Statute. And a restriction on the exercise of sovereign rights cannot be regarded as an infringement of sovereignty when the State concerned has formally consented to such restrictions in a treaty concluded by it. In this connection, the Court observes that according to its construction of the Statute, it matters little whether the actual exercise by the European Commission of its powers in the disputed sector was based before the war on a legal right or on mere toleration.

The Court next approaches the main question: Did the European Commission in fact exercise before the war the same powers between Galatz and Braila as below Galatz? Before proceeding further, the Court observes in this connection that it is not unimportant to see whether the distinction drawn by Roumania between technical and juridical powers finds any support in the provisions governing the activities of the Commission. The Court therefore first of all analyzes the relevant provisions and then considers the practice followed, in the light of various elements of fact.

The international instruments determining the law applicable to international rivers since 1815, and to the Danube in particular since 1856, lead the Court to the conclusion that, far from supporting the Roumanian contention, the relevant instruments are entirely fatal to it. For from the very beginning, the congresses and conferences which have had to deal with the question have treated the making and enforcement by the Commission itself of regulations implying the exercise of juridical powers as an essential element of the exercise of the technical powers indispensable to make the internationalized Danube navigable and to keep it in a navigable condition.

Has a situation of fact developed differing from this legal situation? The elements of fact which the Court considers in order to determine this point are of two kinds: firstly, the findings on issues of fact of the Special Committee of the League of Nations in regard to decisions taken by the European Commission, which findings the Court considers that for the purposes of the case it must accept; secondly, the regulations issued by the European Commission—on which Roumania has been represented since 1878—and applicable immediately before the war. For the Court holds that the situation of fact results not only from decisions taken by the Commission in particular cases but also from the issue of regulations, etc., containing clauses designed to apply to the disputed sector and which thus constitute an exercise of powers over that sector. The conclusion deduced by the Court from these data, and from a comparison between the powers indisputably possessed by the European Commission below Galatz and those exercised by it between Galatz and Braila, is that both cover practically the same ground. An identical state of things prevailed on the whole maritime Danube, and this is moreover quite natural.

This conclusion completely confirms the findings of the Special Committee; and, in view of the construction placed by the Court on the Definitive Statute of the Danube, it is to be deduced that under the law in force the European Commission enjoys the same powers at all points upon that river.

The Council, however, also asks the Court to fix the exact upstream limit of these powers; this question, on being analyzed, amounts to asking whether or not Braila is included in the so-called maritime Danube and is therefore within the jurisdiction of the European Commission. To this question the Court gives an affirmative answer mainly based on arguments deduced from the fact that Braila is indisputably, from a commercial point of view, a port of the maritime Danube, frequented by seagoing vessels. This conclusion is moreover corroborated by data taken from the findings of the Special Committee and by the provisions of the regulations in force on the Danube, as also by certain circumstances relating to the fixing above Braila of the downstream limit of the jurisdiction of the International Commission of the Danube, the powers of which, as has been seen, extend from Ulm to Braila.

The Court next takes question No. 2, which relates to the nature of the powers of the European Commission in regard to the ports of Galatz and Braila. It observes, in the first place, that it follows from the actual terms of the question that in these ports the Roumanian authorities possess certain

powers which are maintained by the Statute of the Danube. What the Court has to do therefore is to establish the line of demarcation between the powers of the Roumanian authorities and those of the European Commission. With this object in view, various methods of territorial demarcation have been suggested by the Roumanian Government or others. The Court rejects all these methods, either because they are supported neither by the relevant texts nor by practice, or because they are actually contrary to the express terms of the Definitive Statute. It only remains therefore to endeavour to find a non-territorial criterion.

In this connection, the Court states at the outset that the powers which Roumania, the territorial sovereign, exercises over the maritime part of the Danube are not incompatible with those possessed by the European Commission under the Statute of the Danube. That instrument, though it does furnish a criterion for differentiating between the jurisdictions of the territorial State and of the Commission, proclaims two principles: freedom of navigation and equal treatment of all flags; and it is on the basis of these two principles that the solution is to be found. Now the conception of navigation essentially covers the movement of vessel with a view to the accomplishment of voyages; but, according to the regulations in force on the Danube, the voyage of a vessel only terminates when it reaches its moorings in a port. Freedom of navigation therefore is not complete if ships cannot enter ports under the same conditions as they may pass through them or, in general, navigate upon the river. Consequently, the jurisdiction of the European Commission of the Danube covers ships entering, leaving, or passing through a port.

The conception of navigation also comprises the idea of contact with the economic organization of the country reached by a vessel. It would follow from this that the jurisdiction of the European Commission should include the policing of the ports of Galatz and Braila; but that conclusion would be contrary to the facts recorded by the Special Committee: control over the ports in question is exercised by the Roumanian authorities as regards vessels moored therein. This situation of fact however cannot in any case affect the application of the principle of the equal treatment of all flags, which it is the duty of the Commission to ensure upon the maritime Danube. It follows that in the event of a violation of this principle, the Commission would necessarily have power to intervene, even as regards vessels moored in the ports.

To summarize: though the powers of regulation and jurisdiction in the ports of Galatz and Braila belong to the territorial authorities, the right of supervision with a view to ensuring freedom of navigation and equal treatment of all flags belongs to the European Commission.

The Court however adds that it is impossible for it to define and develop these criteria, as the texts and data necessary for this purpose are lacking. Moreover, a delimitation of the respective powers can only be effected on the basis of special regulations taking into account the specific conditions and circumstances, which may vary from time to time.

Lastly, the Court observes that there is no need for it to consider the third question, which is rendered superfluous by its reply to question No. 1.

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*Dissenting opinions*

Though accepting the conclusions of the Court, MM. Nyholm and Moore wished to append to the Opinion certain separate observations. On the other hand, M. Negulesco, Deputy-Judge, stated that he could not accept the Opinion given by the Court and, availing himself of the right bestowed by Article 71 of the Rules, attached to the Opinion of the Court a statement of his separate opinion.

*Observations by M. Nyholm*

M. Nyholm points out that it seems possible or preferable to look differently at certain parts of the reasoning of the Advisory Opinion and in particular the interpretation given to Articles 6 and 9 of the Statute of 1921.

M. Nyholm starts by observing that, even though the river has in fact been subject to successive regulations which leave some doubt as to the law in force in Danube, it is the Statute—and, in case of doubt, principally the Treaty of Versailles—which is the basis when a reply is to be given to the question in dispute, namely, whether the European Commission possesses any jurisdiction on the Galatz-Braila sector.

According to M. Nyholm, the Court's Opinion gives to Article 6 an interpretation which overturns, in fact, all the principles of the Treaty of Versailles, by declaring that Article 9, combined with Article 6, fixes Braila as terminus, whereas the Treaty, for the fixing of limits, refers to the past without any precise determination.

M. Nyholm notes that, in interpreting the Statute, in order to avoid confusion, it is particularly important to distinguish clearly between the *territorial* competence (Article 6) and the *nature* of the competence (Article 5) of the Commission.

As regards territorial jurisdiction, M. Nyholm observes that no limit is fixed in Article 6, which merely confirms that the Treaty (and the Statute) did not wish to fix *either* Galatz *or* Braila, but that they left the situation as it existed in practice theretofore. The limit of the European Commission's jurisdiction *was therefore an unknown point, and could only be fixed after it had been determined by an enquiry into the effective exercise of jurisdiction in the past*. Furthermore, it does not seem possible to admit that Article 9 of the Statute definitely fixed Braila as terminus.

As regards the nature of the powers of the European Commission, M. Nyholm points out that the investigations of the Special Committee have made it possible to reach the general conclusion that, throughout the disputed sector, the European Commission exercised the same powers as below Galatz and that the point where the jurisdictions of the two Commissions meet is Braila.

Finally, M. Nyholm observes that Roumania cannot regard this conclusion as a diminution of her sovereign rights; for the basis of this conclusion is not a kind of acquisitive prescription in favour of the European Commission, even supposing that prescription of such a kind were recognized by international law. For, in consequence of the creation of the International Commission, the sector would not come under the full exercise of Roumanian sovereignty; that sovereignty would be limited by the authority of the International Commission, which practically speaking is not far short of that of the European Commission.

*Observations by Mr. Moore*

While concurring in the conclusions and generally in the reasoning of the Court's Opinion, Mr. Moore expresses the opinion that the first and main question, whether "under the law at present in force" the European Commission has the same powers from Galatz to Braila as it has below Galatz, is essentially simple.

With regard to the contention that while the Commission has full jurisdiction below Galatz, it has, between Galatz and Braila, only technical powers and not juridical powers, Mr. Moore observes that the alleged distinction is not mentioned in any relevant legal instrument. He notes, in particular, that Article 6 of the Statute, which speaks of the maintenance of past jurisdictional limits, neither mentions nor even remotely hints at any local severance of juridication from technical powers and that the Interpretative Protocol cannot serve as a definite legal basis for this distinction.

Mr. Moore notes that the claim that the express mention of the power to take care of the navigable channel and its pilotage service is to be interpreted as excluding the exercise of any juridical powers encounters two fundamental objections. The first is, that the claim is completely at variance with the plan of internationalization as it has existed on the Danube since 1856. The second objection is that, by the very terms of the various international instruments under which the Interpretative Protocol states that the European Commission is to continue to exercise its powers, the Commission's juridical powers are directly associated with the care of the navigable channel and the pilotage service, no less than with its other activities. In order, therefore, to establish the suggested distinction it would be necessary to show that the juridical powers conferred upon the Commission have been renounced or abandoned, either expressly or by implication. No such proof has been adduced, and to argue that, in its absence, the European Commission now possesses above Galatz no juridical powers, is in effect to maintain that the specific provisions of the Definitive Statute, and of the previous international acts which it confirms, have been impliedly revoked by what the Interpretative Protocol failed to say.

*Dissenting opinion by M. Negulesco*

M. Negulesco notes that the "law in force" in conformity with which the Court must reply in the first place to the questions submitted is the Statute of the Danube of July 23rd, 1921. He observes that Articles 5, 6 and 41 of the Statute show that, in order to determine the limits of the jurisdiction of the European Commission upon the sector in dispute, the *de facto* situation before the war must be considered, as well as the international treaties and instruments relating to the Danube and its mouths.

After having described the history of the legal status of the Commissions on the Danube, M. Negulesco rejects the argument that the extension of the European Commission's powers as far as Braila was proclaimed by the Treaty of London of 1883 and that if Roumania, which had been a sovereign State since 1878, was not summoned to take part in the Conference, this was because the Treaty of Berlin gave the Powers the right to act without the co-operation of Roumania. He considers that, even if it be supposed that the signatory States received a mandate to extend the territorial jurisdiction of the European Commission beyond the limits fixed at Galatz, such power could not be exercised without Roumania's consent. The Powers at the London Conference therefore acted *ultra vires* and could not in any way modify the provisions of Article 55 of the Treaty of Berlin, which had fixed Galatz as the point of separation between the two Commissions. M. Negulesco also rejects the argument that Roumania adhered to the Treaty of London, noting that it never accepted the prolongation of the Commission's powers as far as Braila.

M. Negulesco further takes issue with the argument that independently of Roumania the Treaty of London possesses legal force as being an application of the system adopted by the Concert of Europe. He notes that the decisions of the Great Powers, met together as the Concert of Europe, have never been held to be legally binding upon States not represented in the Concert. With reference to several documents relating to the London Conference, M. Negulesco argues that the reason for the exclusion of Roumania from the Congress was not the principle of the Concert of Europe; the real reason must be sought, firstly in the desire of certain Powers to extend to Braila the authority of the European Commission, and secondly in Austria-Hungary's desire that the Conference should adopt the Regulations of Navigation and River Police from the Iron Gates to Braila to benefit Austria-Hungary to the detriment of the other riparian States.

M. Negulesco proceeds to consider whether in fact the European Commission could not extend its powers on the grounds of international custom. He observes that the European Commission possesses and can only exercise the rights conferred upon it within the limits defined by the international treaties by which it was created. It cannot of its own will either extend or diminish its own powers. In his opinion, the formation of a customary rule compelling Roumania to submit in the disputed sector to a limitation of its right of sovereignty could not have been established. No international custom showing

that Roumania had abandoned her right of jurisdiction over the Galatz-Braila sector in favour of the European Commission of the Danube has been able to develop; since neither a recurrence of facts from immemorial times nor ideas of justice held in common can be shown to exist.

M. Negulesco considers that, in the disputed Galatz-Braila sector, the European Commission exercises in common certain rights of superintendence; but there are no stipulations in favour of this Commission exercising rights of jurisdiction. M. Negulesco then observes that the "practice established on the maritime Danube", invoked by the Committee of Enquiry, is contradicted by the treaties and international acts relating to the Danube and its mouths, which he examines in detail.

M. Negulesco further finds that a comparison between the Statute of the Danube and the Treaty of Versailles shows some profound differences with regard to the extent of the powers and territorial authority of the European Commission. He states, however, that the Statute of the Danube could not modify the provisions of the Treaty of Versailles and that it is then the Treaty of Versailles which must be applied.

M. Negulesco therefore concludes: 1. (a) that, in accordance with the law in force, the European Commission of the Danube does not possess any powers over the Galatz-Braila sector; (b) that the powers of the European Commission extend on the Lower Danube as far as below Galatz, excluding that port; 2. that the Galatz-Braila sector and the navigable channel which crosses the ports of Galatz and Braila come under the jurisdiction of the International Commission of the Danube; and 3. that the line of demarcation between the powers of the European Commission and those of the International Commission must be fixed at the 71 ½ milestone.

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*Results of the Opinion*

On March 7th, 1928 (4th meeting of the 49th Session), the Council, having received the Court's Opinion, decided to communicate it to the President of the Advisory and Technical Committee of Communications and Transport for transmission to the Governments which had signed the Agreement of September 18th, 1926.

Negotiations have been begun between these Governments with a view to arriving at an agreement regarding the régime of the maritime Danube, based on the Court's Opinion.

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**Fifth Annual Report of the Permanent Court of International Justice (15 June 1928—15 June 1929), Series E, No. 5, pp. 223–226**

ACTION TAKEN UPON ADVISORY OPINION NO. 14

The Opinion given by the Court on December 8th, 1927, in the question of the jurisdiction of the European Commission of the Danube between Galatz and Braila, was duly submitted to the Council of the League of Nations, which, on March 7th, 1928, decided to send it to the President of the Advisory and Technical Committee of Communications and Transit for transmission to the Governments which had signed the Arrangement of September 18th, 1926, whereby they requested the Council to ask the Court for an opinion. Negotiations were entered into between these Governments with a view to the conclusion of an agreement regarding the régime of the maritime Danube.

A special committee, set up for this purpose by the Committee of Communications and Transit, working in conjunction with the delegates upon the European Commission, drew up a draft convention which is dated at Geneva, March 20th, 1929.

This draft lays down that, on the maritime Danube, that is to say, from the sea up to the port of Braila (174 kms.), the police regulations for navigation are promulgated by the European Commission of the Danube; the police regulations for the ports and banks are promulgated and carried into effect by the territorial authority subject to the jurisdiction of the European Commission of the Danube. The provisions constituting the police regulations for the ports and banks may not encroach upon the application of the police regulations for navigation.

The Roumanian Government will set up for the purpose of carrying into effect the convention, one or more navigation tribunals, the seats of which will be towns situated on the maritime Danube. These navigation tribunals will have sole jurisdiction over all breaches of the police regulations for navigation, as well as of the police regulations for the ports and banks of the maritime Danube, and their jurisdiction will be limited to such breaches. Nevertheless, proceedings cannot be taken nor any sanctions enforced against the agents of the European Commission and the Roumanian Government except by the European Commission or the Roumanian authorities respectively.

Article 4 of the draft runs as follows:

"A Court of navigation is constituted at Galatz.

This Court will be composed of the first president of the Court of Appeal at Galatz, who will act as president, and of two other members nominated as follows: one, the national of a State represented on the European Commission, will be nominated by the Commission by a majority vote; the other, a national of a State not represented on the European Commission, will be nominated by the Commission by a unanimous vote.

If the European Commission has not made any nomination within six months from the date when a vacancy has occurred, the nomination shall be made by the President of the Permanent Court of International Justice under the conditions as regards nationality provided for by the preceding paragraph and upon the request of one of the States represented on the European Commission.

The members thus nominated will be appointed for four years by the head of the State of Roumania so that they shall enter upon their official duties three months after their nomination.

In the event of an appointment not having taken place within this time-limit, they will provisionally take up their duties three months after the date of their nomination, whilst awaiting appointment.

The non-Roumanian members of the Court enjoy the same immunities as the non-Roumanian members of the European Commission.

The official languages of the Court shall be Roumanian and French."

Any judgment of a navigation tribunal may be appealed from but only to the Court of navigation, whose decision is final.

The draft moreover defines more closely the jurisdiction of the inspector of navigation and of the captains of the port, who will have sole power, each within the limit of his jurisdiction, to investigate and record either personally or through their duly qualified agents, breaches of the pertinent regulations, and to take proceedings for their suppression in first and second instance.

The head of the Roumanian State agreeing to represent for this purpose all the other contracting Parties, the latter agree in the terms of the convention that the judgments of the tribunals and of the Court of navigation will be given in that State's name. The Roumanian authorities and the European

Commission will lend their assistance for the preliminary investigation of cases and for the carrying into effect of the judgments. The costs of the tribunals and of the Court of navigation, as provided for in the convention, will be equally divided between the Roumanian Government and the European Commission, who will also share equally in the amount resulting from fines.

Persons amenable to justice of all nationalities will have equal treatment before the tribunals of the Court of navigation. They will be allowed to conduct their own defence or to be represented or assisted; no tax or duty will be charged in respect of the procedure and judgment.

The Powers represented on the European Commission of the Danube renounce the rights which the treaties in force confer upon them as regards police vessels in the maritime waters of the Danube.

The terms of Article 12 of the draft are as follows:

"Every State interested may submit for examination by the European Commission difficulties relating either to the interpretation or the application of the treaty provisions relating to the maritime Danube or to points of international law which concern the régime of this waterway.

The difficulties referred to in the preceding paragraph which are found incapable of settlement by the Commission within a reasonable time-limit and which have assumed the form of a dispute between States, will be settled upon the request of any interested State according to the procedure provided for in Article 22 of the General Convention relating to the Régime of Navigable Waterways of International Concern.

The same procedure will be followed upon the request of one of the States represented on the European Commission if, in cases other than those provided for above, there arises between these States a difficulty relating to the interpretation or the application of the regulations or of the decisions of that Commission which the Commission has been unable to settle by means, for example, of a modification of its rules or its decisions.

The decisions of the Commission cannot form the subject of a dispute unless it is contended that such decisions have not been taken by the Commission in the regular exercise of its powers or are not in conformity with the law in force.

The difficulties contemplated in the preceding paragraphs include those which may arise as a result of decisions having the force of *res judicata* by a tribunal of navigation or by the Court of navigation. These decisions themselves remain final in conformity with Article 5, but the tribunals and the Court of navigation will in future be obliged to follow the interpretation given to the texts by the Permanent Court of International Justice, as well as to observe the rules of international law as determined by that Court.

The procedure provided for by the present article shall take precedence over any other procedure provided for by any other treaty of conciliation, arbitration or judicial settlement.

The present article in no way affects the relations between the Commission and private individuals."

Article 13, the last one of the draft, stipulates that the texts of all conventions applicable to the maritime Danube and in force at the date of the signature of the present convention shall be maintained in force as regards all provisions which are not abrogated or modified by the stipulations of this convention.

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**Seventh Annual Report of the Permanent Court of International Justice (15 June 1930—15 June 1931), Series E, No. 7, pp. 241–244**

ACTION TAKEN UPON ADVISORY OPINION NO. 14.

The draft agreement between the interested governments prepared by the Special Committee of the Advisory and Technical Committee for Communications and Transit and initialled on March 20th, 1929, by the delegates of the governments represented on the European Commission of the Danube, of which draft a summary was given in the Fifth Annual Report, was communicated on December 20th, 1929, by the President of the Advisory and Technical Committee to the Secretary-General of the League of Nations for transmission to the Council.

The President of the Advisory and Technical Committee, in his covering letter of December 20th[1], briefly indicated the history of the dispute and the various phases of its settlement, and expressed the opinion that the Council would doubtless wish for its part to facilitate the complete success of the work of conciliation. In conclusion he made the following proposals:

"In the opinion of the Special Committee and of the delegates to the European Commission of the Danube, the text, which these delegates consider might be embodied in a Convention between the Powers represented on the European Commission of the Danube, with a view to ending the difficulties which have arisen and avoiding their recurrence in the future, involves the modification of certain provisions of the international treaties, instruments or arrangements maintained in force by Articles 5 and 6 of the Convention instituting the Definitive Statute of the Danube and, previously, by Article 346 of the Treaty of Versailles, the provisions of the latter article, however, being among those which the League of Nations may recommend for revision under Article 377 of the Treaty.

If the Council agrees with the Advisory and Technical Committee and decides to support its recommendations, I have the honour to request it, in conformity with the proposals put forward by the Chairman of the Special Committee in agreement with the delegates to the European Commission of the Danube, to ask the Secretary-General to communicate the attached draft Convention (Appendix 1)[2], which the Powers represented on the European Commission of the Danube propose to conclude, to the other Powers parties to the Convention instituting the Definitive Statute of the Danube, and further to request him to invite the representatives of all the Powers parties to the said Convention to sign a protocol in which, by a joint declaration, they would signify their assent to the modifications proposed in the legal régime of the maritime portion of the Danube. A draft of this declaration is attached (Appendix II)[3]."

This draft declaration[4] is as follows:

"The undersigned Plenipotentiaries of the Governments of the States which are parties to the Convention instituting the Definitive Statute of the Danube, duly authorized, hereby declare that their respective Governments, having been acquainted by a communication from the Secretary-General of the League of Nations dated. . . , in pursuance of a resolution of the Council dated . . . , with the provisions which the Powers represented on the European Commission of the Danube propose to embody in a special Convention with the object of putting an end to the difficulties that have arisen between them and preventing the recurrence of such difficulties:

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[1] See *League of Nations, Official Journal*, February 1930, p. 188.

[2] Not reproduced here.

[3] Not reproduced here.

[4] See *League of Nations, Official Journal*, February 1930, p. 192.

Hereby declare that they jointly agree that, should the said Convention be put into force, the above-mentioned provisions shall be substituted for those laid down in previous treaties, conventions and acts or arrangements so far as they may differ from such treaties, conventions, acts or arrangements.

Done at Geneva,

| | |
|---|---|
| Austria | Greece |
| Belgium | Hungary |
| Bulgaria | Italy |
| Czechoslovakia | Roumania |
| France | Yugoslavia |
| Germany | |
| The United Kingdom of Great Britain and Northern Ireland | |

When the question came before it, the Council of the League of Nations, on January 16th, 1930 (7th meeting of 58th Session), adopted the following resolution[5] which was accepted by the representative of the Roumanian Government who was present at the Council table for the purposes of this question:

"The Council

Has noted the information furnished in the letter from the Chairman of the Advisory and Technical Committee for Communications and Transit dated December 20th, 1929, and in the memorandum addressed to the Council by the Secretary-General on January 15th, 1930, at the request of the Chairman of the Advisory and Technical Committee, on the result of the negotiations carried on by the delegates of France, the United Kingdom of Great Britain and Northern Ireland, Italy and Roumania, under the auspices and with the assistance of the Advisory and Technical Committee, with a view to the settlement of the difficulties which had arisen regarding the competence of the European Commission of the Danube;

It notes the Resolution adopted by the Advisory and Technical Committee on March 22nd, 1929, and

Expresses its great satisfaction at the successful issue of the negotiations undertaken;

The Council

Considers it highly desirable that the agreement reached should be put into force as rapidly as possible with the co-operation of all the countries called upon to give their assent to the changes proposed in the legal régime of the maritime Danube;

It therefore instructs the Secretary-General of the League, as soon as the Chairman of the Advisory and Technical Committee has finally communicated to him the text of the draft convention which the Powers represented on the European Commission of the Danube propose to conclude, to communicate to the Powers parties to the Convention instituting the Definitive Statute of the Danube the present Resolution, together with the letter from the Chairman of the Advisory and Technical Committee, dated December 20th, 1929, the draft convention mentioned above and the draft declaration annexed to the said letter;

The Council

[5] See *League of Nations, Official Journal*, February 1930, p. 110.

Requests these Powers to appoint representatives to sign, at the seat of the League of Nations, the declaration recording their common consent, the text of which is annexed to the letter from the Chairman of the Advisory and Technical Committee. The date for these signatures shall be fixed by the President of the Council after consulting the Chairman of the Advisory and Technical Committee;

It further requests the Powers represented on the European Commission of the Danube, immediately after the signature of this declaration by all the Powers parties to the Convention instituting the Definitive Statute of the Danube, to sign the Convention mentioned above at the seat of the League of Nations."

The declaration submitted as a draft in the above-mentioned report of the President of the Advisory and Technical Committee for Communications and Transit to the Council of the League of Nations, was signed at Geneva on December 5th, 1930. Several of the signatures were affixed subject to ratification.

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**Ninth Annual Report of the Permanent Court of International Justice (15 June 1932—15 June 1933), Series E, No. 9, pp. 115–117**

### Effects of Opinion No. 14 of 8 December 1927

In the Fifth Annual Report, a brief description was given of a draft convention, dated Geneva, March 20th, 1929, drawn up by a special committee of the Advisory and Technical Committee for Communications and Transit, in collaboration with the delegates upon the European Commission, following upon negotiations entered into after the delivery of the Court's Opinion. As this convention could not be put into force, fresh negotiations followed and, on May 17th, 1933, the delegates of France, Great Britain, Italy and Roumania agreed upon the following arrangement:

"The delegates of France, Great Britain, Italy and Roumania, assembled at Galatz in plenary session of the European Commission of the Danube,

whereas, at the meeting held in Paris on March 13th, 1932, following upon the negotiations which had taken place between their respective Governments with the assistance of a special committee of the League of Nations regarding the jurisdiction of this Commission, they held that the Convention initialled on March 20th, 1929, could not be put into force until the operative regulations mentioned in Article 10 of that Convention had been drawn up, and whereas it proved impossible to reach agreement in regard to some points of these regulations; whereas, moreover, at that time, economic conditions in general, and the financial position of the Commission and of Roumania in particular, did not seem favourable for a modification of the existing judicial organization on the lines contemplated, and as, accordingly, it did not seem expedient to continue negotiations the results of which—if indeed any definite results were reached—could not be applied;

whereas they then unanimously decided temporarily to adopt, subject to the approval of their Governments, a *modus vivendi*, drawn up on March 13th, 1932;

whereas this *modus vivendi* was supplemented by the additional declaration signed at Semmering on July 27th, 1932, by the delegates of France, Great Britain, and Roumania, which declaration was modified at Dresden in July 1932 on the proposal of the Roumanian delegate and subsequently signed by all the delegates;

whereas, in a letter of August 30th, 1932, the Roumanian delegate submitted certain objections of his Government to the adoption of point 1 of paragraph 1 of the declaration and as, after an exchange of correspondence, this modification was adopted by the four Governments;

Record this agreement between the Governments upon the text of the *modus vivendi* as thus modified and upon that of the additional declaration, which texts now read as follows:

I.—*Modus vivendi*

1.—Roumania agrees to abstain from disputing the complete jurisdiction of the European Commission of the Danube from the sea to Braila (kl. 174).

On the other hand, the Commission agrees to abstain from exercising its judicial powers between Braila and Galatz and to observe the following arrangements:

(*a*) With regard to vessels navigating to or from Braila and not calling at Galatz, the Commission's Inspector of Navigation shall exercise his authority exclusively between the port of Soulina and *mille* 79.

(*b*) With regard to vessels ascending the river and calling at Galatz, the authority of the Inspector of Navigation shall cease when the port of Galatz pilot takes over his duties on board or, if no pilot of the port is on board, when the vessel begins to take up its moorings or to come alongside in the port. Nevertheless, the port of Galatz pilot shall not take up his duties below *mille* 77½.

(*c*) With regard to descending vessels calling at Galatz, the authority of the Inspector of Navigation shall only begin when the vessel resumes its voyage on leaving Galatz, or when the port of Galatz pilot, if on board, ceases his duties, which, in any event, shall not be continued beyond *mille* 77½.

2.—The Commission agrees that, in the event of a vacancy in the appointment of captain of the port of Soulina, it will fill the vacancy from amongst candidates of Roumanian nationality.

II.—*Declaration*

The delegates of France, Great Britain and Italy upon the European Commission of the Danube—after considering the observations of the legal adviser to the Roumanian Ministry for Foreign Affairs regarding the interpretation to be placed upon the *modus vivendi* signed this day concerning the jurisdiction of the European Commission of the Danube—confirm, on behalf of their respective Governments, that the two first paragraphs of point 1 of the *modus vivendi* form an inseparable whole and shall be mutually interdependent for the whole duration of the *modus vivendi*.

When this *modus vivendi* comes to an end, the Roumanian Government, like the three other Governments, reserves the right to revert to its previous legal position.

This declaration supplements the *modus vivendi* signed the same day and shall be communicated together with that instrument to the Advisory and Technical Committee of the League of Nations."

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**Tenth Annual Report of the Permanent Court of International Justice (15 June 1933—15 June 1934), Series E, No. 10, p. 91**

Sequel to Opinion No. 14 of December 8th, 1927

In the Ninth Annual Report was reproduced the text of an arrangement, comprising a *modus vivendi* and a declaration, agreed upon on May 17th, 1933, by the delegates of France, Great Britain, Italy and Roumania, at a full meeting of the European Commission of the Danube.

On June 25th, 1933, the Commission held an extraordinary session at Semmering (Austria), at which the arrangement was finally signed6. On this occasion, it was also agreed that the four Governments represented on the Commission should send to the Secretary-General of the League of Nations identical letters informing him that the Commission had settled to their mutual satisfaction the matter forming the subject of the dispute concerning its jurisdiction on the Galatz-Braila sector, by means of a *modus vivendi*.

The Commission transmitted the terms of the *modus vivendi* to the (Commission's) inspector of Danube navigation, together with instructions, and also to the captain of the port of Sulina, for information and any necessary action[7].

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## 26. INTERPRETATION OF JUDGMENTS NOS. 7 AND 8 (FACTORY AT CHORZÓW)

### Judgment of 16 December 1927 (Series A, No. 13)

**Fourth Annual Report of the Permanent Court of International Justice (15 June 1927—15 June 1928), Series E, No. 4, pp. 184–190**

*Articles 60 and 59 of the Statute: In order that an application for interpretation should be admissible, it must refer to a passage of the judgment in question having binding force—Meaning of "dispute"—An application for interpretation is also admissible when the dispute relates to the question whether the disputed passage does or does not possess binding force—The Court is free to consider the intention and not the form of the submissions of which it may give a reasonable interpretation—Judgment No. 7, which is declaratory of existing law, recognizes, with binding force for the purposes of the case, the right of ownership of the Oberschlesische Company over the Chorzów Factory, without making this right depend upon the result of subsequent proceedings instituted by the Polish Government before a municipal jurisdiction—Scope of an interpretation under Article 60 of the Statute*

In Judgment No. 7, rendered on May 25th, 1926, in the case between the German and Polish Governments in regard to "certain German interests in Polish Upper Silesia"—which interests according to the judgment related amongst other things to the "deletion from the land registers of the name of the Oberschlesische Stickstoffwerke A.-G. as owner of certain landed property at Chorzów and the entry in its place of the Polish Treasury"—the Court laid down that the attitude of the Polish Government in regard to the Oberschlesische Stickstoffwerke was not in conformity with the Geneva Convention concluded on May 15th, 1922, between Germany and Poland.

On the basis of this decision of the Court, the two Governments entered upon negotiations with a view to a settlement by friendly arrangement of the claims of the above-mentioned company, *inter alia* by means of the payment of pecuniary compensation. But these negotiations failed, and the German Government having informed the Polish Government that the point of view of the two Governments seemed so different that it appeared impossible to avoid recourse to an international tribunal, filed with the Court on February 8th, 1927, an Application submitting amongst other things that the Polish Government was under an obligation to make good the injury sustained by the Oberschlesische in consequence of the

[6] Protocols of the European Commission of the Danube, 1933, Spring Session and Extraordinary Session (Galatz, 1933), pp. 145 *et sqq*.

[7] Resolutions adopted by the European Commission of the Danube in June and in the autumn of 1933 (Galatz, 1933), pp. 7 and 8.

attitude of that Government in respect of that company. The Polish Government having objected to the jurisdiction of the Court in the case, the Court overruled the objection on July 26th, 1927, by Judgment No. 8, and decided to reserve the suit for judgment on the merits after March 1st, 1928.

On September 16th, 1927, the Polish Government brought an action against the Oberschlesische Company before the District Court of Katowice, within the jurisdiction of which the Factory of Chorzów was situated. The plaintiff in this action, whilst invoking more particularly Judgment No. 7 of the Court, submitted that it should be declared that the defendant company had not become the owner of the Factory in question; that the entry made in its favour in the land register was null and void; and that the ownership of the Factory in question fell to the Polish Treasury. The arguments brought forward in support of these submissions were as follows: By Judgment No. 7 the Court had decided the dispute from the standpoint of the rules of international law and had observed in its statement of reasons that it did not pass any opinion on the question whether the transfer of ownership and entry in the land registers were valid at municipal law. Relying on the fact of the existence of the entry, the Court, it was alleged, had taken no decision in regard to one of the arguments put forward by the Polish Government, namely, the invalidity of the entry itself; nevertheless the Court, it was claimed, had said that the annulment of the entry, if it were claimed by the Polish State, could in any case only take place as a result of a decision given by the competent tribunal; which amounted to reserving to the Polish Government the possibility of disputing before such competent tribunal the validity of the change of ownership as well as of the entry in the land register.

*Application instituting proceedings*

The German Government, considering that a difference of opinion had arisen between its own views and those of the Polish Government in regard to the meaning and scope of Judgments Nos. 7 and 8 of the Court, filed with the Registry on October 18th, 1927, an Application for the interpretation of those judgments. The German Government requested the Court to declare that the contention to the effect that in Judgment No. 7 the Court had reserved to the Polish Government the right to annul by process of law the entry of the Oberschlesische as owner, and that the action brought before the Civil Tribunal at Katowice with a view to effecting this annulment, was of international importance in connection with the suit now pending before the Court, was not in accordance with the true construction of Judgments Nos. 7 and 8.

*Public sittings*

After an interchange of documents, of which those submitted by the Polish Government, the Respondent, concluded that there was no ground for giving effect to the request of the German Government, the case was entered on the list of cases for the Twelfth (ordinary) Session of the Court (June 15th to December 16th, 1927), and the agents of the Parties were heard in the course of a public sitting held for the purpose on November 28th.

*Composition of the Court*

The Court on this occasion was composed as follows:

MM. Huber, *President*; Loder, *Former President*; Lord Finlay, MM. Nyholm, Altamira, Oda, Anzilotti, *Judges,* Beichmann, Negulesco, *Deputy-Judges.*

MM. Rabel and Ehrlich, appointed as national judges by the German and Polish Governments respectively, also sat as members of the Court in this case.

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*Judgment of the Court (analysis)*

The judgment of the Court was delivered on December 16th, 1927.

After recalling the facts the Court, in the first place, observes that the case has been submitted under Article 60 of the Statute, according to the terms of which, in the event of a dispute as to the meaning or scope of a judgment, the Court shall construe it upon the request of any Party. But the Polish Government has denied that, in this particular case, the conditions, required by Article 60 in order that effect should be given to a question for interpretation, are present. The first question arising is consequently whether the request is admissible.

What are the conditions required by Article 60? There must, in the first place, be a dispute as to the meaning and scope of a judgment of the Court; and secondly, the request must have for its object an interpretation of that judgment. As regards the latter condition, it has not been disputed that the term "to construe" must be understood as meaning: to give a precise definition of the meaning and scope which the Court intended to give to the disputed judgment. But on the contrary, as regards the former submission, the Polish Government has denied the existence of a dispute between the Parties as to the meaning and scope of the judgments referred to by the Applicant and submitted that the request should be disallowed.

Before examining the question thus raised, the Court considers it advisable to define the meaning which should be given to the terms "dispute" and "meaning or scope of the judgment" which are to be found in Article 60 of the Statute. The word "dispute" and the context of the article do not require negotiations between the Parties as a condition precedent; there is no reason for requiring that the dispute should be formally manifested: it is sufficient if the Parties have in fact shown themselves as holding opposite views in regard to the meaning and scope of a judgment. In order to realize the meaning of the expression "meaning and scope of the judgment", it should be compared with Article 59 of the Statute according to which a decision of the Court has no binding force except between the Parties and in respect of the particular case decided. Indeed, the natural inference to be drawn is that the proceedings for interpretation provided for under Article 60 are intended to enable the Court, if necessary, to make quite clear the points which had been settled with binding force in a judgment; and on the other hand that such proceedings could not be applied to a request which had not that object in view. Consequently, in order that a difference of opinion should become the subject of a request for an interpretation under Article 60, it must refer to those of the points which had been decided with binding force in a judgment the meaning of which was disputed; and amongst such differences of opinion, the question whether a particular point had or had not been decided with binding force, must be included.

Proceeding to consider the facts of the case in the light of these criteria, the Court comes to the conclusion that the matter before it is indeed a dispute as to the meaning and scope of Judgment No. 7 within the meaning of Article 60 of the Statute. The German Government has claimed that Judgment No. 7 of the Court was a final decision, under municipal law also, as regards the right of ownership of the Oberschlesische over the Factory at Chorzów and that it was binding as concerns the claim for compensation put forward on behalf of that Company; whereas the Polish Government has supported the opposite view, relying on a certain passage of the judgment in question, which, according to its opinion, showed the soundness of this view and which might in one sense be described as a reservation. There is therefore a true dispute as to the meaning and scope of Judgment No. 7. But on the other hand, as regards Judgment No. 8, the Court is of the opinion that neither its meaning nor its scope is directly at issue either in the first or the second German submission.

The Court having arrived at this conclusion with regard to the admissibility of the application, then proceeds to consider on the merits the request for an interpretation of Judgment No. 7. In so doing it states that it does not regard itself as constrained merely to reply affirmatively or negatively to the

submissions of the Applicant; it will take an unfettered decision. The submissions of the application are interpreted by the Court as merely constituting the indication of the point at issue required by the Rules of Court in proceedings for interpretation. Indeed, according to any other construction of the application, the formal conditions laid down by the Rules of Court would be lacking; but, as it has already had occasion to lay down in other judgments, the Court may, within reasonable limits, disregard defects of form in the documents submitted. Adopting this standpoint, the Court observes that the two submissions formulated in the German Application will, upon examination, be found to refer to the same disputed point. This point was raised with reference to a passage in Judgment No. 7, where it was stated that if Poland disputed the validity of the entry of the Oberschlesische, the annulment of that entry could in any case only take place in pursuance of a decision given by the competent tribunal; in reality, what the Applicant seeks is an interpretation of this passage, in relation to the judgment as a whole, from two aspects, namely that of its meaning and that of its scope.

As regards the first of these aspects—the meaning of the passage in dispute—the Court observes the following: A literal reading of the passage in question might give the impression that the Court contemplated the possibility of the institution of proceedings by Poland before the municipal courts with a view to obtaining the annulment of the entry of the name of the Oberschlesische in the land register. But, taken together with its context, it cannot in any case be regarded as rendering conditional and provisional the operative part of the judgment which declares the attitude of Poland towards the Oberschlesische to have been contrary to her international obligations, by making the binding effect of that part of the judgment dependent upon a subsequent decision of a Polish court.

That is the meaning both of Judgment No. 7—which a reservation such as Poland inferred would deprive of its logical foundation—and of Judgment No. 8. Indeed, the terms of the latter equally show that, in the intention of the Court, subsequent action on the part of the Polish Government to justify after the event its attitude in respect of the Oberschlesische could not enter into account.

In regard to the second aspect—the scope of the disputed passage—the Court recalls that in Judgment No. 7 it laid down that the attitude of the Polish Government towards the Oberschlesische was not in conformity with the provisions of the Geneva Convention. This conclusion, which has now indisputably acquired the force of *res judicata*, was based, on the one hand, on the right of the German Government to alienate the Chorzów Factory, and on the other, on the finding that from the point of view of municipal law the Oberschlesische had validly acquired the right of ownership to the Factory. These findings constituted a condition essential to the Court's decision. Consequently the one that related to the rights of ownership of the Oberschlesische was included amongst the points which, in accordance with the terms of Article 59 of the Statute, were decided by the judgment with binding force between the Parties.

In conclusion, the Court finds that Judgment No. 7 is in the nature of a judgment declaratory of existing law and is intended to ensure once and for all with binding force as between the Parties the recognition of a situation at law, which, as regards all the legal effects ensuing therefrom, can henceforward no longer be called in question by the Parties to the suit as far as concerns this particular case. On the other hand, the Court is careful to point out that the interpretation thus given can only have binding force within the limits of what has been decided in the judgment construed, and secondly—referring to the pending case relating to the indemnity due for the unlawful taking possession of the Chorzów Factory—that it refrains from any consideration of the effect which the judgment construed might exercise upon submissions made by the Parties in other proceedings or otherwise brought to the Court's knowledge.

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The Court's judgment was adopted by eight votes to three. Mr. Moore, Judge, took part in the discussion and voted for the adoption of the judgment but had to leave The Hague before judgment was delivered.

*Dissenting opinions*

M. Anzilotti, Judge, declared that he was unable to concur in the judgment of the Court, and, availing himself of the right conferred on him by Article 57 of the Statute, delivered a separate opinion.

*Dissenting opinion by M. Anzilotti*

M. Anzilotti states that the request for interpretation by the German Government could not be entertained.

In his opinion, Article 60 of the Statute contains a clause establishing the compulsory jurisdiction of the Court for a certain category of disputes. This provision is closely connected with Article 59 which determines the material limits of *res judicata* when stating that "the decision of the Court has no binding force except between the Parties and in respect of that particular case". It follows that a binding interpretation of a judgment, under Article 60, can only have reference to the binding portion of the judgment construed.

M. Anzilotti finds that this is equivalent to saying that the request for interpretation can only relate to the meaning and scope of the operative part thereof, as it is certain that the binding effect attaches only to the operative part of the judgment and not to the statement of reasons.

With regard to the first of the submissions made by the German Government, M. Anzilotti considers that the observations of the Polish Government reduce the divergence between the views of the two Governments to a question of words and that there is therefore no dispute within the terms of Article 60. The situation is different, however, as to the second German submission, for which M. Anzilotti then considers whether a request for an interpretation can be entertained.

M. Anzilotti notes that it is a well-known principle that the objective limits of *res judicata* are determined by the claim. With reference to the claims upon which Judgment No. 7 was based, he finds that no claim for restitution or compensation was made by the German Government, which, according to the statements of its Agent, only sought to obtain a declaratory judgment.

He continues that it is clear that the decision in regard to the question whether the Oberschlesische was the owner of the property of which it was dispossessed, can only be regarded as an incidental or, more exactly, as a preliminary decision to that which the Court had to give upon the claim of the Applicant. The German Government expressly admits this.

Furthermore, he posits that under a generally accepted rule which is derived from the very conception of *res judicata,* decisions on incidental or preliminary questions which have been rendered with the sole object of adjudicating upon the Parties' claims *(incidenter tantum)* are not binding in another case. According to M. Anzilotti the real question submitted to the Court is whether this general rule also covers the case of an action for indemnity following upon a declaratory judgment in which the preliminary question has been decided. In his view, that question is neither a question involving the interpretation of the operative part of Judgment No. 7 nor a question involving the interpretation of the operative part of Judgment No. 8, which was merely a decision as to the jurisdiction of the Court to take cognizance of the action for indemnity. It is a question which exclusively relates to proceedings actually pending before the Court, and must consequently be considered and adjudicated upon in those proceedings and not by the indirect method of an interpretative judgment.

Finally, M. Anzilotti states that, in coming to this conclusion, he has relied upon principles obtaining in civil procedure. The Court's Statute, in Article 59, clearly refers to a traditional and generally accepted theory in regard to the material limits of *res judicata*; it was only natural therefore to keep to the essential factors and fundamental data of that theory, failing any indication to the contrary, either in the Statute itself or in international law. If there be a case in which it is legitimate to have recourse, in the absence of conventions and custom, to "the general principles of law recognized by civilized nations" that case is assuredly the present one.

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## 27. DENUNCIATION OF THE TREATY OF NOVEMBER 2nd, 1865, BETWEEN CHINA AND BELGIUM

### Order of 21 February 1928 (Series A, No. 14)

**Fourth Annual Report of the Permanent Court of International Justice (15 June 1927—15 June 1928), Series E, No. 4, p. 151**

*The case between Belgium and China*

The case between Belgium and China was submitted to the Court for judgment by the filing on November 25th, 1926, of an Application instituting proceedings on behalf of the Belgian Government. The Third Annual Report indicated, at pages 125 *et sqq.*, the objects which the application was intended to serve, and enumerated the Orders for interim measures of protection to which this case had given rise. In accordance with the terms of an Order, issued by the Court on February 21st, 1928, the written proceedings, the time-limits for which had been on several occasions extended, will be concluded on November 15th, 1928.

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## 28. JURISDICTION OF THE COURTS OF DANZIG (PECUNIARY CLAIMS OF DANZIG RAILWAY OFFICIALS WHO HAVE PASSED INTO THE POLISH SERVICE AGAINST THE POLISH RAILWAYS ADMINISTRATION)

### Advisory Opinion of 3 March 1928 (Series B, No. 15)

**Fourth Annual Report of the Permanent Court of International Justice (15 June 1927—15 June 1928), Series E, No. 4, pp. 213–219**

*The Agreement between Poland and Danzig of October 22nd, 1921, forms a part of the "contract of service" of the Danzig railway officials who passed into the Polish civil service—An international instrument is not a direct source of rights and obligations for private individuals unless the Parties to the instrument have a contrary intention—Such intention must be looked for in the light of (1) the terms of the instrument itself, and (2) the facts relating to its application—Basis of the jurisdiction of the Courts of Danzig to take cognizance of pecuniary claims of the officials in question against the Administration—*

*The obligation incumbent upon Poland to carry out the judgments rendered, subject to its right of recourse to the proper international instances in the event of a violation by Danzig of its international obligations in regard to Poland—One of the Parties before the Court cannot avail itself of a method of proof based on its own failure to carry out its international obligations*

*Outline of the case*

Under Article 104 of the Treaty of Versailles, the Principal Allied and Associated Powers undertook to negotiate a treaty between the Polish Government and the Free City of Danzig which should come into force at the same time as the establishment of the said Free City, with a view, amongst other matters, to ensure to Poland the control and administration of the whole railway system within the Free City. The treaty thus provided for was concluded at Paris on November 9th, 1920. It lays down that as a result of the transfer to the Polish administration of the railways in the Free City, the questions relating to rights and obligations of Danzig officials who have passed to the Polish service would be regulated by agreement between Poland and the Free City. Failing such agreement, a decision would be taken by the High Commissioner of the League of Nations at Danzig.

On July 20th, 1921, a provisional agreement in this respect was signed between the Parties; and subsequently, on October 22nd in the same year, a definitive agreement, which was in the main based on two Decisions of General Haking, the High Commissioner of the League of Nations at Danzig, which had been given on August 15th and September 5th, in pursuance of the procedure as stated above. These Decisions, against which the Parties undertook not to appeal, were recognized by them, through the instrumentality of a Special Agreement dated December 1st, 1931, as coming into force on the same day; they provided, *inter alia*, that all disputes relating to the Polish administration of the railways of the territory of Danzig would fall within the jurisdiction, both civil and criminal, of the Courts of the Free City.

Now, in 1925, certain Danzig officials who had passed to the Polish service brought actions against the Polish Administration before the Danzig Courts, actions which were based on the Agreement of October 22nd, 1921. The Defendant pleaded to the jurisdiction, pointing out that the Agreement did not constitute a valid basis upon which the claim could rest, but he was overruled; whereupon the Government of Warsaw declared, on January 11th, 1926, that by taking cognizance of these actions, the Danzig Courts had contravened the customary law in force and that it refused to carry out the judgments which had been rendered. The Senate of the Free City, whilst declaring itself ready to ask the High Commissioner of the League of Nations for a formal decision, requested him on May 27th, 1926, in the meantime to endeavour to obtain from the Polish Government the withdrawal of this declaration. Prolonged negotiations ensued with the object of finding a solution. But on January 12th, 1927, the Senate of the Free City formally requested the High Commissioner, in pursuance of the procedure provided for by the Convention of November 9th, 1920, to take a decision on certain submissions concerning the dispute formulated by the Senate (and described as "requests" by the Council).

The Decision which the High Commissioner thereupon gave, dated April 8th, 1927, laid down ("the First Part") that the Polish contention that the Danzig Courts were not legally entitled to take cognizance of actions in respect of pecuniary claims brought against the Polish Railway Administration by railway officials who had passed from the Danzig service into Polish service could not be upheld: this was in agreement with the Danzig submissions. But the Decision went on to lay down ("the Second Part") that nevertheless the Danzig Courts had no jurisdiction when actions were based on the Agreement of October 22nd, 1921: that implied a rejection of the claim made by the Free City in regard to this second point. The High Commissioner gave no decision in regard to Poland's obligation to carry out and to recognize the judgments of the Danzig Courts; this obligation the Senate had hoped to see affirmed.

The "First Part" of the High Commissioner's Decision was accepted both by Poland and by Danzig; the "Second" was not agreed to by the Senate of the Free City which therefore appealed to the Council of the League of Nations. On September 22nd, 1927, the Council adopted a resolution asking the Court to state whether the impugned decision of the High Commissioner, in so far as it did not comply with the "requests" of the Free City of Danzig, was legally well founded.

*The Request for an opinion*

In accordance with the usual procedure, the Request for opinion was notified to Members of the League of Nations and to States entitled to appear before the Court. At the same time the Registrar sent to the Governments of Poland and of the Free City of Danzig, as being regarded as likely to furnish information upon the question submitted, a special and direct communication to the effect that the Court was prepared to receive from them written statements and if necessary to hear oral statements made on their behalf.

*Public sittings*

Following upon this communication, the two Governments filed Memorials with the Registry and the question was entered in the list of cases for the Thirteenth (extraordinary) Session of the Court (February 6th to April 26th, 1928), which session had, in fact, been convoked for the purpose. Public sittings were held on February 7th and 8th, 1928, to hear the representatives of the Parties before the Council.

*Composition of the Court*

On this occasion the Court was composed as follows:

MM. Anzilotti, *President;* Huber, *Former President;* Weiss, *Vice-President;* Loder, Nyholm, Altamira, Oda, *Judges,* Yovanovitch, Beichmann, Negulesco, Wang, *Deputy-Judges*.

MM. Ehrlich and Bruns, appointed as national judges by the Polish and Danzig Governments respectively, under Article 71, paragraph 2, of the Rules of Court which thus was applied in practice for the first time, also sat as members of the Court for this particular case.

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*The Opinion of the Court (analysis)*

The Opinion of the Court in the first place defines the point at issue: the Court is not called upon to give an opinion as to the "First Part" of the Decision of the High Commissioner, since that Part, which has not been disputed either by Poland or the Free City, may be considered as complying with the "requests" of Danzig in so far as it recognizes that any pecuniary claims based on the terms of the contract of service of those interested may be the subject of an action before the Danzig Courts. The right of the interested Parties to sue the Polish Railway Administration before the Danzig Courts has consequently not been disputed; this observation of the Court does not however imply the acceptance by it of the grounds given by the High Commissioner in support of his decision on this point. But it is the restriction which the "Second Part" of the High Commissioner's Decision placed upon the exercise of this right which has led to the appeal by the Free City. As has already been observed, according to the High Commissioner, the Danzig Courts had no jurisdiction to take cognizance of actions based on the very Agreement of October 22nd, 1921, the terms of this Agreement, in his opinion, not forming a part of the "contract of service". It hence becomes incumbent upon the Court to state whether or not

the terms of this Agreement form a part of the totality of the provisions governing the legal relationship between the interested persons and the Polish Administration (the "contract of service"). In regard to this point, the Polish Government has claimed that the Agreement, as an international instrument, and failing its incorporation, in a Polish law, creates rights and obligations as between the contracting Parties only (the Governments of Poland and of Danzig) and not in favour of the interested officials, persons coming under municipal law; in other words, according to that Government, the juridical relationship between the Polish Railway Administration and the interested officials would solely be governed by Polish municipal law.

The reply to this question, the Court lays down, depends upon the intention of the contracting Parties, for though there be a well-established principle of international law that an international agreement as such has no direct effects of this kind, it cannot be disputed that the situation may be different if such be the intention of the Parties. The Court next endeavours to ascertain that intention from the contents of the Agreement and from the facts relating to the manner in which it has been applied.

An analysis of the Agreement shows that that instrument was certainly intended to create a special legal régime directly governing the relations between the Polish Railway Administration and the interested officials, and that that was so independently of any condition as to the previous incorporation of the provisions in a Polish enactment. One of the main proofs in support of this is that according to the Agreement, in the event of the Polish Government altering its disciplinary laws, such modifications, in so far as they may not be in harmony with the Agreement, will not *ipso facto* apply to the interested officials but must previously be embodied in the Agreement. It is true, as Poland has observed, that the Agreement contains a clause entitling the Polish Railway Administration to regulate all matters "affecting" the interested officials, but, in the opinion of the Court, the discretionary power which this clause confers upon Poland to issue regulations in this respect is limited. Moreover, by the Protocol previously referred to, signed by the Parties on December 1st, 1921—the date of the transfer of the Danzig railways to Poland—they have recognized the full operative force as from that date, not only of the decisions of General Haking, but also of the Agreement in question.

The Court consequently concludes that the Agreement forms part of the "contract of service" of the interested officials; the latter are entitled to bring actions based upon it before the Danzig Courts, since the High Commissioner in the uncontested portion of his impugned decision has recognized that they have a right to take action before those Courts in regard to pecuniary claims based on the said "contract"; and the judgments given in such cases must consequently be accepted and complied with by the Polish Railway Administration. This conclusion does not however affect the right which Article 39 of the Convention of Paris of November 9th, 1920, confers upon Poland to have recourse to the international procedure provided for in that article, if she can adduce that the Danzig Courts have exceeded their jurisdiction or violated any general or special rules of international law.

Having reached this conclusion from a consideration of the Agreement and of its application, and being desirous of looking at the matter from the point of view of the submissions ("requests") which Danzig made to the Council on January 12th, 1927, the Court then proceeds to endeavour to ascertain how far, apart from the terms of the Agreement, the Polish Government is obliged to recognize the jurisdiction of the Danzig Courts to take cognizance of the claims of the interested officials based on their "contract of service".

The legal basis for the jurisdiction of those Courts being the Decision of the High Commissioner of September 5th, 1921—a decision couched in very comprehensive terms—judgments rendered within the limits of the jurisdiction as defined by the High Commissioner are, in the opinion of the Court, legally valid and must be recognized by Poland, provided always that they do not violate any rule of international law in force between Poland and Danzig. The question which consequently remains is as follows: Do the judgments rendered by the Danzig Courts by virtue of the Agreement come within the

terms of the Decision of September 5th, 1921, or are they in conflict with any such rule of international law? According to the Decision of the High Commissioner of April 8th, 1927, the jurisdiction of the Danzig Courts to take cognizance of pecuniary claims of the interested officials based on a "contract of service" is derived from the Decision of September 5th, 1921. Now jurisdiction implies the right to decide what substantive law is applicable to each case; the Danzig Courts can consequently, if they see fit, apply the provisions of the Agreement to a given case, and such application must be considered as being in conformity with international law, unless the contrary be proved—unless for instance it were shown that in the intention of the Parties the Agreement was not designed to form part of the "contract of service", or in other words was not intended to be applied directly by the Danzig Courts. But the Court, for the reasons indicated above, has rejected such a construction of the Agreement.

From a consideration of the case from the two aspects set out above, the Court concludes that the impugned decision of the High Commissioner is not well founded in law in so far as it does not give satisfaction to the "requests" made by the Senate of the Free City to the Council.

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*Effects of the Opinion*

The Opinion of the Court was adopted unanimously by all the judges present. It was transmitted in due course to the Council of the League of Nations, which took official note thereof on March 8th, 1928.

The Council also officially noted at the same time an Agreement concluded between Danzig and Poland on March 2nd, and formally signed on March 6th; according to the terms of this Agreement, the Parties request the Council not to place the question on the agenda for its session, in view of the fact that they had in advance decided to accept the opinion of the Court. By a letter dated March 21st, 1928, the Polish Minister at The Hague communicated the terms of this Agreement to the Registry of the Court.

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## 29. RIGHTS OF MINORITIES IN UPPER SILESIA (MINORITY SCHOOLS)

### Judgment of 26 April 1928 (Series A, No. 15)

**Fourth Annual Report of the Permanent Court of International Justice (15 June 1927—15 June 1928), Series E, No. 4, pp. 191–199**

*Plea to the jurisdiction—Stage of the proceedings at which pleas may be raised (Art. 38 of the Rules of Court); importance of the fact that the Party raising the plea does not ask for a decision on the plea before the consideration on the merits—The jurisdiction of the Court is based on the consent of the Parties; this consent may be either express, tacit or implicit—The fact of pleading to the merits shows an intention to obtain a judgment on the merits—The "guarantee of the League of Nations"*

*Fin de non-recevoir (inadmissibility of the suit); nature of the jurisdiction of the Council of the League of Nations and that of the Court according to the terms of the German-Polish Convention relating to Upper Silesia*

*Interpretation of the German-Polish Convention—Is the membership of a minority a question of intention or of fact?*

*Is a supervision by the authorities of the country admissible?—Conditions to which admission of children to minority schools are subject and the principle of equal treatment*

*Outline of the case*

At the time of the partition of Upper Silesia between Germany and Poland, following upon the plebiscite provided for in the Treaty of Versailles, a Convention was signed at Geneva on May 15th, 1922, by the two neighbouring States in order to regulate the conditions in the partitioned territory. This Convention comprises in Part III provisions for the protection of the racial, linguistic and religious minority in the German as well as in the Polish portion of Upper Silesia. According to the terms of certain provisions in that Part relating to education, particularly Articles 106 and 131, minority schools were to be created; and to these schools children were to be admitted whose language—according to declarations to be made by the persons responsible for their education—was a minority language. The authorities were to abstain from any verification or dispute as to the veracity of the declarations of the responsible persons; the same prohibition applied, according to Article 74, to the question whether a person did or did not belong to a minority.

In the course of the year 1926, the Polish authorities issued orders for certain measures to be taken with a view to verifying the authenticity of the applications for admission to the minority schools and whether these applications came from persons entitled to make them. As a result of the enquiry, more than 7,000 children were excluded from the minority schools. The *Deutscher Volksbund für Polnisch Oberschlesien* thereupon addressed a petition to the Minorities Office at Katowice asking for the cancellation of these annulments; the Mixed Commission for Upper Silesia gave a decision in favour of the petitioners; but the responsible Polish authorities declared that they were unable to comply with the opinion given in its entirety; whereupon the petitioners appealed to the Council of the League of Nations under the terms of the German-Polish Convention. The Council considered the question at its Forty-Fourth Session (March 1927); it adopted a Resolution in which it recommended the Polish Government not to insist upon the measures taken to exclude from the minority schools certain categories of children whose admission had been annulled; the Resolution declared however at the same time that it was inexpedient to admit to those schools children who only spoke Polish; and it indicated certain measures of supervision intended to ensure the equitable application of the Resolution. These measures might in a limited sense be applied even to cases falling outside the cases contemplated in the petition.

In the month of October of the same year, the Polish Government, in conformity with the procedure provided for by the Resolution of the Council, requested the author of the report, upon which the Council had taken its decision in the case, to give an opinion as to whether the supervision set up by this Resolution should also apply to certain children of the 1927–1928 school year; the rapporteur's reply was in the affirmative. The Council dealt with the question thus raised at its Forty-Eighth Session (December 1927); during the discussions which then took place, the German representative pointed out that the decision of March 1927 had been understood by him as solely referring to children of the 1926–1927 school year. Realizing that there existed a difference of opinion between the Members of the Council in this respect and considering that it had become necessary to clear up once and for all the legal questions of principle governing the admission of children to German minority schools, he announced his intention of having recourse to the Court for the purpose of asking for an interpretation of the relevant provisions of the Geneva Convention.

*Application instituting proceedings*

The Council noted the declaration of the German representative; and on January 2nd, 1928, the German Government filed with the Registry of the Court an Application instituting proceedings together with a Case. These documents were duly communicated to the Polish Government, Respond-

ent; the written proceedings having been terminated on March 10th, 1928, and the case being considered urgent, it was entered on the list of cases for the Thirteenth (extraordinary) Session of the Court (February 6th to April 26th, 1928).

*Public sittings*

Public sittings were held on March 13th, 16th and 17th, in order to hear the pleadings, reply and rejoinder of the Parties.

*Composition of the Court*

The following judges sat on the Court:

MM. Anzilotti, *President*; Huber, *Former President*; Weiss, *Vice-President*; Loder, Nyholm, Altamira, *Judges,* Yovanovitch, Beichmann, Negulesco, Wang, *Deputy-Judges*.

M. Schücking and Count Rostworowski, appointed as national judges, by the German and Polish Governments respectively, for this particular case, also sat as members of the Court.

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*The judgment of the Court (analysis)*

The judgment of the Court was delivered on April 26th, 1928. After reviewing the facts the Court proceeds to an analysis of the submissions of the Parties.

The application is based on Article 72 of the Convention relating to Upper Silesia, according to the terms of which article Poland agreed that any dispute as to questions of law or fact arising out of the preceding articles would, if the other Party so desired, be referred to the Permanent Court of International Justice; on the other hand, the submissions of the German Government, in the opinion of the Court, comprise the following three contentions:

(1) Articles 74, 106 and 131 of the Geneva Convention establish the unfettered liberty of any person to declare, according to his own conscience and on his own personal responsibility, that he does or does not belong to a racial, linguistic or religious minority, subject to no verification, dispute, pressure or hindrance in any form whatsoever on the part of the authorities.

(2) The above-mentioned articles also establish the unfettered liberty of any person to choose the language of instruction and the corresponding school for the pupil or child for whose education he is responsible—likewise subject to no verification, dispute, pressure or hindrance in any form whatsoever on the part of the authorities.

(3) Any measure singling out the minority schools to their detriment is incompatible with the equal treatment granted by Articles 65, 68, 72, paragraph 2, and the Preamble to Division II of the Convention.

As regards the Polish Government, Respondent, it asked the Court to dismiss the claim of the Applicant or, in the alternative, to give an interpretation of Articles 74, 106 and 131 of the Geneva Convention differing from that set forth by the Applicant and partly opposed to that interpretation; that Government being, in particular, of the opinion that Article 69 of the Convention, which is ignored in the German submission, should also be taken into consideration in the case on the same footing as the articles invoked in the Application; moreover, the Respondent does not admit that the articles in question confer an unfettered liberty to choose the language of instruction of the children, but only to

declare what is in fact their language; finally, it does not accept in its entirety the contention regarding exemption from any kind of verification, etc., as regards the veracity of the declarations made.

But in addition the Polish Government has adduced two other arguments which it only submitted in its written Rejoinder stating that it was not a question of a preliminary plea but of one which should be joined to the merits. It argued in the first place that the Court had no jurisdiction in this case under Article 72 because the provisions the interpretation of which was asked for by the German submissions were not to be found among the clauses which preceded the article but among those which followed. Secondly, it said that a *fin de non-recevoir* should be opposed to the application because the subject of the dispute had already been settled by the Resolution of the Council of the League of Nations of March 7th, 1927; and the Council had sovereign power to fix the measures to be taken and its decision could not be subject to revision by the Court.

The Court then proceeds, in the first place, to consider these two arguments. As regards the objection to the jurisdiction, the German Government claimed that it should be overruled. Invoking Article 38 of the Rules of Court, according to the terms of which any preliminary objection shall be filed within the time fixed for the filing of the Counter-Case, it claimed that the Polish objection should be overruled as not having been raised within that time-limit. On this point the Court does not share the opinion of the German Government since it is of the opinion that Article 38 of the Rules of Court only provides for cases in which the Respondent asks for a decision upon the objection before any further proceedings on the merits. But in the present case the Polish Government expressly stated that it did not desire a separate treatment of this kind. Moreover the Court, whose jurisdiction depends on the will of the Parties, can take cognizance of all matters in which its jurisdiction has been accepted by those appearing before it. Such acceptance does not depend on the fulfilment of certain definite formalities, such for example as the drawing up of an express agreement: it may equally arise from declarations showing assent made subsequently to the unilateral filing of an application, or even from mere acts showing consent in a conclusive fashion. According to the Court, whenever a government proceeds to plead to the merits, its attitude in doing so should be regarded as an unequivocal indication of its desire to obtain a decision on the merits and the consent which can be inferred from a will expressed in this way cannot be withdrawn during the subsequent course of proceedings, unless in very special circumstances, which the Court in the present case does not consider as being present. This is true even where, as in the present case, the unilateral application has been submitted by the Applicant in a special capacity (in the present case that of a Member of the League of Nations), whereas in the proceedings in regard to questions submitted to the Court by virtue of the mere consent of the Respondent, the Applicant would appear in another capacity (in the present case that of one of the signatories of the German-Polish Convention).

The Court consequently overrules the objection to the jurisdiction raised by the Respondent; the Polish Government has implicitly accepted the jurisdiction of the Court to decide upon the merits in respect of all the submissions of the German Government. Moreover, the objection to the jurisdiction cannot be looked upon as referring to the last of the contentions embodied in these submissions, since it invokes Articles 65 and 68 of the Convention, which articles precede Article 72 and consequently come within the jurisdiction conferred upon the Court under that article. Without stopping to consider the question of how far the jurisdiction conferred by this article might possibly extend also to the two preceding contentions embodied in the German submissions, the Court in this respect lays down that the "guarantee of the League of Nations" referred to in the Germano-Polish Convention does not apply to Articles 74, 106 and 131 of that Convention.

The Court then proceeds to consider the plea by Poland that the submissions cannot be entertained and concludes that this plea should similarly be overruled. Indeed, the Court is of opinion that its own jurisdiction and that of the Council under the Convention relating to Upper Silesia are of a

different character; and moreover, as appears from the minutes of the sessions of the Council and the terms of the resolutions adopted, the Council did not intend to settle the question of law by its Resolution of March 1927.

The objection to the jurisdiction and the claim that the suit could not be entertained having thus been overruled, the Court then proceeds to consider the submissions of the Applicant. It deals in the first place with the difference of opinion between Germany and Poland as to the point whether membership of a linguistic minority is a question of intention or of fact. The Court considers that Poland was justified in construing the provisions of the Convention relating to Upper Silesia as though it were a question of a point of fact; but it adds that there are a great number of cases to be found particularly in Upper Silesia, where the answer to this question cannot readily be given from the facts alone. That, in the opinion of the Court, is perhaps the reason why the Convention, whilst requiring declarations in conformity with the *de facto* situation, prohibits all verification or dispute as to the veracity of these declarations. The Court realizes the difficulties to which this interpretation may give rise; but it considers that the Parties clearly preferred this state of affairs to that which would arise if the authorities were empowered to verify or dispute the veracity of the declarations.

Similarly, in regard to the second contention which could be inferred from the submissions of the German Government—namely, the freedom to choose the language of instruction—the Court is of opinion that the Polish Government is right in deeming that the declarations intended to show what the language of the pupil or child is, should be mere declarations of fact and do not allow of any freedom of choice. But here again it adds that in appreciating what are the facts, a subjective element may properly be taken into consideration, particularly in cases where the children speak both German and Polish, or else have an insufficient acquaintance with either of these languages.

In regard to a minor point, the Court considers that the Geneva Convention contains nothing contrary to the contention which was put forward by the Polish Government but contested by the German Government, namely, that as a condition precedent for the admission of children into existing minority schools, a declaration relating to the mother tongue of the children must be demanded; in particular, the Court sees nothing in this method contrary to the principle of equal treatment as embodied in the Convention.

Finally, in regard to the third contention which may be inferred from the submissions of the German Government, the Court confines itself to stating that there does not appear to be a difference of opinion between the two Governments on this point. Consequently it is not necessary for the Court to take any decision thereon.

The operative part of the judgment is as follows:

(1) The objections, whether to the jurisdiction or respecting the admissibility of the suit, raised by the Respondent, must be overruled.

(2) Articles 74, 106 and 131 of the German-Polish Convention of May 15th, 1922, concerning Upper Silesia, bestow upon every national the right freely to declare, according to his conscience and on his personal responsibility, that he does or does not belong to a racial, linguistic or religious minority, and to declare what is the language of a pupil or child for whose education he is legally responsible; these declarations must set out what their author regards as the true position in regard to the point in question, and that the right freely to declare what is the language of a pupil or child, though comprising, when necessary, the exercise of some discretion in the appreciation of circumstances, does not constitute an unrestricted right to choose the language in which instruction is to be imparted or the corresponding school; nevertheless, the declaration contemplated by Article 131 of the Convention and also the question whether a person does or does not belong to a racial, linguistic or religious minority, are subject to no verification, dispute, pressure or hindrance whatever on the part of the authorities.

(3) The Court is not called upon to give judgment on that portion of the Applicant's submission according to which any measure singling out the minority schools to their detriment is incompatible with the equal treatment guaranteed by Articles 65, 68, 72, paragraph 2, and by the Preamble of Division II of Part III of the Convention.

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*Dissenting opinions*

The judgment of the Court was adopted by eight votes to four. M. Huber, Former President, M. Nyholm, Judge, M. Negulesco, Deputy-Judge, M. Schücking, National Judge, being unable to concur, delivered separate opinions. Two of the dissenting Judges (MM. Huber and Negulesco) dissented from their colleagues on the question of jurisdiction.

*Dissenting opinion by M. Huber*

M. Huber considers that it is not within the jurisdiction of the Court to pass upon the submissions in the German Application in the circumstances in which this is recognized as possible in the Judgment. The Court must confine itself to adjudicating upon those submissions solely on the basis of Division I of Part III of the Geneva Convention.

M. Huber notes that the jurisdiction conferred by Article 72, paragraph 3, of the Geneva Convention only extends to Division I of Part III. According to M. Huber, first, it is a characteristic feature of the whole system of the Geneva Convention to provide different forms of jurisdiction and remedy almost for each Part or Division. Second, Article 72, paragraph 3, is the literal reproduction of Article 12 of the Minorities Treaty of June 28th, 1919, and of analogous provisions of other treaties, in which judicial action is based upon stipulations which relate to the relations between the respondent State and its own nationals. Division II has a different character: it constitutes an agreement between the two States, taking into account the special conditions in Upper Silesia.

M. Huber observes that it is nevertheless possible that the Parties may have extended the basis of the Court's jurisdiction by an agreement arrived at between them. In his view, however, it is not to be presumed that Article 36 of the Court's Statute recognizes a way according to which jurisdiction would result from the fact that a State has submitted, by unilateral application, a claim which is, in part, at all events, outside the scope of any pre-existing jurisdiction, and that the Respondent has replied by argument upon the merits. Such an interpretation of Article 36 appears difficult to reconcile with the conceptions which, at the time of the preparation of the Statute, were current in Government circles in regard to compulsory arbitration, and it is itself contradicted by the records of the preparatory work.

M. Huber considers that the whole trend of the proceedings which have taken place before the Court is against the presumption of the consent of the Parties to its jurisdiction. He states that it is true that the attitude of the representatives of the two Parties before the Council seems to indicate that they both expected to obtain from the Court an interpretation of the articles cited with this object in the German submissions. But this fact is not relevant at law. As the jurisdiction of international tribunals is almost always derived from treaties or other instruments expressly declaring the intention of the State, it is difficult to conceive that new jurisdictional powers—even in regard to a particular case only—could be indirectly inferred from the line of conduct of agents. He concludes that the Court's jurisdiction is determined by the treaty or special agreement establishing that jurisdiction, and not by the contentions maintained by the Parties in the particular case.

M. Huber then notes that since the Court should base its judgment on Division I, it should only deal incidentally with the provisions of Division II. Adopting the point of view taken by the Court in construing the German submissions, he states that the following results are arrived at on the basis of Division I. First, the submissions in regard to the interpretation of Articles 74, 106 and 131 as such fall outside the scope of the Court's jurisdiction. Second, in so far as the submissions relating to these articles concern the conformity of certain interpretations with the provisions of Division I, more especially the conformity of the so-called objective and subjective principles with Articles 68 and 69, a *non liquet* is indicated. Articles 68 and 69 contain nothing forbidding a State to verify whether, according to objective criteria, a person belongs to a minority or what is a child's own language. But these articles which, like the whole of Division I, are intended to secure to minorities certain rights and a certain specially favourable treatment, do not prevent States, either by independent legislation or by convention, from granting minorities more extensive rights or a more liberal treatment. For this reason, the contentions of the two Parties in regard to the interpretation of Articles 74, 106 and 131 are neither supported by nor in opposition to the provisions of Division I.

*Dissenting opinion by M. Nyholm*

With regard to the question whether Poland's objection to jurisdiction has been abandoned and, arising out of this, an agreement has been created between the Parties as a result of which the Court has jurisdiction, M. Nyholm observes that the judgment arrives at the conclusion that the Court has jurisdiction on the basis of the principle that the jurisdiction of the Court is determined by the intention of the Parties (Statute, Article 36); but in the present case this intention has not been sufficiently definitely expressed. In his view, it would seem impossible to dispense with the formalities which, in accordance with the letter and spirit of the Statute and Rules, must be complied with in the drawing up of a special agreement. M. Nyholm further considers that nowhere has Poland *stated* that she accepted the Court's jurisdiction. He also rejects the hypothesis that she would have in effect accepted it. He holds that it is impossible to argue—as does the judgment—that the fact that Poland began her presentation of the case by filing a Counter-Case on the merits constitutes a tacit acceptance. A decisive argument against this contention exists, moreover, in the fact that in the present case, the objection is an objection *ratione materiae* which can accordingly be raised at any stage.

M. Nyholm then turns to the interpretation of the Geneva Convention as the basis for the Court's jurisdiction in the case. From a study of the origin of the Convention and the system adopted by the Commission in drafting it, M. Nyholm concludes that Division II, which by itself constitutes the Convention, is subject to the Court's jurisdiction, as well as to the jurisdiction of the Council. He notes that the Council only has jurisdiction in respect of petitions and requests made by *individuals*, whereas the Court's jurisdiction only covers disputes arising between, on the one hand, either the Polish or German Governments, and, on the other, any of the Principal Allied and Associated Powers or any other Power, a Member of the Council of the League of Nations.

Turning to the merits of the suit in Section IV of his opinion, M. Nyholm considers that the reply which the judgment gives to the question whether a declaration under Article 131 is of a subjective or objective character seems to be drawn up in terms which do not provide a satisfactory solution of the problem. He observes that a declaration *which cannot be disputed or verified* cannot be limited by rules of law. The requirement according to which the declaration must correspond exactly to the facts is only a pious wish and any limitations as regards its sincerity come solely within a *moral* sphere. It follows that the declarer is not subject to a legal obligation and may of his own free will make a declaration without considering whether it corresponds to the actual state of affairs. Accroding to M. Nyholm, the principle underlying Article 131 is explainable by the particular state of affairs existing in Upper Silesia; no precise limits exist either as regards nationality or as regards language.

M. Nyholm therefore considers that any enquiry to verify the language implies a hindrance contrary to the right of free choice. As regards the question whether the authorities of a State could, from an administrative point of view, examine whether there exists in reality a *declaration* within the meaning of the article, namely, for example, whether the person who had made the declaration had the necessary authority for so doing, he states that Poland is entitled to intervene in such cases, but good faith in the carrying out of the Convention requires that such special cases should not furnish grounds for general measures contrary to the substance of Article 131.

*Dissenting opinion by M. Negulesco*

M. Negulesco concurs in the Judgment upon the merits, but differs from the majority of the Court as regards the question of jurisdiction. He holds that the plea to the jurisdiction having been mentioned in the statement of reasons of the Counter-Case, it cannot be said that the Polish Government had renounced the plea.

M. Negulesco declares that the plea to the jurisdiction cannot be considered as submitted too late and that it can be raised at whatever state and at whatever stage of the proceedings. The fact of "pleading the merits" does not imply that the defendants have given up their plea to the jurisdiction, particularly when it was raised in the Rejoinder and in the course of the oral pleadings as a plea joined to the merits. He adds that it would be difficult to see what object there would be in the right of raising the plea to the jurisdiction at any stage of the proceedings if this right were rendered nugatory by a presumption that its exercise had been renounced and that the jurisdiction of the Court had been accepted.

M. Negulesco points out that the plea to the jurisdiction before the Court cannot be assimilated to a plea to the jurisdiction *ratione personae*. It more nearly resembles a plea *ratione materiae,* or even more a plea to the admissibility of the particular judicial remedy; and consequently the defendant cannot be compelled under penalty of forfeiture to raise the plea *in limine litis.* In order that such an obligation may be imposed upon the defendant, a specific provision must exist either in the Statute or in the Rules of Court to that effect.

Moreover, M. Negulesco observes a tacit acceptance of the jurisdiction of the Court which can be deduced merely from the documents of the proceedings is contrary to the provisions of the Statute and of the Rules of Court. He holds that the fact that a special agreement to accept the Court's jurisdiction must be drawn up in due form and not to successive acts in the proceedings, is clearly shown on the one hand by Article 40 of the Statute, which lays down that "cases are brought before the Court, as the case may be, either by the notification of the special agreement, or by a written application . . ." and, on the other hand, by Articles 37 *et sqq.* of the Rules of Court, which define the conditions and the formalities to be fulfilled when a suit is submitted by application or by notification of the special agreement.

M. Negulesco further declares that the extension of the Court's jurisdiction to Division II of the Part III of the Convention is not admissible owing to the special nature of that Part. In his view, such a diminution of the Council's jurisdiction cannot result from a tacit agreement between Germany and Poland.

*Dissenting opinion by M. Schücking*

M. Schücking states that his dissenting opinion is confined to referring to Section IV of M. Nyholm's dissent, examining declarations under Article 31 of the Geneva Convention, which entirely represents his views.

## 30. DENUNCIATION OF THE TREATY OF NOVEMBER 2nd, 1865, BETWEEN CHINA AND BELGIUM

### Order of 13 August 1928 (Series A, No. 16)

**Fifth Annual Report of the Permanent Court of International Justice (15 June 1928—15 June 1929), Series E, No. 5, pp. 203–204**

For the summary of No. 30 (Series A, No. 16), see No. 33.

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## 31. INTERPRETATION OF THE GRECO-TURKISH AGREEMENT OF DECEMBER 1st, 1926 (FINAL PROTOCOL, ARTICLE IV)

### Advisory Opinion of 28 August 1928 (Series B, No. 16)

**Fifth Annual Report of the Permanent Court of International Justice (15 June 1928—15 June 1929), Series E, No. 5, pp. 227–235**

*Article 72 of Rules: formulation of the question put to the Court—The spirit of an instrument, as a factor for the interpretation of one of its clauses—As a general rule, every judicial body is judge of its own jurisdiction—Definition of the term arbitration—Powers of the Mixed Commission and of the Governments concerned, according to the terms of the clause to be construed*

*Outline of the case*

On December 1st, 1926, an agreement was concluded at Athens between the Greek Republic and the Turkish Republic the express object of which was to settle difficulties which had arisen in regard to the application of certain clauses of the Peace Treaty of Lausanne of July 24th, 1923, and of the Declaration (No. IX) annexed to that Treaty, concerning Moslem properties in Greece. With this object, the Agreement bestowed certain powers—including the duty of applying the Agreement—upon the Mixed Commission for the Exchange of Greek and Turkish Populations. This Mixed Commission, which had been established by the Convention for the Exchange of Greek and Turkish Populations concluded at Lausanne on January 30th, 1923, already derived powers from two other sources, namely, the instrument to which it owed its creation, and the Declaration (No. IX) already alluded to above.

The Greco-Turkish Agreement was supplemented by a Final Protocol signed at the same time and forming an integral part of the Agreement itself. Article IV of the Final Protocol is as follows:

> "*Article IV.*—Any questions of principle of importance which may arise in the Mixed Commission in connection with the new duties entrusted to it by the Agreement signed this day and which, when that Agreement was concluded, it was not already discharging in virtue of previous instruments defining its powers, shall be submitted to the President of the Greco-Turkish Arbitral Tribunal sitting at Constantinople for arbitration.
>
> The arbitrator's awards shall be binding."

The arbitral tribunal referred to in this clause had been established between Greece and Turkey by the Peace Treaty of Lausanne. It sat at Constantinople, and its mission was to deal with all dis-

putes relating to the identity or the restitution of certain property, rights and interests, and with claims designed to obtain an addition to the proceeds of liquidation in cases where the property, rights and interests in question had been liquidated.

In September 1927, the members of the Mixed Commission found themselves unable to agree as to the interpretation of the conditions of reference (conditions for appeals) to the arbitrator provided for by Article IV of the Protocol. In connection with a difference of opinion between them as to the wording of the communications in which the Commission was to record the names of persons allowed to benefit by the Greco-Turkish Agreement of December 1st, 1926, a difference which the Greek members had proposed should be referred to arbitration under Article IV, the latter contended that the two States which had signed the Agreement and Protocol were alone entitled to appeal to the arbitrator; on the other hand, in the opinion of the Turkish members, a previous decision by the Mixed Commission was essential.

*The Request for an opinion*

Being unable to settle this point, the Mixed Commission decided by a majority on December 22nd, 1927, to ask the Council of the League of Nations to request the Court to give an advisory opinion. After a discussion, the Mixed Commission, on February 1st, 1928, decided upon the terms of its request which was transmitted by its President to the Secretary-General of the League of Nations by a letter dated February 4th.

Upon receiving the request, the Council decided, at its meeting of March 5th, 1928, and before including the question upon its agenda, first of all to seek the consent of the Greek and Turkish Governments to the submission of the question for an advisory opinion. Both Governments having given a favourable answer, the Council submitted the question to the Court under its Resolution of June 5th, 1928.

*Notifications, memorials and hearings*

In accordance with the customary procedure, notice of the Request for an advisory opinion was given to Members of the League of Nations and to the States entitled to appear before the Court. Furthermore, the Registrar sent to the Greek and Turkish Governments, considered as likely, in accordance with Article 73 of the Rules of Court, to be able to furnish information on the question, a special and direct communication to the effect that the Court was prepared to receive from them written statements and, if necessary, to hear oral statements made on their behalf. Notice of the Request was also given to the Mixed Commission, which informed the Registrar that it would be represented by its President, should the Court see fit to hear its views; the Court however did not find this necessary.

The two Governments each filed with the Registry a written statement, and the question was placed in the list for the Fourteenth (ordinary) Session of the Court which began on June 15th and terminated on September 13th, 1928. Public sittings were held on August 6th and 7th, 1928, for the purpose of hearing the Greek and Turkish representatives.

*Composition of the Court*

The Court was composed as follows for the consideration of the question:

MM. Anzilotti, *President;* Huber, *Former President;* Lord Finlay, MM. Loder, Nyholm, de Bustamante, Altamira, Oda, Pessôa, *Judges,* M. Beichmann, *Deputy-Judge*.

It will thus be seen that, though neither of the two Governments concerned (that is to say the Greek and Turkish Governments) had upon the bench a judge of its nationality and though the question constituted an existing dispute between two States, under the terms of Article 71 of the Rules, the

Court sat as normally composed. This is explained by the fact that having been duly informed by the Court of their right under Article 31 of the Statute each to appoint a judge of their nationality to sit on the case, the two Governments informed the Court that they waived this right.

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*The Opinion of the Court (analysis)*

The Court's Opinion was given on August 28th, 1928.

The Court, in its Opinion, first of all proceeds to define the question put to it. It considers this to be indispensable for the following reason: Article 72 of the Rules lays down that a request must contain an exact statement of the question; but, in this case, the letter sent by the President of the Mixed Commission to the Secretary-General of the League of Nations on February 4th, 1928, with a view to obtaining an opinion from the Court concerning "the conditions for appeals to the arbitrator"—to which letter the Council in its Request is content to refer—does not meet the requirements of Article 72. The Court must determine what the question is upon which its opinion is sought and formulate an exact statement thereof, in order more particularly to avoid dealing with points of law upon which it was not the intention of the Council or Commission to obtain its opinion. In this case it is possible to do this owing to the relatively simple nature of the case: it may not however always be so.

In these circumstances, having regard to the documents submitted to it and particularly to the terms of Article IV of the Final Protocol, which lays down the conditions for appeals to the arbitrator—there being no doubt that the word *recours* (appeals) is to be considered as simply meaning "reference" or "submission", since the arbitrator is not in the position of a superior court—and having regard also to the statements submitted by the interested Governments, the Court considers that it may express the points on which, in substance, its opinion is required, as follows:

"(1) Is it for the Mixed Commission for the Exchange of Greek and Turkish Populations to decide whether the conditions laid down by Article IV of the Final Protocol annexed to the Agreement concluded at Athens on December 1st, 1926, between the Greek and Turkish Governments, for the submission of the questions contemplated by that article to the arbitration of the President of the Greco-Turkish Mixed Arbitral Tribunal at Constantinople, are or are not fulfilled? Or is it for the arbitrator contemplated by that article to decide this?

(2) The conditions laid down by the said Article IV having been fulfilled, to whom does the right of referring a question to the arbitrator contemplated by the article belong?"

It is to these questions and these alone that the Court's opinion constitutes a reply: in so far as the points in dispute fall outside the scope of these questions the Court cannot deal with them.

In order to be able to give the required answer, the Court first of all examines the general structure and duties of the Mixed Commission. This body, the decisions of which are taken by a majority vote, consists of eleven members, four appointed by Greece, four by Turkey and three by the Council of the League of Nations from amongst the nationals of Powers which did not take part in the war of 1914–1918. These members take part in the work of the Commission in an individual capacity and do not constitute delegations, as the minutes of the Mixed Commission and the statements submitted to the Court would seem erroneously to indicate: whether neutrals, Greeks or Turks, they vote independently, so that eleven separate votes are cast in the Commission. This conclusion is imposed by the tenor of the clauses establishing the Commission; moreover, it is corroborated by practice, since it is found that on a particular question two Turkish members have voted on opposite sides.

As regards the duties of the Mixed Commission, these are, as has already been seen, derived from three sources. Under Article 12 of the Convention for the Exchange of Greek and Turkish Populations of January 30th, 1923, the Mixed Commission's task is the supervision and facilitation of the emigration and the carrying out of the liquidation of certain movable and immovable property; in addition to these essentially administrative functions, it has others of a regulatory or legislative nature (settlement of the details of the rules to be followed in regard to emigration and liquidation) and of a judicial nature (final settlement of certain disputes concerning property, rights and interests to be liquidated). Under the Declaration of July 24th, 1923, relating to Moslem properties in Greece, the Mixed Commission is empowered to deal with certain claims respecting the property rights of Moslem persons who are not covered by the Convention of January 30th, 1923. Lastly, under the Greco-Turkish Agreement of December 1st, 1926, it has to regulate the disposal of certain categories of immovable property, and for this purpose it is given certain jurisdictional and general powers in regard to the application of the Agreement. It is clear from the tenor of these instruments that, though distinct from one another, the same intention underlies them all, namely, the facilitation of the exchange of populations and the overcoming of difficulties connected with the application of certain provisions of the Peace Treaty of Lausanne and of the Declaration (No. IX). Adopting a standpoint already taken by it in another case, the Court observes that any measure capable of impeding the work of the Commission in this domain must be regarded as contrary to the spirit of these instruments, to which spirit due importance must be attached in order to arrive at a correct interpretation of Article IV of the Final Protocol, which article it then proceeds to analyse.

In the eyes of the Court, the meaning of this article is clear: though it contains no express provision designed to settle the question by whom or when a question may be referred to the President of the Mixed Arbitral Tribunal, it is possible and natural to deduce that the power to do so rests with the Mixed Commission itself when that body finds itself confronted with questions of the kind contemplated by the article. For, according to the very terms of the article, the questions contemplated are questions arising within the Mixed Commission, i.e. those arising in the course of its deliberations. This being so, it is clear—having regard amongst other things to the principle that, as a general rule, any body possessing jurisdictional powers has the right in the first place itself to determine the extent of its jurisdiction—that questions affecting the extent of the jurisdiction of the Mixed Commission must be settled by the Commission itself without action by any other body being necessary.

Article IV provides for the special reference to another authority of a certain class of questions: in the case of questions of principle of some importance and arising in certain defined circumstances, it is not for the Mixed Commission, but for another authority, the President of the Mixed Arbitral Tribunal, to decide such questions on their merits. Nevertheless, the right of reference can only belong to the Mixed Commission, for it is a matter of determining the extent of its own competence. Accordingly, it rests with the Mixed Commission alone to decide whether the conditions requisite for the reference of a question are fulfilled. Moreover, whatever the legal nature of these conditions may be, their appreciation and the decision whether they are duly fulfilled, both of which are left to the absolute discretion of the Commission, undoubtedly fall within the category of questions naturally arising in the course of the Commission's deliberations. Finally, in practice, the Commission alone is in a position to undertake this. This being so, its duty is to refer a question to the arbitrator if the requisite conditions are fulfilled, and, if not, to decide the disputed point itself. On the other hand, once the President of the Mixed Arbitral Tribunal is satisfied that a question has been referred to him by a decision of the Mixed Commission, he must decide that question without considering whether the requisite conditions are in fact fulfilled. This eliminates any danger of a negative conflict of jurisdiction.

Article IV, however, employs the word "arbitration"; but the Court attributes no special importance to the use of this term, though it regards it as a not very happy way of expressing the idea underlying

the article. For there is no question of an arbitration in the true sense of the word, as the characteristics of arbitration are certainly not present in this case. In the first place, there are no Parties to bring their dispute before the tribunal; again, the submission of a question to the arbitrator does not necessarily presuppose a difference of opinion between members of the Commission, since the reference of a question may be decided upon even if all the members of the Commission are agreed as to the solution which, in their opinion, should be given to a question of principle which has arisen.

The Greek Government however has sought to show that Article IV constitutes an arbitration clause and that for this reason only a State may invoke it. This conclusion would be correct if the premise were so; but it is not: for not only have the terms used in Article IV nothing in common with those of arbitration clauses properly so called, but also the conditions in which questions of the kind under consideration may arise are foreign to the nature of an arbitration between States. The only argument in favour of the Greek contention is the use of the word "arbitration"; but, as has been seen above, no special importance is to be attached to this term.

The spirit underlying the instruments concerning the exchange of Greek and Turkish populations has already been indicated. The article in dispute is likewise framed in the same spirit: the restriction placed by it upon the general powers of the Mixed Commission cannot constitute an impediment to the fulfilment by the latter of the important duties assigned to it, but must be construed in such a way as to accelerate and facilitate the progress made by it with its work. Speed must be regarded as an essential factor in the work of the Commission, both in the interest of the populations concerned and that of the Greek and Turkish Governments. And whilst the terms of Article IV are undoubtedly based on the idea that, the Mixed Commission being mainly an administrative body and its members not being necessarily and in the first place jurists, it is not perhaps the most suitable body for the settlement of legal questions of some importance, those terms may also have been dictated by a desire to secure a measure of consistency as between the decisions of the Mixed Commission and those of the Mixed Arbitral Tribunal which—as has been seen—are both competent to some extent in matters of liquidation.

On the basis of the foregoing considerations—which are deduced from the actual terms of Article IV of the Protocol and from the spirit of the relevant international instruments—the Court arrives at the conclusion with regard to the disputed points submitted to it, firstly, that it is for the Mixed Commission alone to decide whether the requisite conditions for reference to the arbitrator are fulfilled, and, secondly, that when these conditions are fulfilled, it also rests with the Mixed Commission alone to refer a question to the arbitrator. The Court however would arrive at the same result even leaving aside these considerations; for an individual member or a group among the Greek or Turkish members of the Commission can have no power to take action outside the Commission. It would be contrary to an accepted principle of law to allow the members of an organization constituted as a corporate body any right to take action of any kind outside the sphere of proceedings within that organization. A further observation must also be made: the treaty provisions entrust the application and carrying out of the clauses governing the exchange of Greek and Turkish populations, not to the contracting States, but to the Mixed Commission. The latter acts in the interests of the two contracting States; accordingly, it does not rest with the latter to apply and carry out the clauses governing the matter, each for its own part and in the exercise of its sovereign rights.

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*Effects of the Opinion*

The Court's Opinion was adopted by a unanimous vote of the judges. It was duly transmitted to the Council of the League of Nations which, by a Resolution dated September 8th, 1928, placed it on

record and instructed its Secretary-General to forward the Opinion on its behalf to the President of the Mixed Commission for the Exchange of Greek and Turkish Populations.

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## 32. FACTORY AT CHORZÓW (CLAIM FOR INDEMNITY) (MERITS)

### Judgment of 13 September 1928 (Series A, No. 17)

## FACTORY AT CHORZÓW (INDEMNITY)

### Order of 13 September 1928 (Series A, No. 17)

**Fifth Annual Report of the Permanent Court of International Justice (15 June 1928—15 June 1929), Series E, No. 5, pp. 183–199**

*Import of the Application—A violation of a right involves an obligation to make reparation—Reparation at international law: injury suffered by a State; injury suffered by a private person—Relevance of Article 256 of Treaty of Versailles in this case—Establishment of the fact that the Companies concerned have suffered injury—Appraisement of this injury: determination of principles and institution of an expert enquiry—Method of payment; set-off under international law*

*Outline of the case*

When the Court, by its Judgment of May 25th, 1926 (No. 7[1]), in the case between the German Government, Applicant, and the Polish Government, Respondent, had decided that the attitude of the Respondent, who had taken certain measures of dispossession against two industrial concerns—the Oberschlesische Stickstoffwerke A.-G., owner of the factory at Chorzów, and the Bayerische Stickstoffwerke A.-G., which operated this factory—had not been in conformity with the Convention concerning Upper Silesia concluded at Geneva on May 22nd, 1922, the two Parties to the dispute entered into negotiations with a view to establishing a situation corresponding both in fact and in law to the Court's conclusions. Irreconcilable differences of opinion soon arose between them, and the German Government, calling the attention of the Polish Government to the fact that throughout the negotiations it had reserved the right to have recourse to the Court failing the conclusion of an agreement, instituted fresh proceedings by means of an Application dated February 8th, 1927. The Applicant having filed a Case on May 3rd of the same year, the Polish Government, the Respondent, proceeded to raise a preliminary objection. The Court, by its Judgment (No. 8) of July 26th, 1927[2], overruled the objection and reserved the case for judgment on the merits.

[1] Judgment No. 7 of May 7th, 1926, concerning certain German interests in Polish Upper Silesia (see Second Annual Report, p. 109). This judgment had been preceded by another in which, in consequence of preliminary objections taken by the Polish Government, the Court decided the question of its jurisdiction to deal with the case (Judgment No. 6 of August 25th. 1925; see Second Annual Report, p. 100).

[2] See Fourth Annual Report, p. 155. See also, in regard to this question, the Order of November 21st, 1927, rejecting a request for the indication of measures of protection in the Chorzów case (Fourth Annual Report, p. 163) and Judgment No. 11 of December 16th, 1927, upon a request for the interpretation of Judgments Nos. 7 and 8 (Fourth Annual Report. p. 184).

Furthermore, Judgment No. 8 also instructed the President of the Court to fix the times for the filing of the Counter-Case, Reply, and Rejoinder; and the case on the merits was entered on the list for the Fourteenth Ordinary Session of the Court which began on June 15th, and ended on September 13th, 1928.

*Hearings*

In the course of public sittings held on June 21st, 22nd, 25th, 27th and 29th, 1928, the Court heard the arguments of the representatives of the Parties.

*Composition of the Court*

The Court, on this occasion, was constituted as follows:

MM. Anzilotti, *President*; Huber, *Former President*; Lord Finlay, MM. Nyholm, de Bustamante, Altamira, Oda, Pessôa, *Judges,* M. Beichmann, *Deputy-Judge*.

MM. Rabel and Ehrlich, who were appointed as judges *ad hoc* by the German and Polish Governments respectively, also sat on the Court in this case.

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*Judgment of the Court (analysis)*

The Court's judgment was given on September 13th, 1928. Before proceeding with its judgment, the Court observes that the Parties, and in particular the Applicant, have several times in the course of the written and oral proceedings amended their submissions. In this case the Court has not availed itself of its right, under Article 48 of the Statute, to lay down by order the form and time in which each Party must conclude its arguments; accordingly it allows these amendments in the present case, subject only to the condition that the other side must always have had an opportunity of commenting upon them. It follows, however, that, in order to ascertain the points at issue upon which it has to pass judgment, the Court is obliged to determine what the final submissions on both sides are.

The Court formulates as follows the final submissions of the Applicant:

"(1) That by reason of its attitude in respect of the Oberschlesische Stickstoffwerke and Bayerische Stickstoffwerke Companies, which attitude has been declared by the Court not to have been in conformity with the provisions of Article 6 and the following articles of the Geneva Convention, the Polish Government is under an obligation to make good the consequent injury sustained by the aforesaid Companies from July 3rd, 1922, until the date of the judgment sought;

(2) (*a*) that the amount of the compensation to be paid to the German Government is 58,400,000 Reichsmarks, plus 1,656,000 Reichsmarks, plus interest at 6% on this sum as from July 3rd, 1922, until the date of judgment (for the damage caused to the Oberschlesische Stickstoffwerke A.-G.);

(*b*) that the amount of the compensation to be paid to the German Government is 20,179,000 Reichsmarks for the damage caused to the Bayerische Stickstoffwerke A.-G.;

(3) that until June 30th, 1931, no nitrated lime and no nitrate of ammonia should be exported to Germany, to the United States of America, to France or to Italy;

in the alternative, that the Polish Government should be obliged to cease from exploiting the factory or the chemical equipment for the production of nitrate of ammonia, etc.;

(4) (*a*) that the Polish Government should pay, within one month from the date of judgment, the compensation due to the Oberschlesische Stickstoffwerke A.-G. for the taking possession of the work-

ing capital and the compensation due to the Bayerische Stickstoffwerke A.-G. for the period of exploitation from July 3rd, 1922, to the date of judgment;

(*b*) that the Polish Government should pay the remaining sums at latest within fifteen days after the beginning of the financial year following the judgment; in the alternative, that, in so far as payment may be effected by instalments, the Polish Government should within one month from the date of judgment, give bills of exchange for the amounts of the instalments, including interest, payable on maturity to the Oberschlesische Stickstoffwerke A.-G. and to the Bayerische Stickstoffwerke A.-G.;

(*c*) that from the date of judgment, interest at 6% per annum should be paid by the Polish Government;

(*d*) that the Polish Government is not entitled to set off against the above-mentioned claim for indemnity of the German Government, its claim in respect of social insurances in Upper Silesia; that it may not make use of any other set-off against the said claim for indemnity; and that the payments mentioned under (*a*) to (*c*) should be made without any deduction to the account of the two Companies with the Deutsche Bank at Berlin;

in the alternative, that set-off is only permissible if the Polish Government puts forward for this purpose a claim in respect of a debt recognized by the German Government or established by a judgment given between the two Governments.**"**

As regards the Respondent, the Court holds that his final submissions may be set down as under:

"A. As regards the Oberschlesische:

(1) that the claim of the applicant Government should be dismissed;

(2) in the alternative, that the claim for indemnity should be provisionally suspended;

(3) as a further alternative, in the event of the Court awarding some compensation, that such compensation should only be payable after the previous withdrawal by the said Company of the action brought by it and pending before the German-Polish Mixed Arbitral Tribunal in regard to the Chorzów factory, and after the formal abandonment by it of any claim against the Polish Government in respect of the latter's taking possession and exploitation of the Chorzów factory.

(4) In any case, it is submitted that the German Government should, in the first place, hand over to the Polish Government the whole of the shares of the Oberschlesische Stickstoffwerke Company, of the nominal value of 110,000,000 Marks, which are in its hands under the contract of December 24th, 1919.

B. As regards the Bayerische:

(1) (*a*) that the applicant Government's claim for compensation in respect of the past, in excess of 1,000,000 Reichsmarks, should be dismissed;

(*b*) that, *pro futuro*, an annual rent of 250,000 Reichsmarks, payable as from January 1st, 1928, until March 31st, 1941, should be awarded;

(*c*) that these indemnities should only be payable after previous withdrawal by the said Company of the claim pending before the German-Polish Mixed Arbitral Tribunal in respect of the Chorzów factory and after the formal abandonment by it of any claim against the Polish Government in respect of the latter's taking possession and exploitation of the Chorzów factory;

(2) that the applicant Government's third submission to the effect that until June 30th, 1931, no exportation of nitrate of lime or nitrate of ammonia should take place to Germany, the United States of America, France or Italy, should be dismissed.C. As regards the Oberschlesische and Bayerische jointly:

that submission No. 4—to the effect that it is not permissible for the Polish Government to set off against the above-mentioned claim for indemnity of the German Government its claim in respect of social insurances in Upper Silesia, that it may not make use of any other set-off against the above-mentioned claim for indemnity, and that the payments mentioned under 4 (*a*)—(*c*) should be made without any deduction to the account of the two companies with the Deutsche Bank at Berlin—should be rejected."

Such therefore are the opposing submissions. Other claims have indeed been put forward; but in so far as they do not constitute developments of the original submissions or alternatives to them, the Court will regard them as mere suggestions as to the procedure to be adopted and will not pass upon them. It will confine itself to taking them into account, when considering the arguments of the Parties for the purposes of the judgment which it has to give.

The Court then briefly outlines the facts of the case. These facts had already been set out in the previous judgments given in regard to the same case; but it is necessary to do so again, because the standpoint which the Court must now adopt is a different one: it must consider the nature—and, if necessary, the amount and method of payment—of the reparation which may be due by Poland. In the next place the Court analyses the application in order to determine its nature and scope: in the light of the results of this investigation, it will consider the submissions of the Parties.

As regards the nature and scope of the Application, the Parties are at variance in regard to the following point: In the view of the Respondent, the German Government had in the first place, acting as representative of the two injured Companies, defined the subject of the dispute as the obligation directly to compensate the two Companies; it had altered the subject of the dispute when, finally, acting on its own behalf, it claimed compensation for the injury which it had itself sustained by the violation of the Geneva Convention committed in respect of its nationals. The Applicant contended that there had been no change of attitude, for it held that a Government could content itself with reparation in any form which it considered proper, and that reparation need not necessarily consist in the compensation of the individuals concerned. The Court holds that even if the Application and certain of the subsequent submissions of the Applicant can be construed as contemplating compensation due directly to the two Companies for the injury suffered by them and not reparation due to Germany for a breach of the Geneva Convention, it follows from the conditions in which the Court has been seized of the suit and from the considerations which led the Court to reserve it for decision on the merits, that the object of the Application can only be to obtain reparation due for a wrong suffered by Germany in her capacity as a contracting Party to the Geneva Convention. This reparation may consist in an indemnity corresponding to the damage which the nationals of the injured State have suffered as a result of the act which is contrary to international law. But when it takes this form—which is moreover the most usual—that is to say when the damage sustained by a private person is taken as the measure, the reparation does not therefore change its character: the rules of international law apply and not the law governing relations between the State at fault and the individual injured. Accordingly, the Applicant, in asking for payment of the indemnity to the accounts of the two Companies with the Deutsche Bank, simply had in view the *locus solutionis* and consequently had no intention, in so doing, of disturbing the purely inter-State character of the suit.

The nature and scope of the Application having been thus elucidated, several questions arise: Does an obligation to make reparation exist? Have the two Companies suffered damage? As regards the first point, it is a principle of international law, or even of law in general, that any breach of an engagement involves such an obligation; and in this case, as the Court has decided, there has been a violation of an engagement and the wrongful act is established. As regards the second point concerning the existence of the damage alleged by the Applicant, the Respondent denies it as concerns the Oberschlesische, and

admits it as concerns the Bayerische, whilst however disputing its extent. The Court must therefore, in the first place, pass upon the former issue.

As regards the Oberschlesische, the Polish Government maintains that that Company did not suffer damage as a result of dispossession, because its right of ownership was never valid, or because in any case it ceased to be so in virtue of a judgment subsequently given by the competent Polish civil court, which declared the entry in the land register of the transfer of ownership to be null and void. For the Court to accept the first of these arguments as well-founded would, however, be incompatible with its Judgment No. 7, in which it based its decision that the Oberschlesische had been unlawfully dispossessed and consequently that a breach of the Geneva Convention had taken place on that Company's rights of ownership in the factory, which rights it declared were not fraudulently acquired. As regards the municipal judgment cited—which moreover was entered by default and (according to the text submitted to the Court) contained no statement of reasons—whatever its effect may be at municipal law, it can neither render inexistent the violation of the Geneva Convention nor destroy one of the grounds on which Judgment No. 7 is based.

Furthermore, the Court rejected the argument that, since the Reich had certain rights, which the Polish Government described as rights of ownership, over most of the shares of the Oberschlesische, this Company was in fact identical with the German Government, and that consequently it has suffered no damage since under Article 256 of the Treaty of Versailles such rights would pass automatically to the Polish Government. The grounds upon which the Court refuses to allow this argument are firstly, that the German Government was in law not the owner of the shares, and secondly, that it cannot be said that in fact the Oberschlesische was controlled by the German Reich within the meaning of Article 6 of the Geneva Convention and would thus come under Article 256, since Judgment No. 7 was based on the undisputed ground that the Oberschlesische was controlled by German nationals as opposed to the German Reich, and, moreover, in any case the Oberschlesische might sooner be said to have been controlled by the Bayerische than by the Reich.

Neither can the alternative Polish submission, to the effect that the value of the rights possessed by the Reich over the shares in question should be deducted from the indemnity, as coming within the scope of Article 256 or of paragraph 10 of the Annex to Articles 297 and 298 of the Treaty of Versailles, be allowed. The shares must, the Court holds, be regarded as localized at the registered office of the Company at Berlin and consequently cannot be said to have been "situated" in ceded German territory according to the terms of Article 256, nor can the Company be said to have been "incorporated" within the meaning of paragraph 10 of the Annex in question.

The Court also disallows an alternative claim made by Poland to the effect that the Court's judgment be provisionally suspended. In making this claim the Polish Government relies, firstly, on the Armistice Convention of Spa and, secondly, on Article 248 of the Treaty of Versailles which reserves to the Reparation Commission a right of control over the property and resources of the Reich. But Poland is not amongst the signatories of the first of these instruments and consequently cannot base a claim upon it, whilst the second would only become applicable in this case after payment by Poland of an indemnity, failing which the rights of the German Government in the enterprise would probably lose all value.

The objections raised by the Respondent with regard to the existence of any damage which would justify compensation to the Oberschlesische having been set aside, and that Party having recognized the existence of damage to be made good in respect of the Bayerische, the Court next proceeds to determine the amount of the compensation due. In regard to this, the Court lays down that in accordance with international practice, it is only the value of the property, rights and interests affected and the owner of which is the person on whose behalf compensation is claimed, or the person who has suffered the damage which serves as a means of gauging the reparation claimed, that must be taken

into account. This compensation being for a seizure of property, rights and interests which could not be expropriated, need not necessarily be limited to the value of the undertaking. In principle, restitution must be in kind, or if that is not possible, a sum must be paid corresponding to the value of the thing which cannot be restored: for the reparation must as far as possible wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. The economic unity of the Chorzów undertaking makes necessary the fixing of a lump sum for the damage to be made good to the two Companies, whilst not excluding such damages as the Bayerische may have sustained through the dispossession but outside the undertaking itself.

As regards the actual estimation of the value of the undertaking, neither the cost of construction of the factory nor the price in the contract of December 24th, 1919, nor the price offered for the factory in 1922 could be taken as criteria, nor could the sum agreed upon between the Parties, in the course of the negotiations which followed Judgment No. 7, serve as an indication.

In these circumstances and in order to obtain further enlightenment, the Court decides to arrange an expert enquiry in regard to two questions, the first having for its purpose the determination of the monetary value, both of the object which should have been restored in kind and of the additional damage, on the basis of the estimated value of the undertaking, including stocks, at the moment of taking possession by the Polish Government, together with any probable profit that would have accrued to the undertaking between the date of taking possession and that of the expert enquiry; the second being directed to the ascertainment of the present value on the basis of the situation at the moment of the expert enquiry and leaving aside the situation presumed to exist in 1922. The Court further lays down that the Chorzów factory to be valued by the experts includes also the chemical factory (for the conversion, amongst other things, of nitrated lime into nitrate of ammonia, etc.).

As regards the possibility referred to above of the Bayerische having suffered damage outside the undertaking itself, the Court observes that no such damage from competition or through the narrowing of the field in which the Bayerische could carry out its experiments, etc., had been sufficiently proved in the course of the case.

The prohibition of the exportation of nitrated lime and nitrate of ammonia asked for by the German Government is refused by the Court, since the questions put to the experts cover indirectly the value which such a clause limiting the exploitation of the factory might present to the Bayerische. Furthermore, as the value of the undertaking to be ascertained by the experts' enquiry covers its future prospects, the German Government's claim that the Court should prohibit the further exploitation of the factory is likewise rejected.

The Court then goes on to reserve the question of the method of payment of the compensation to be awarded until the replies of the experts are received.

As regards the German Government's submission that the Polish Government should be prohibited from setting off against the damages arising from this claim debts due or owing to the Polish Government from the German Government on other claims, the Court abstains from passing upon it, since no specific plea of set-off depriving the claimant of the effectiveness of his remedy has been raised by the Respondent, and the Court cannot generally prohibit set-off, as the Court's jurisdiction to award monetary compensation cannot reasonably be made to extend to any question whatever of international law, even if foreign to the particular convention under consideration, simply because the manner in which such question is decided might have an influence on the effectiveness of the reparation asked for. The fact that a specific plea to set-off was put forward by the Polish Government in the negotiations following upon Judgment No. 7 makes no difference, since the Court cannot take cognizance of declarations, admissions or proposals made by the Parties in the course of direct negotiations between

them, nor is there anything to justify the Court in thinking that the Polish Government would wish to put forward, against a judgment, claims which it may have thought fit to raise during negotiations.

The operative part of the judgment is as follows:

"The Court,

(1) gives judgment to the effect that, by reason of the attitude adopted by the Polish Government in respect of the Oberschlesische Stickstoffwerke and Bayerische Stickstoffwerke Companies, which attitude has been declared by the Court not to have been in conformity with the provisions of Article 6 and the following articles of the Geneva Convention, the Polish Government is under an obligation to pay, as reparation to the German Government, a compensation corresponding to the damage sustained by the said Companies as a result of the aforesaid attitude;

(2) dismisses the pleas of the Polish Government with a view to the exclusion from the compensation to be paid of an amount corresponding to all or a part of the damage sustained by the Oberschlesische Stickstoffwerke, which pleas are based either on the judgment given by the Tribunal of Katowice on November 12th, 1927, or on Article 256 of the Treaty of Versailles;

(3) dismisses the submission formulated by the Polish Government to the effect that the German Government should in the first place hand over to the Polish Government the whole of the shares of the Oberschlesische Stickstoffwerke Company, of the nominal value of 110,000,000 marks, which are in the hands of the German Government under the contract of December 24th, 1919;

(4) dismisses the alternative submission formulated by the Polish Government to the effect that the claim for indemnity, in so far as the Oberschlesische Stickstoffwerke Company is concerned, should be provisionally suspended;

(5) dismisses the submission of the German Government asking for judgment to the effect that, until June 30th, 1921, no nitrated lime and no nitrate of ammonia should be exported to Germany, to the United States of America, to France or to Italy; or, in the alternative, that the Polish Government should be obliged to cease working the factory or the chemical equipment for the production of nitrate of ammonia, etc.;

(6) gives judgment to the effect that no decision is called for on the submissions of the German Government asking for judgment to the effect that the Polish Government is not entitled to set off, against the above-mentioned claim for indemnity of the German Government, its claim in respect of social insurances in Upper Silesia; that it may not make use of any other set-off against the said claim for indemnity, and, in the alternative, that set-off is only permissible if the Polish Government puts forward for this purpose a claim in respect of a debt recognized by the German Government or established by a judgment given between the two Governments;

(7) gives judgment to the effect that the compensation to be paid by the Polish Government to the German Government shall be fixed as a lump sum;

(8) reserves the fixing of the amount of this compensation for a future judgment, to be given after receiving the report of experts to be appointed by the Court for the purpose of enlightening it on the questions set out in the present judgment and after hearing the Parties on the subject of this report;

(9) also reserves for this future judgment the conditions and methods for the payment of the compensation in so far as concerns points not decided by the present judgment."

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*Dissenting opinions*

The Court's judgment was adopted by nine votes to three. MM. de Bustamante and Altamira, judges, declared that they were unable to concur, the former as regards No. 8 of the operative part reproduced above, in that he held that certain questions which it was proposed to put to the experts should not be put to them, and the latter as regards No. 6 of the operative part.

Lord Finlay, judge, and M. Ehrlich, judge *ad hoc*, being unable to concur in the judgment, delivered separate opinions which were attached thereto. M. Nyholm, judge, desired to append to the judgment certain observations, as also did M. Rabel, judge *ad hoc*.

*Observations by M. Rabel*

M. Rabel starts by briefly explaining his point of view in accepting the solution adopted by the Court concerning the fixing of the indemnity due by the Respondent. In his opinion, the principles resulting from the unlawful nature of the expropriation are applicable in practice whenever the damage caused appears greater than the compensation which would be due if expropriation had been lawful. It is in fact obvious that the expropriator's responsibility must be increased by the fact that his action is unlawful and, moreover, that the unlawful character of his action can never place the expropriator in a more favourable position, nor the expropriated Party in a more unfavourable position, either by reducing the indemnity due or by increasing the burden of proof resting upon the Applicant. This point of view appears to him to be in accordance with the general principles of law.

M. Rabel, however, cannot concur in the Court's decision in regard to the so-called question of set-off. He observes that the Court considers that it has not jurisdiction to pass upon this difference of opinion under Article 23 of the Geneva Convention. In his view, however, if, in an international case, the Parties are at issue as to the action to be taken by the defendant in complying with the judgment, it appears that the nature of this action must be defined in the judgment in order to avoid any possible uncertainty.

*Dissenting opinion by Lord Finlay*

Lord Finlay states that question II ought not to have been put to the experts and is further unable to agree with what is said in the judgment as to the principles governing the assessment of the indemnity.

He observes that, in its Memoire, the German Government renounced its claim to restitution of the undertaking. The Party who has been dispossessed has a choice of remedies and may abandon any claim to restitution of the actual property and claim damages instead. He notes that a Party who has given up his right to *restitutio in integrum* is not entitled to claim damages on the footing that it is right that he should have the enhanced value, if any, that he would have got if he had pressed his claim for restitution. The German Government has given up restitution and elected to take damages and these damages must be assessed according to the general rule as at the time of the wrong.

In the opinion of Lord Finlay, according to the general principle of international law, these damages should be assessed upon the basis of the value of the undertaking at the time of the seizure, that is the 3rd July, 1922, together with a fair rate of interest on that value from that date until the date of payment; and in addition any other damage directly consequent upon the seizure. He adds that it is immaterial whether the result of this selection is to put Germany and the German Companies in a better or worse position than that in which they would otherwise have been.

Lord Finlay points out that it is argued that it would not be equitable that the liability of a mere wrongdoer should be no greater than that of one who had expropriated the property in accordance with the terms of the Geneva Convention. He notes that no special provision is made in the Convention as

to what is to happen if the Government takes property in contravention of these provisions: that is left to the general law. He observes that it is now however argued that it is not equitable that the general law should apply in such a case, and an effort is made to modify it so as to prevent the Government which has so acted being financially in no worse a position than one which has acted under the provisions of the Geneva Convention. Lord Finlay finds this entirely beyond the province of the Court in effect to introduce provisions of this nature, in the absence of agreement in treaty or convention to that effect.

Lord Finlay lays out that if the relevant time for determining the value of the undertaking is the time of the seizure, it is not necessary to refer to the experts any question directed to the value at the present time. He thinks therefore that question II is unnecessary. In addition, Lord Finlay considers the question unsatisfactory in itself. It is directed to two values under hypothetical conditions.

*Dissenting opinion by M. Ehrlich*

M. Ehrlich first states that, in his opinion, the Court should have taken into consideration the judgment given by the Civil Court of Katowice. The Parties agreed, and moreover it follows from the principles generally accepted by arbitral tribunals, that in cases like the present the basis of the award must be found, not in the enrichment of the Respondent, but in the loss suffered by the individuals concerned. The question to be decided is: what was the loss actually sustained by the Oberschelesische? M. Ehrlich notes that there is nothing in Judgment No. 7 to prevent a subsequent decision by the competent tribunals, as to the existence and extent of property rights at municipal law, nor is there anything to prevent such a decision being taken into account by the Court.

M. Ehrlich then declares that the objections of the Respondent based on the view that the rights of the Reich both in the Chorzów enterprise and in the shares (of the Oberschlesische) have passed to Poland under Article 256 of the Treaty of Versailles, should have been upheld. He holds that the Reich is the owner of the shares of the Oberschlesische. Even if it be sought to deny that the Reich was owner of the shares of the Oberschlesische, according to M. Ehrlich, it is impossible to deny that it had a complete and perpetual right of antichresis in virtue of which it was the owner in so far as all third parties were concerned. He finds that the only restriction upon it, namely the obligation to maintain the management in certain hands for a limited time, cannot be looked upon as a real obligation, but as a purely personal obligation, which cannot affect the position of the Reich as the actual shareholder. M. Ehrlich asserts that the question of the alleged control of the Reich over the Oberschlesische has been left open by Judgment No. 7. Even admitting for the sake of argument that the Reich was not the owner of the Oberschlesische's shares, it would still be true that that Company was exclusively controlled by the Reich. It follows that the whole of the property of that Company in Polish Upper Silesia falls under the provisions of Article 256 of the Treaty of Versailles; in any case, the rights of the Reich should be regarded as situated in Polish Upper Silesia.

M. Ehrlich then lays out that, assuming that the Oberschlesische was legally owner of the factory at Chorzów and that it was neither identical with the Reich as treasury nor controlled by it, it must also be held that the Oberschlesische has suffered no material damage. He states that the indemnity can only include the amount corresponding to the damage actually sustained by the persons whose losses should, according to the claim of the German Government, serve as a basis for the assessment of compensation in the present case. The Court has only to estimate the loss suffered by the Oberschlesische and Bayerische, in accordance with the principle *non ultra petita*. The loss caused to any given person can only be *quantum ejus interest*. M. Ehrlich concludes that if the interests of the Reich be excluded, no material injury could have been suffered by the Oberschlesische; for the Reich had, to the exclusion of anyone else, all rights of ownership in the factory.

M. Ehrlich finally observes that any assessment of the damage resulting from the taking over of the enterprise must be based on the extent of the damage suffered at the time of dispossession. If there were delay in payment, the damage may be increased by the amount of the loss resulting from such delay.

*Observations by M. Nyholm*

M. Nyholm asks whether it is possible to obtain a result by having recourse to expert opinion for the purpose of estimating the compensation due in respect of the Chorzów factory. As it is a question of estimating what financial results the factory would have produced between 1922 and 1928, if it had remained in German hands, the experts will find themselves in a sphere in which they will have difficulty in replying otherwise than by hypothetical answers. In his view, the answer can hardly take the form of the indication of a precise sum which would enable the affair to be immediately settled. In turn, he considers therefore whether it is worth while to delay the settlement of the case and to incur the difficulties connected with an expert report. He asserts that the numerous data afforded by the documents in the case would appear to make an immediate decision possible.

M. Nyholm holds that the Court need not again concern itself with the Respondent's arguments that it should not pay the indemnity because it is not the two Companies which are entitled to receive it, but the Reich, or that, based on Article 256 of the Treaty of Versailles, the Reich should be regarded as owner. Both are points which have already been decided.

M. Nyholm then turns to a question of more general legal interest that arises as regards the situation of Germany in the proceedings; that Germany alone, to the exclusion of the two Companies, can sue, is undeniable, since this is a suit within the jurisdiction of the Permanent Court, which is open only to States. However, as regards the claim for indemnity, he states that, since the damage has been sustained by others, it is not in the capacity of *owner* that Germany can claim an indemnity.

M. Nyholm notes that international precedent has laid down that the State may put forward before an international court the claims of its subjects, may "take up" their case, with the result that such claims must then be decided according to international law. It results that the claims must indeed be granted to the German Government in name, but only as mandatory for the Companies. He adds that the Court cannot therefore award the money to Germany without further comment and without considering the question whether the German State can in law make free disposition of the amount of the indemnity as owner, and without the legal obligation to pay it to the parties dispossessed.

In this perspective, M. Nyholm considers that the amalgamation of the claims of the Oberschlesische and Bayerische, officially declared by the judgment, seems therefore to have no support in law. And further, in fact, it meets with great difficulties.

As regards the question of set-off, M. Nyholm states that the Court, which has jurisdiction as regards the sums in dispute, will also have the right to hear and determine the objections. To those which relate to the extinction of the credit claimed may be added the declaration of a set-off which cancels out the credit. He concludes that in international law no principle can be raised which would establish on this subject a difference between national and international law.

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## Order
### instituting an expert enquiry in the case concerning the factory at Chorzów (Indemnities—Merits)

*Institution of an expert enquiry—Points to be covered by it—Composition of the committee of experts; its procedure—Allocation of expenses*

On September 13th, 1928, after the delivery of Judgment No. 13 in the case of the claim for indemnity in respect of the factory at Chorzów (merits), the Court made an Order instituting an expert enquiry in this case, its object being to enable the Court to fix with a full knowledge of the facts, in conformity with the principles laid down in Judgment No. 13, the amount of the indemnity to be paid by the Polish Government to the German Government under the terms of that judgment.

*Composition of the Court*

On this occasion, the following judges composed the Court:

MM. Anzilotti, *President*; Huber, *Former President*; Lord Finlay, MM. Loder, Nyholm, de Bustamante, Altamira, Oda, Pessôa, *Judges,* M. Beichmann, *Deputy-Judge*.

MM. Rabel and Ehrlich, appointed as judges *ad hoc* by the German and Polish Governments respectively, also sat on the Court in this case.

*Order of Court (analysis)*

In its Order, the Court sets out the object of the enquiry; it indicates the points to be covered by it, which are as follows:

"I. A.—What was the value, on July 3rd, 1922, expressed in Reichsmarks current at the present time, of the undertaking for the manufacture of nitrate products of which the factory was situated at Chorzów in Polish Upper Silesia, in the state in which that undertaking (including the lands, buildings, equipment, stocks and processes at its disposal, supply and delivery contracts, goodwill and future prospects) was, on the date indicated, in the hands of the Bayerische and Oberschlesische Stickstoffwerke?

B.—What would have been the financial results, expressed in Reichsmarks current at the present time (profits or losses), which would probably have been given by the undertaking thus constituted from July 3rd, 1922, to the date of the present judgment, if it had been in the hands of the said Companies?

II.—What would be the value at the date of the present judgment, expressed in Reichsmarks current at the present time, of the same undertaking (Chorzów) if that undertaking (including lands, buildings, equipment, stocks, available processes, supply and delivery contracts, goodwill and future prospects) had remained in the hands of the Bayerische and Oberschlesische Stickstoffwerke, and had either remained substantially as it was in 1922, or been developed proportionately on lines similar to those applied in the case of other undertakings of the same kind, controlled by the Bayerische, for instance, the undertaking of which the factory is situated at Piesteritz?"

The enquiry is entrusted to a committee composed as follows: The President of the Court shall appoint by order three experts. Each of the Parties shall have the right to appoint, within fifteen days from the date of that order, an assessor who will take part in the work of the committee in an advisory capacity. The experts appointed by the President of the Court shall elect the chairman of the committee from amongst themselves.

On accepting their task, the experts and assessors are to make a solemn declaration. The Registrar is to be responsible for the secretarial arrangements of the committee and for liaison between it and the Court. For this purpose he shall in particular detach, for duty with the committee of experts, one of the higher officials of the Registry. This official shall act as intermediary for all communications between the Court and its services on the one hand and the committee of experts on the other.

The committee of experts is to receive the full record of the previous proceedings in the case. The committee is to be entitled to ask for the production of any document and any explanations which it may consider useful for the fulfilment of its task; in this respect, its decisions shall be taken by a majority. Such requests shall be addressed to the Registrar of the Court, who will comply with them within the limits fixed by Article 24 of the Rules or, if necessary, submit them to the President of the Court for the purposes of Article 49 of the Statute.

The committee of experts shall likewise be entitled to ask for any other facilities which it may consider useful for the fulfillment of its task; in particular it may ask for authorization to inspect the premises; in that case, the procedure laid down for the production of documents shall be applied.

A first meeting of the committee of experts shall be convened by the President of the Court. The committee shall file its report, in two original copies, with the Registrar of the Court, within a period, commencing from this first meeting, to be fixed by the President after hearing the views of the experts. The report, to which shall be attached all documents referred to therein, shall contain the reasoned opinion, in regard to each question put, of each member of the committee. It shall be communicated, with the attached documents, by the Registrar to the members of the Court and to the Agents of the Parties. The Court, or if it is not sitting, the President, shall fix a date for a public sitting of the Court, which the experts will be summoned to attend and the object of which will be to enable the Agents of the Parties to discuss the report and to enable the Court and the said Agents to ask the experts for explanations.

The fees of the experts appointed by the President of the Court, the amount of which shall be fixed by the President after hearing the views of the experts, shall be paid to the latter by the Registrar at the conclusion of the enquiry. The fees shall include subsistence and entertainment expenses of the experts but not travelling expenses, etc. Such expenses shall be refunded to those concerned by the Registrar upon the production of accounts submitted at the conclusion of the enquiry, subject to the deduction of any advances made on account of such expenses.

Each Party shall pay the expenses and fees of the assessor appointed by it. All other fees, costs and expenses, including secretariat and establishment expenses, as also expenses for the services of technical staff which the committee may secure with the consent of the President of the Court, shall be advanced by the Court and refunded by the Parties in the proportion to be fixed by the Court in accordance with Article 64 of the Statute.

The Parties are invited to pay to the Registrar of the Court, within fifteen days from the date of this Order, the sum of 25,000 florins each on account towards the expenses of the expert enquiry.

The Court reserves to itself or, if it is not sitting, to the President, power to construe and, if necessary, to supplement the foregoing provisions.

In the event of a request for an extension of the times laid down in the foregoing provisions, Article 33 of the Rules of Court shall apply

## 33. DENUNCIATION OF THE TREATY OF 2 NOVEMBER 1865 BETWEEN CHINA AND BELGIUM

### Order of 25 May 1929 (Series A, No. 18)

## FACTORY AT CHORZÓW (INDEMNITIES)

### Order of 25 May 1929 (Series A, No. 19)

**Fifth Annual Report of the Permanent Court of International Justice (15 June 1928—15 June 1929), Series E, No. 5, pp. 203–204**

ORDER

TERMINATION OF PROCEEDINGS IN THE CASE BETWEEN BELGIUM AND CHINA

*Abandonment of proceedings—Force of a unilateral declaration of intention by Applicant to abandon proceedings when Respondent has taken no proceeding in the case—Termination of proceedings*

The circumstances which led to the filing by the Belgian Government on November 25th, 1926, with the Registry of the Court, of an Application instituting proceedings against the Chinese Government in regard to the denunciation by China of the Sino-Belgian Treaty of November and, 1865, have been described in the Third Annual Report.

In addition to the Order of January 8th, 1927, indicating provisional measures of protection and the Order of February 15th of the same year revoking the first—both of which Orders were made at the request of the Belgian Government, Applicant—the Sino-Belgian case gave rise to several extensions of the times for the filing of the documents of the written proceedings (other than the Applicant's Case which was filed on January 5th, 1927, within the time fixed). Ultimately, the Court, by means of an Order dated August 13th, 1928, decided finally to fix the times as follows:

For the Counter-Case, by the Respondent,

February 15th, 1929;

For the Reply, by the Applicant,

April 1st, 1929;

For the Rejoinder, by the Respondent,

May 15th, 1929.

The Agent for the Belgian Government in this case, however, by a letter dated February 13th, 1929, and filed with the Registry on February 13th, requested the Registrar to inform the Court that the dispute between Belgium and China was virtually settled by the conclusion of a preliminary treaty signed at Nanking on November 22nd, 1928, the ratification of which would shortly take place, and that, accordingly, the Belgian Government withdrew the action brought by it and asked that it should be removed from the Court's list. In a subsequent letter of March 4th, 1929, the Belgian Government's Agent added that the preliminary treaty had been ratified.

The Registrar replied to the Belgian Government's Agent that the President of the Court had decided to leave it to the Court itself officially to record the fact that Belgium intended to break off the proceedings instituted by her. The Registrar also duly communicated the letters of the Belgian Agent

to the Chinese Government, through the Chinese Legation at The Hague, which confined itself to an acknowledgment of receipt.

The question was placed on the list for the Sixteenth (Extraordinary) Session (May 13th—July 12th, 1929), and the Court dealt with it by means of an Order made on May 25th, 1929. The following judges composed the Court:

MM. Anzilotti, *President*; Huber, *Vice-President*; Loder, Nyholm, de Bustamante, Altamira, Oda, Pessôa, Hughes, *Judges,* Beichmann, Negulesco, *Deputy-Judges*.

The Order states that as the Chinese Government, Respondent, has never taken any proceeding in the suit, there is nothing to prevent the unilateral withdrawal of the suit by the Applicant; and that, in these circumstances, the request made for the removal of the case from the list should be complied with. Accordingly, the Court records the fact that Belgium intends to break off proceedings, declares that the proceedings begun in regard to the said suit are thus terminated and instructs the Registrar to remove the case from the list.

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## Order
## Termination of proceedings in the case concerning the factory at Chorzów (Indemnities—Merits)

**Fifth Annual Report of the Permanent Court of International Justice (15 June 1928—15 June 1929), Series E, No. 5, pp. 200–202**

*Agreement between the Parties regarding the settlement of the dispute—Notification of agreement to Court—Termination of proceedings*

By the Order made on September 13th, 1928, instituting an expert enquiry in the case concerning the factory at Chorzów (indemnities—merits), the President of the Court was instructed to appoint experts. The President made an Order for this purpose on October 16th, 1928. The experts, assisted by assessors and a liaison officer, held five meetings at The Hague, from November 10th to 12th, 1928; they decided amongst other things to make an inspection of the premises (visits to the factories at Chorzów, Piesteritz and Trostberg). And on November 14th, 1928, the President made a further Order fixing February 28th, 1929, as the date for the presentation of the experts' report.

On December 6th, 1928, however, the Agent for the German Government, referring to Article 61 of the Rules of Court, informed the Registrar of the Court that "in the case concerning the factory at Chorzów, the Parties had concluded an agreement regarding the settlement of the dispute". The German Agent's letter was accompanied by two documents: the German translation of an agreement reached between the Polish Government, on the one hand, and the Bayerische Stickstoffwerke A.-G. and the Oberschlesische Stickstoffwerke A.-G., on the other, and a copy of two letters exchanged on November 27th, 1928, by the German and Polish Governments, the purport of which letters was that the German Government noted the agreement above mentioned and declared that in regard to the Chorzów case, no further difference of opinion existed between the German Reich and Poland and that the suit pending before the Court would be withdrawn as having no further purpose.

On December 13th, 1928, the Agent for the Polish Government sent to the Registrar a communication in the same terms and referring to the documents filed by the German Agent.

The Registrar acknowledged the communications received from the Parties' Agents and at the same time informed the latter that the President of the Court preferred to leave it to the Court, when it met, officially to record the agreement concluded between the Parties and thus formally to terminate the proceedings instituted before the Court by the German Government on February 8th, 1927. On December 15th, 1928, however, the President made an Order terminating the expert enquiry. It was stated in this Order that the agreement concluded must be considered as settling the whole of the dispute submitted to the Court and that, as written notice of the agreement between the Parties had been given to the Court before the close of the proceedings, it merely remained for the Court, under Article 61 of the Rules, officially to record the conclusion of the agreement.

The question was placed on the list for the Sixteenth (Extraordinary) Session (May 13th—July 12th,1929), and the Court dealt with it by means of an Order made on May 25th, 1929.

The following judges composed the Court:

MM. Anzilotti, *President;* Huber, *Vice-President*; Loder, Nyholm, de Bustamante, Altamira, Oda, Pessôa, Hughes, *Judges,* Beichmann, Negulesco, *Deputy-Judges*.

The Order—considering that the notes exchanged on November 27th, 1928, between the Polish Minister for Foreign Affairs and the German Minister at Warsaw constitute in this case the "agreement regarding the settlement of the dispute", written notice of which to the Court is, under Article 61, paragraph 1, of the Rules, one of the conditions governing the application of that provision—places on record the agreement regarding the settlement of the dispute concluded on November 27th, 1928, between the Government of the German Reich and the Government of the Polish Republic, Applicant and Respondent respectively, in the case concerning the Factory at Chorzów (indemnities), and declares that the proceedings in regard to the said suit are terminated.

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## 34. PAYMENT OF VARIOUS SERBIAN LOANS ISSUED IN FRANCE

### Judgment of 12 July 1929 (Series A, No. 20)

## PAYMENT IN GOLD OF THE BRAZILIAN FEDERAL LOANS CONTRACTED IN FRANCE

### Judgment of 12 July 1929 (Series A, No. 21)

**Fifth Annual Report of the Permanent Court of International Justice (15 June 1928—15 June 1929), Series E, No. 5, pp. 205–215**

JUDGMENT NO. 14

*The Court's jurisdiction: admissibility of the suit; capacity of the Parties; subject-matter of the dispute: the competence of the Court to decide questions other than those of international law (matters of fact, application of municipal law)—Interpretation of the contracts: the weight to be attached to the preliminary documents and to the manner in which the contract has been executed in determining the intention of the Parties; the principle of estoppel—Existence of the gold clause: its significance and whether it is effective—The law applicable to the substance of the debt, and to the methods of payment; French legislation and the jurisprudence of French courts: the scope of these*

*Outline of the case*

On April 19th, 1928, the Governments of the French Republic and of the Kingdom of the Serbs, Croats and Slovenes concluded a Special Agreement with a view to the submission to the Court of the following questions:

"(*a*) Whether, as held by the Government of the Kingdom of the Serbs, Croats and Slovenes, the latter is entitled to effect in paper francs the service of its 4% 1895, 5% 1902, 4½% 1906, 4½% 1909 and 5% 1913 loans, as it has hitherto done;

(*b*) or whether, on the contrary, the Government of the Kingdom of the Serbs, Croats and Slovenes, as held by the French bondholders, is under an obligation to pay in gold or in foreign currencies and at the places indicated hereinafter, the amount of bonds drawn for redemption but not refunded and of those subsequently drawn, as also of coupons due for payment but not paid and of those subsequently falling due for payment of the Serbian loans enumerated above, and in particular:

1. With regard to the Serbian 4% loan of 1895, whether holders of bonds of this loan are entitled, whatever their nationality may be, to obtain, at their free choice, payment of the nominal amount of their coupons due for payment but not paid and of those subsequently falling due for payment, as also of their bonds drawn for redemption but not refunded and of those subsequently drawn, at Paris, London, Berlin, Vienna, Geneva and Belgrade, in the currency in circulation at one of these places;

2. With regard to the 5% 1902, 4½% 1906, 4½% 1909 and 5% 1913 loans and, subsidiarily with regard to the above-mentioned 4% loan of 1895, whether holders of these bonds are entitled to obtain payment of the nominal amount of their coupons due for payment but not paid and of those subsequently falling due, as also of their bonds drawn for redemption but not refunded and of those subsequently drawn, in gold francs at Belgrade, Paris, Brussels and Geneva, or at the equivalent value of the said amount at the exchange rate of the day in the local currency at Berlin, Vienna and Amsterdam, in so far as concerns the 1902, 1906 and 1909 loans;

3. Lastly, how the value of the gold franc is to be determined as between the Parties for the above-mentioned payments."

The 4% loan of 1895 was a conversion loan intended to replace the existing 5% loans, the securities appropriated to the latter being maintained for the benefit of the new loan; it was of a nominal capital of over 355 millions of francs. The 5% loan of 1902 was designed to liquidate a portion of the floating debt; the nominal amount of this loan was 60 million francs. The 4½% loan of 1906 (nominal amount 95 million francs) was destined for the construction of railways and the acquisition of war material. The 4½% loan of 1909 (150 million francs) was intended for the same purpose as that of 1906. Lastly, the 5% loan of 1913 (250 million francs) was as to one half to be devoted to the payment of the expenditure resulting from the wars of 1912 and 1913, and as to the remaining half to expenditure in connection with the requirements of the public services and the economic development of the Kingdom and especially of the new territories.

All these loans were issued in France either in their entirety or for the greater part. Their yield was credited to Serbia in French paper francs and Serbia, in her turn, effected the service of the loans in the same currency both before the war and during the war—when it was met by means of funds advanced by the British and French Governments—as well as subsequently, including the first period of the depreciation of the franc, without any apparent manifestation of dissatisfaction on this ground on the part of the bondholders.

Seeing, however, that the bonds of these loans and the documents relating thereto contain references to gold or to the gold franc, the bondholders, in view of the increasing depreciation of the French franc, were induced to claim payment of their coupons and redemption of their bonds on a gold basis.

As from 1924 or 1925, the French Government, whose attention had been drawn to the situation, took up the case of the bondholders and entered into diplomatic negotiations with the Serb-Croat-Slovene Government. The negotiations, however, did not lead to the settlement of the dispute between the two Governments, which dispute, according to certain documents appertaining to the negotiations, concerned the question whether, as held by the French Government, the French bondholders were justified in their claim to obtain payment in gold currency, or whether the Serbian Government was right in maintaining that payment was only due in French paper currency.

This was the position when the Special Agreement of April 16th, 1928, was concluded which, having been ratified on May 16th, was notified to the Registry by means of letters dated May 24th, 1928, from the representatives at The Hague of the Governments concerned.

The two Parties each filed a Case and a Counter-Case within the times laid down, and the case was entered in the list for the Court's Fifteenth (Extraordinary) Session. Owing to the illness of a judge, however, the Court was unable to assemble the necessary quorum, and this session had to be declared closed by order of the President. The case was then transferred to the list for the Sixteenth (Extraordinary) Session (May 13th—July 12th, 1929).

*Hearings*

The Court heard the arguments presented orally on behalf of the Parties at sittings held on May 15th, 16th, 17th, 18th, 22nd, 23rd and 24th, 1929.

*Composition of the Court*

The following judges composed the Court for this case:

MM. Anzilotti, *President;* Huber, *Vice-President*; Loder, de Bustamante, Altamira, Oda, Pessôa, Hughes, *Judges*, Beichmann, Negulesco, *Deputy-Judges*.

MM. Fromageot and Novacovitch, respectively appointed as judges *ad hoc* by the French and Serb-Croat-Slovene Governments, also sat on the Court for this case.

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*Judgment of the Court (analysis)*

The Court's judgment was given on July 12th, 1929.

The Court in the first place describes the origin of the dispute before it. But before approaching the question submitted to it, the Court feels called upon to define the task entrusted to it under the Special Agreement in relation to the provisions governing its jurisdiction and working. This is made necessary by the fact that the Special Agreement defines the dispute by formulating, on the one hand, the contentions of the Yugoslav Government, and on the other, those of the bondholders of the loans; whence it follows that the jurisdiction which the Court is called upon to exercise would seem to constitute a departure from the principles laid down by the Court in previous judgments with regard to the conditions under which a State may bring before it cases relating to the private rights of its nationals.

As regards considerations of form, the case is admissible, as it has been brought before the Court by an agreement signed by the two Governments. Nevertheless, according to the strict terms of the Special Agreement, this dispute is not between two Governments, but between a Government and private individuals. But if the dispute were to be regarded as a dispute between the Serb-Croat-Slovene Government and certain bondholders of the loans, one of the essential conditions of procedure before the Court, namely, the legal capacity of the Parties, would be unfulfilled: for the Statute lays down that only States can be Parties in cases before the Court.

In this connection the Court recognizes that the controversy is solely concerned with relations between the borrowing State and private persons; but it also observes that once the French Government had stated that it did not share the views of the Serbian Government to the effect that the latter was fulfilling all its obligations by paying in French paper francs, there is, side by side with the dispute between the Serbian Government and its creditors, another dispute between the Serbian Government and the French Government, the latter acting in the exercise of its right to protect its nationals. And the Court holds that it is really the second of these two disputes which is submitted to it by the Special Agreement. Accordingly, there is no further question as to its jurisdiction, provided that the actual subject of the dispute referred to it, which relates only to questions of fact and of municipal law, does not prevent the Court from dealing with it.

In regard to this question, the Court says that though its true function is to decide disputes on the basis of international law, nevertheless, under paragraph 2 of Article 36 of the Statute, it may have to pass upon pure matters of fact and, when two States agree to have recourse to it, its duty to exercise its jurisdiction must remain unaffected in the absence of a clause in the Statute to the contrary. The Court's jurisdiction therefore is unimpaired; but since the dispute, which is definitely restricted to the relations between the borrowing State and the bondholders, exclusively concerns a *nexus* of law between the former and the latter, the Court cannot, in arriving at a decision, take into account acts of the French Government.

Having thus established its own jurisdiction, the Court proceeds to consider the dispute on its merits. As a result of a detailed analysis of the documents relating to the coupons of the various loans, it observes that in regard to each of the loans there is a promise to pay in gold. The fact that mention is sometimes made of francs without specification of gold cannot be regarded as detracting from the force of this promise, for according to elementary principles of interpretation, the special words control the general expressions. As the bonds themselves are not ambiguous, there is no occasion for reference to the documents preceding the issue of the loans; moreover, if these are examined it will appear that they tend to confirm the agreement for payment in gold.

The Yugoslav Government, on various grounds, argued that this promise should be construed as a mere promise to pay in French currency. As it is fundamental that the terms of a contract qualifying the promise are not to be rejected as superfluous and as the definitive use of the word "gold" cannot be ignored, the Court then has to decide what is the significance of the expression *gold franc*.

It cannot, as contended by the Serbian Government, indicate a mere modality of payment, that is to say, in gold coin: to treat it thus would be to destroy the gold clause, and moreover, having regard to the amount of the half-yearly interest payable per bond (12 frs. 50), such payment would have been impracticable, for no gold pieces of this value existed. It is therefore manifest that the Parties, in providing for gold payments, were referring, not to payment in gold coin, but to gold as standard of value. It would be in this way, naturally, that they would seek to avoid, as was admittedly their intention, the consequences of fluctuations in the Serbian dinar.

Was there then at the time when the loans were issued a standard of value which was properly denoted by the term gold franc? The Court holds that there was. This standard, which was international

in that it was adopted by three countries, and had been made the subject of the Convention of the Latin Union, was the twentieth part of the French gold piece of twenty francs, a coin defined in the French law of the 17th Germinal of the Year XI; this was the standard of value to which the loan contracts referred.

The Serb-Croat-Slovene Government however contended that the contracts provided for payment at certain places "at the sight rate of exchange on Paris", that therefore the engagement was for payment of the number of francs stated on the bond or coupon at the sight rate of exchange on Paris on the date that payment fell due, and that consequently payment was to be made on the basis of French francs, or French paper francs, of whatever value they might be at the time. The Court, however, only regards this as a subsidiary provision which must be construed in the light of the principal stipulation which is for payment at gold value. The purpose of this provision is plainly not to alter the amount agreed to be paid, but to place the equivalent of that amount, according to banking practice, at the command of the bondholders in the foreign money at the designated cities. Only the holders of bonds belonging to a special issue of the 1895 loan are entitled to payment in sterling in London.

Against this view, the Serbian Government, in the course of the proceedings, has argued that, by the tacit consent of the Parties, the loan-service was conducted on the basis of the paper franc; that, in accordance with the familiar principle applicable to ambiguous agreements, this method of executing the contract should be deemed to be controlling in determining the intention of the Parties, and that, consequently, this intention was not to provide for payment in gold francs. In the view of the Court, the argument has no force since the contracts are not ambiguous. If the subsequent conduct of the Parties is to be considered, it must be not to ascertain the terms of the loans, but whether the Parties by their conduct have altered or impaired their rights.

In regard to the latter point of view, the Serb-Croat-Slovene Government has sought to apply the principle known in Anglo-Saxon law as estoppel. The Court holds that when the requirements of the principle of estoppel to establish a loss of right are considered, it is quite clear that no sufficient basis has been shown for applying the principle in this case. The Serbian debt remains as it was originally incurred; the contract between borrower and lender finds its expression in bearer bonds which entitle the bearer to claim, simply because he is a bearer, all the rights accruing under the bonds.

Finally, the Serbian Government has invoked *force majeure*: it contends that under the operation of the forced currency régime in France, pursuant to the law of August 5th, 1914, payment in gold francs became impossible. But as the loan contracts are to be deemed to refer to the gold franc as a standard of value, payments of the equivalent amount of francs, calculated on that basis, could still be made.

Having thus established the meaning which, on a reasonable construction, is to be attached to the terms of the bonds, the Court proceeds to consider the subsidiary contentions of the Serb-Croat-Slovene Government to the effect that the obligations entered into are subject to French law which, it is alleged, renders a clause for payment in gold or at gold value null and void, at all events in so far as payment is to be effected in French money and in France. This leads the Court to determine what law is applicable to the loans; this it must do—as municipal courts must also do in the absence of rules for the settlement of conflicts of law—by reference to the nature of the obligations in question and to the circumstances attendant upon their origin, though it may also take into account the expressed or presumed intention of the Parties.

In regard to this point, the Court, on various grounds, arrives at the conclusion that the law governing the obligations at the time when they were entered into was Serbian law. Of course, Serbia might have wished to make its loans subject to some other law, either generally, or in certain respects; but there are no circumstances which make it possible to establish that such was its intention. But though the substance of the debt is certainly governed by Serbian law, the Court recognizes that the application

of this law in France may be prevented by French public policy legislation and further that, even apart from this possibility, the methods of payment may be governed by some law other than that applicable to the substance of the debt. The Court however does not consider in detail the possible consequences of these two contingencies, as it holds—contrary to the contentions of the Serbian Government—that French law does not in any case prevent compliance with the gold clause.

The Court bases this conclusion on the manner in which the French legislation has been construed by the courts of that country, for in the Court's opinion it is French legislation, as actually applied in France, which really constitutes French law. And the Court holds that though the doctrine of the French courts is that any gold stipulation is null and void when it relates to a domestic transaction, this does not hold good in the case of international contracts, even when payment is to be effected in France. In these circumstances, there is nothing to prevent the creditors in this case from requiring payment in France of the gold value stipulated for. Furthermore, the forced currency law promulgated in 1914 has been abrogated by the currency law of June 25th, 1928; according to this new law, no obstacle resulting from the forced currency régime will for the future exist, and the reduction of the metallic value of the franc, as newly defined, to about one-fifth of its original value, will not affect the payments involved by the Serbian loans at issue which are undoubtedly international payments.

For these reasons, the Court gives judgment as follows:

(1) That, in regard to the Serbian 4% loan of 1895, the holders of bonds of this loan are entitled, whatever their nationality may be, to obtain, at their free choice, payment of the nominal amount of their coupons due for payment but not paid and of those subsequently falling due, as also of their bonds drawn for redemption but not refunded and of those subsequently drawn, at Paris, Berlin, Vienna and Belgrade, in the currency in circulation at one of these places;

(2) That, in regard to the 4% 1895, 5% 1902, 4½% 1906, 4½% 1909 and 5% 1913 Serbian loans, the holders of these bonds are entitled to obtain payment of the nominal amount of their coupons due for payment but not paid and of those subsequently falling due, as also of their bonds drawn for redemption but not refunded and those subsequently drawn, in gold francs, in the case of the 1895 loan, at Belgrade and Paris, and, in the case of the 1902, 1906, 1909 and 1913 loans, at Belgrade, Paris, Brussels and Geneva, or at the equivalent value of the said amount at the exchange rate of the day in the local currency at Berlin and Vienna, in the case of the 1913 loan, and at Berlin, Vienna and Amsterdam, in the case of the 1902, 1906 and 1909 loans.

(3) That the value of the gold franc shall be fixed between the Parties, for the above-mentioned payments, as equivalent to that of a weight of gold corresponding to the twentieth part of a piece of gold weighing 6 grammes 45161, 900/1000 fine.

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*Dissenting opinions*

The Court's judgment was adopted by nine votes to three; MM. de Bustamante (judge), Pessôa (judge) and Novacovitch (judge *ad hoc*), being unable to concur with the judgment, delivered separate opinions which are attached thereto.

*Dissenting opinion by M. de Bustamante*

After having considered some preliminary issues relating to the holders of bonds or coupons of the Serbian 1895 loan, M. de Bustamante turns to the principal problem which dominates all others, namely how, as regards currency, are payments of all these loans to be made. He begins by observing

that it is above all important to determine what rules of law are applicable to the problem. He finds that, as regards the relations between the debtor State and foreign bankers or holders, there are not, and could not be, any rules or doctrine in international public law. The question is one of a loan, i.e., a civil or, in some circumstances, commercial contract, the purely private legal nature of which cannot be changed between the contracting Parties owing to the fact that the debtor or borrower happens to be a State. For all difficulties of a legal nature that may arise between these contracting Parties, there must be rules of private law which, drawn from a particular legislation, fix the limits in space of each national law, if there is a possibility that two or several laws may be rendered applicable.

M. de Bustamante sets out that in contracts, both as regards their provisions and their execution, two different laws, or better, two different rules, may be invoked or applied. On the one hand, the sovereign will of the Parties who adopt a particular law or freely determine their wishes as to each detail of their affair. On the other hand, there are matters which are outside the will of the Parties and which require the application of imperative and territorial legal provisions. Amongst these matters are classed the form, the currency and the method of payment. Citing the Code of International Private Law, which states that "the local law regulates the conditions of payment and the money in which payment shall be made", he considers that reference shall be made to the legislation of the country in which payment was to be made, in this case especially the French legislation. He notes that, as regards France, the law in force is quite clear and does not require interpretation, as it states "the debtor must return the amount in figures lent, *and must return only this amount, in the specie in currency at the time of payment*."

M. de Bustamante notes that the applicable law of the French Civil Code gave to the borrower the right, and imposed on him the duty, as regards payments to be made in France, of assuming, at the moment of each payment, the consequences arising from the increase or diminution of the value of the currency, in the one case to his own advantage, in the other to the advantage of his creditors. He concludes that this situation in law was an acquired right for the borrower and for the holders of bonds and coupons, and could not be changed by subsequent legislation which had no retroactive effect as regards these loans.

According to M. de Bustamante, if payment is subject to the law of the place where it is made, as concerns the currency in which the debtor must pay, the Serbian State can only be obliged to deliver gold in the cases where gold currency is legal tender at the date of each payment, at the place where payment is made. He adds that since the bonds and coupons were to be paid in several countries, and many of these, for instance Belgium, France, Switzerland and even Serbia (under the denomination Dinar) had that currency, the Gold Franc without any qualification is referred to in order to indicate the currency of these four countries. He declares that the rate of exchange on Paris is excluded as regards places where that rate is not mentioned. In other words, the argument as to the French franc for payments at Brussels, Belgrade, etc., cannot be admitted.

*Dissenting opinion by M. Pessôa*

M. Pessôa states that, for the Court to have jurisdiction, it is essential that the case, in itself, should be "of an international character" and should be governed by international law (Articles 13 and 14 of the Covenant and 38 of the Statute). He notes that the judgment itself admits that the Franco-Serbian dispute "is *exclusively* concerned with relations between the borrowing State and private persons, that is to say, relations which are, in themselves, within the domain of *municipal law*", and he therefore concludes that the Court is not competent to deal with this dispute.

M. Pessôa affirms that the difference of opinion between the two Governments is the same as that existing between Serbia and the bondholders. As the controversy existing between the Serbian Govern-

ment and its creditors "is exclusively concerned with relations at municipal law" and consequently is outside the Court's jurisdiction, it is not easy to see why and how the difference of opinion between the two Governments can be within that jurisdiction.

Noting that, in support of its position, the Court cites Article 36, paragraph 2, of its Statute, M. Pessôa observes that the terms of this provision only apply in respect of the optional clause régime, a special régime, differing so widely from the normal régime, that the Statute specifies separately the cases in which the Court has jurisdiction under the two régimes. Additionally, he notes that in this case there is no fact which, if established, would constitute a breach of an international obligation.

M. Pessôa further observes that, in this suit, a State is taking up a case on behalf of persons unknown and anonymous and thus he questions whether the intervention of France is justified, since if the Court is not competent, no agreement between the Parties can give it powers which its constitutional texts withhold from it.

Turning to the interpretation of the parties, M. Pessôa notes that, from 1915–1928, the holders of the Serbian loans, in spite of the enormous depreciation of the franc and the loss of millions which this depreciation represented for them, quietly accepted, without protest or claim, payment of the interest on their bonds in paper francs depreciated to the extent indicated. According to M. Pessôa, this seems to show that, in the eyes of the creditors themselves, the gold clause attached to the payment of interest and redemption of the loans had not the significance now attributed to it. M. Pessôa adds that the transferability of the bonds strengthens his argument, as it creates a presumption that the number of holders during the period of six years fixed by the judgment must have been really enormous and, in spite of this, there has been no opposition in any country to the payment of the Serbian loan in *paper.*

M. Pessôa asserts that, at the date of the issue of the loans, the French bank-note had for a long time had the same value as gold and that the expressions *paper franc, French franc,* or *gold franc* were used indifferently. He holds that it is therefore an indisputable fact that the Parties, for many years, and in perfect harmony, interpreted and executed the contracts as *paper* loans, which they were generally understood to be. According to M. Pessôa, it is not the literal meaning of the terms of the Serbian contracts to which regard must be had in order to arrive at a sound decision upon the case, but the *intention* of the Parties.

M. Pessôa considers that if the gold clause in the Serbian contracts really constitutes an undertaking to pay in gold or its equivalent, to provide against the risks of depreciation in French currency the gold clause would not be valid and the contracts could not be executed in France. Noting that the law which governs is the territorial law of the country where payment is made, he contends that Article 1895 of the French Civil Code could not be clearer: the debtor must return the *amount in figures* lent and must return this amount only *in the specie in currency at the time of payment.* Considering the question whether the Parties in this case may have intended to exclude payment in bank-notes and to provide for payment in gold alone., M. Pessôa considers that this would not be possible, given that the laws governing legal tender are laws appertaining to *public policy.*

M. Pessôa states that the majority judgment's reliance on the jurisprudence of French courts to support the point that the gold clause would not be void in the case of international contracts even if payment is to be made in France is misplaced; the jurisprudence of the French courts in this matter has not as yet that continuous, uniform and fixed character which is required in order to make it binding.

Finally, M. Pessôa also dispels the reference to the law of June 25th, 1928, as an act subsequent to the dispute and emanating exclusively from one of the Parties cannot be invoked against a right previously acquired by the other Party.

*Dissenting opinion by M. Novacovitch*

M. Novacovitch states that this case deals with a dispute between a State and private individuals of another nationality. Noting the Court's previous cases in which a dispute between States may have originated in a controversy between a State and individuals, he contends that in all these cases the dispute related to the application of treaties between States, and what had to be considered was whether there had been a breach of public international law. The State took up the cause of the individual but only because it contended that there had been a breach of public international law, a breach which affected not only the rights of individuals but also those of the State. And it is this injury to the rights of a State, and not to the rights of an individual, which brought the dispute within the domain of public international law and gave the Court jurisdiction.

M. Novacovitch observes that in the present case it has never been contended that the Serb-Croat-Slovene Government has violated an international treaty, or that it has disregarded or violated a rule accepted as forming part of the law of nations, and that a difference of opinion as to the interpretation of a private contract between a State and foreign nationals does not suffice to engage the international responsibility of that State.

M. Novacovitch further considers the question of the rules to be applied to the dispute, noting that in the present case the Court is obliged to apply municipal law and nothing but municipal law. In regard to national systems of law, the Court has already had occasion to state in previous cases that it could not undertake to pass upon questions of municipal law.

M. Novacovitch therefore concludes that the Court is not competent to hear the case. He also sets out, however, his disagreement on the merits. He asserts that all the facts show that notwithstanding the gold clause, the Parties had in mind the French franc. Further, adopting this same concrete standpoint, the conclusion should have been reached that the intention of the Parties was to make the execution of the contracts subject to French law and not to Serbian law. M. Novacovitch notes that the Court rejected the concrete side of the question and has only regarded the abstract side, holding that the question concerned bearer bonds, that is to say bonds the holders of which are not personally known. He finds that if the abstract aspect of the question be alone considered, all the objections based on the execution of the contracts fall to the ground, since the bondholder for the time being is not bound by the acts of preceding holders. But, from another point of view, the result of keeping to the abstract aspect is that, as opposed to the debtor, the Serb-Croat-Slovene State, there is merely an anonymous, impersonal creditor, and in that case the French bondholders disappear and consequently there is no one for the French State to protect.

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*Action to be taken upon the judgment*

Under Article 2 of the Special Agreement concluded between the French and Serb-Croat-Slovene Governments on April 29th, 1928—under which Special Agreement the case was submitted to the Court—the Serb-Croat-Slovene Government and the representatives of the bondholders, within one month from the date of the Court's judgment, are to enter upon negotiations with a view to concluding an arrangement which will make to the Serb-Croat-Slovene Government, having regard to its economic and financial situation and capacity for payment, certain concessions as compared with that which the bondholders would be strictly entitled to claim.

Failing the conclusion of such an arrangement within three months from the commencement of the negotiations contemplated, either of the two contracting Parties may submit the question of the concessions referred to in the preceding paragraph and of the method of giving effect to them to one

or more arbitrators, who shall be appointed within two months from the expiration of the preceding time-limit, by agreement between the French Government and the Government of the Kingdom of the Serbs, Croats and Slovenes, or, failing such agreement, by the President of the Permanent Court of International Justice.

This arbitral award shall be given and complied with within one year from the delivery of the award of the Permanent Court of International Justice, even in the event of one of the Parties failing to enter an appearance.

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**Tenth Annual Report of the Permanent Court of International Justice (15 June 1933—15 June 1934), Series E, No. 10, pp. 92–95**

### Sequel to the judgment of July 12th, 1929

Subsequent to the judgment given by the Court on July 12th, 1929, negotiations were entered into, in pursuance of Article 11 of the Special Agreement concluded on April 19th, 1928, by the French and Yugoslav Governments, between the latter Government and the representatives of the bondholders of the loans mentioned in the Special Agreement. These negotiations terminated with the signature at Paris, on March 31st, 1930, of a Convention which was subsequently ratified by the Yugoslav Government[1]. The Convention is as follows:

"*Article 1.*—As from April 1st, 1930, the service of the following Serbian loans: 4% 1895, 5% 1902, 4½% 1906, 4½% 1909 and 5% 1913, shall be effected in gold francs.

*Article 2.*—The value of a gold franc, for payments to be made under this Convention, shall be equivalent to that of a quantity of gold representing one-twentieth part of a piece of gold 6.45161 grammes in weight and 900/1000 in fineness.

*Article 3.*—Coupons shall be paid and bonds redeemed in the legal currency of the place of payment or redemption, at a rate equivalent to their value in gold francs—as defined in Article 2—in the manner set out below, bondholders being under no obligation to prove their nationality.

*Article 4.*—For the calculation of this equivalent value in practice, a basic currency shall be selected from amongst currencies which are based on the free circulation of gold and the free conversion of notes into gold coin, without any kind of restriction. Gold francs, as defined in Article 2, shall be converted into the legal currency of the place of payment with the aid of the above-mentioned basic currency in the following manner: these gold francs shall first be converted into gold monetary units of the basic currency, at the legal parity of these monetary units with the said gold franc. The amount of matured coupons and of bonds due for redemption shall in this way be fixed in the basic currency and shall remain fixed in the basic currency adopted on the date on which the coupons mature or the bonds become redeemable for the whole period of prescription. Payment shall be effected at each place of payment at the sight rate of exchange of the basic currency at that place.

As a partial derogation from the foregoing and so long as French currency is practically at par with gold, the French franc (as defined by the law of June 25th, 1928) of which the legal parity with the gold franc, as defined in Article 2, is: one French franc = 0.203050 gold franc, shall serve as the

[1] See Communication No. 349, dated April 18th, 1930, of the *Association Nationale des Porteurs français de Valeurs mobilières.*

basic currency. A new basic currency will have to be chosen whenever the basic currency in use varies in relation to the gold franc as defined in Article 2, by more than 3%. In that case, it shall rest with the delegate of French holders of Serbian bonds, member of the Autonomous Administration of Monopolies, to notify the new basic currency to the Royal Government not later than fifteen days before the next date of maturity.

[Articles 5 to 11 relate to the places at which coupons are to be presented for payment, to the interest service as from April 1st, 1930, and to the sinking fund service.]

*Article 12.*—The annuities requisite for the service of the loans in gold francs—as defined in Article 2—in accordance with the foregoing articles, are fixed in the tables annexed to this Convention.

*Article 13.*—The necessary provision for these annuities shall be made by means of twelve equal monthly payments of the Autonomous Administration of Monopolies in respect of the 1895, 1902, 1906, 1909 and 1913 loans.

For the calculation of the necessary provision for redemption, the bonds to be redeemed shall be taken at their nominal gold value, subject to the percentages indicated in Article 7. If the provision made is not entirely absorbed by the sinking fund payments, the balance remaining available shall be carried forward to the provision to be made for the following date of maturity.

Should the provision be inadequate, the Royal Government undertakes to make up the amount.

Special arrangements shall be made to supplement the first monthly payments so that the first maturities can be wholly met.

*Article 14.*—The necessary provision for the interest annuities to be paid in accordance with the percentages indicated in Article 7 shall be invariable for the whole duration of each term of years, with the exception of the last term. Any saving accruing to the Royal Government as a result of redemptions effected in the preceding year shall be carried forward to the annuity for the following year. For each of the seventeen years of the last term, the provision for the interest annuity shall be calculated according to the number of bonds in circulation.

*Article 15.*—The payments which make up the annuity in gold francs, as defined in Article 2, required for the service of the interest and sinking fund of all the loans, shall be effected in French francs to an amount equivalent to their value in gold francs on the date of each payment.

Should French currency cease to be the basic currency, steps will be taken fifteen days before the coupons reach maturity, to calculate, in accordance with Article 4, the value in gold francs of the existing provision which shall then be converted into the basic currency. Should the provision be inadequate, the Royal Government will be bound to make up, before the date of maturity, the amount necessary for coupons and sinking fund payments, on the basis laid down in Articles 1 to 11 inclusive of this Convention.

*Article 16.*—The Autonomous Administration of Monopolies shall be bound by law, and shall give an undertaking regularly to make the payments specified and fixed above. It shall also be bound, over and above the annuities, to cover all expenses on account of agio, the transmission of funds, publicity and commission, in connection with the payment of coupons and the redemption of bonds.

[Articles 17 to 21 relate to guarantees.]

*Article 22.*—Coupons and bonds of the loans forming the subject of the present Convention, which have matured or been drawn before April 1st, 1930, not having been encashed or prescribed, shall be redeemed at a rate equivalent to 40% of their nominal gold value.

The amount of the arrears, calculated at the above rate, shall be computed, on April 1st, 1930, in gold francs, as defined by the law of June 25th, 1928. Such arrears shall be paid to bondholders in the manner hereinafter laid down in Articles 23 to 32.

*Article 23.*—As from July 1st, 1930, each of the aforementioned coupons or bonds in arrears shall receive, as a first interim payment, a number of French francs equal to the number of francs expressed on the coupon or bond.

This interim payment shall be made to bondholders, in respect of each loan, by the banks which effect the service of such loan, and at the places of payment specified in Article 5 of this Convention.

At places of payment where the local currency differs from the French franc, the bondholders shall receive the equivalent of the latter in local currency, computed at the sight exchange rate of the French franc on the date of the first interim payment.

[Articles 24 to 31 relate to the settlement of arrears by means of scrip certificates.]

*Article 32.*—Should the bondholders prefer a cash settlement in place of a partly deferred settlement, they may elect to receive payment, for coupons in arrears and redeemed bonds, as from July 1st, 1930, at the rate of 35% of the nominal gold value of such coupons or bonds, in full settlement. Bondholders must notify their decision to that effect before October 1st, 1930, after which date they will be assumed not to have desired to avail themselves of the provisions of this Article.

*Article 33.*—The Special Agreement signed at Paris on April 19th, 1928, shall be regarded as suspending any prescription of the coupons and bonds, as from the date of its signature until July 1st, 1930.

[Articles 34 to 41 contain various special clauses.]

*Article 42.*—Any dispute that may arise between the Royal Government and the bondholders in regard to the execution of this Convention shall be submitted to arbitration. One arbitrator shall be appointed by the Royal Government, and one by the *Association nationale des Porteurs français de Valeurs mobilières*. These arbitrators shall be appointed within a period of one month after a request for arbitration has been notified either by the Royal Government or by the aforesaid *Association nationale*. The arbitrators shall make their award within two months from the date of their appointment. Should they be unable to agree, a deciding vote shall be given by a third arbitrator, who shall be appointed for that purpose, before the expiry of the above-mentioned period of two months, by the President of the *Tribunal fédéral* of Lausanne.

The decision of this third arbitrator shall be given within the month following his appointment.

The costs of the arbitral procedure shall be borne by the losing Party.

[Article 43 relates to the taking of steps to clarify the clauses of the Convention.]

*Article 44.*—The present Convention shall be binding on the Royal Government and upon all bondholders who shall accede to it.

The Royal Government shall be bound, as from the date of the legal ratification of this Convention, and the accession of the bondholders shall be deemed to be recorded by the encashment of a coupon after April 1st, 1930."

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**Fifth Annual Report of the Permanent Court of International Justice (15 June 1928—15 June 1929), Series E, No. 5, pp. 216–222**

## Judgment No. 15

*The Court's jurisdiction—Interpretation of the contracts: Weight to be attached to the preliminary documents and to the manner of performance of the contract—Existence of the gold clause: its significance and whether effective—The law applicable to the substance of the debt and to the methods of payment; French legislation and the jurisprudence of French courts: the scope of these and estimation of the weight to be attached thereto by the Court under the terms of the Special Agreement*

*Outline of the case*

On August 27th, 1927, the Governments of the French Republic and of the Republic of the United States of Brazil concluded a Special Agreement submitting to the Court the following question:

> "With regard to the Brazilian Federal Government's 5% loan of 1909 (Port of Pernambuco), 4% loan of 1910, and 4% loan of 1911, is payment of coupons which have matured and are not barred by prescription at this date, and coupons which shall mature, as also repayment of bonds drawn for redemption but not actually paid which are not barred by prescription on the date of the Court's decision, or of bonds subsequently to be redeemed, to be effected by delivery to the French holders, in respect of each franc, of the value corresponding, in the currency of the place of payment at the rate of exchange on the day, to one-twentieth of a gold piece weighing 6.45161 grammes of 900/1000 fineness, or is such payment or repayment to be effected as hitherto in paper francs, that is to say, in the French currency which is compulsory legal tender?"

The 5% loan of 1909 was issued to finance works to be carried out at Recife (Port of Pernambuco); it was for a nominal amount of 40 million francs. The 4% loan of 1910 consisted of bonds issued to an amount of 100 millions of francs, for the construction of certain railway lines at Goyaz. The 4% loan of 1911 (60 millions of francs) was designed to finance a system of railways in the State of Bahia. These three loans were issued under the following conditions: The Federal Government in each case concluded with a company of contractors or a railway company a concession contract under which the company undertook to carry out certain works in consideration of payment in bonds of the Federal Debt to be issued by the Government, which bonds were then to be negotiated and sold by the company. This the three companies concerned did by means of flotation contracts concluded with French banks.

The loans were issued, at all events for the most part, in France. The yield of the loans was credited to those entitled to receive it in French paper francs at the current value, and the bondholders, for a large number of years including the first years of the depreciation of the franc, accepted, without apparent protest, payment of the service of these loans in that currency. The increasing depreciation of the franc, however, ultimately led to the taking of steps by the bondholders with a view to inducing the French Government to intervene. According to the Brazilian Government, this attitude on the part of the bondholders dates only from 1924 and is explained by speculative aims; whereas, according to the French Government, the discontent of the bondholders and its earliest manifestations date from an earlier period. However that may be, in 1924, the French Government intervened with the Brazilian Government on behalf of the holders of the three Brazilian loans and at their instance, claiming that payment of the interest upon and redemption of the capital of these loans should be effected on a gold basis. Diplomatic conversations then took place which, however, did not succeed in disposing of the controversy.

Then it was that the Special Agreement of August 27th, 1927, was concluded which was ratified on February 23rd, 1928, and notified to the Registry of the Court by letters from the French and Brazilian Ministers at The Hague dated April 26th and 27th, 1928. The two Parties each filed a Case and a Counter-Case within the times fixed, and the suit was placed on the list for the Sixteenth Extraordinary Session of the Court which was held from May 13th to July 12th, 1929. The case was heard on May 25th, 27th, 28th and 29th, 1929.

*Composition of the Court*

The following judges composed the Court for this case:

MM. Anzilotti, *President;* Huber, *Vice-President*; Loder, de Bustamante, Altamira, Oda, Pessôa, Hughes, *Judges*, Beichmann, Negulesco, *Deputy-Judges.*

M. Fromageot, appointed as judge *ad hoc* for the purpose of this case by the French Government, also sat on the Court.

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*Judgment of the Court (analysis)*

The Court's judgment was given on July 12th, 1929.

The Court first of all describes the origin of the dispute before it. It then observes that the terms in which the Franco-Brazilian Special Agreement formulates the question submitted to the Court—the Special Agreement, in fact, speaks of "a dispute which has arisen between the Brazilian Federal Government and French holders"—call for observations in regard to its jurisdiction similar to those made in Judgment No. 14 in the case of the Serbian loans; the Court therefore refers to those observations in so far as concerns the reasons for which it holds that it has jurisdiction in this case.

The Court next approaches the merits of the dispute. As concerns the 1910 and 1911 loans, it observes that the bonds contain an explicit promise for the payment in gold of bonds drawn for redemption and of interest. There is therefore no need to refer to the documents preceding the issue of these loans; but it may be observed that these documents do not disclose any clause which could be regarded as contradicting the bonds.

As regards the 1909 loan, the position is different, for the bonds of this loan, though they contain an explicit promise to pay interest in gold, do not provide for payment in gold of the principal. In these circumstances, the Court refers to the prospectus which invites subscriptions to this loan. As regards the weight to be attached to this document, the Court says, first, that it is a prospectus for which the Brazilian Government has expressly assumed responsibility. Accordingly, it may be regarded as a continuing offer, to the terms of which each bondholder is entitled to refer, in case ambiguity is found in the statements of the bonds: for it is not to be supposed that the original subscribers are to be in a more favoured position with respect to their rights under the bonds than those who later obtain the bonds by transfer. Next, after analysing the prospectus, the Court concludes that persons taking bonds on the faith of the prospectus would undoubtedly understand that they were receiving gold bonds both as to principal and interest. It therefore concludes that the bonds of the 1909 loan, like those of 1910 and 1911, are to be construed as providing for payment of principal and interest in gold.

The existence of the gold clause having thus been established, it remains to ascertain its significance. One argument put forward by the Brazilian Government against its efficacy is that it is simply a clause of "style" or a routine form of expression. The Court rejects this argument, observing that it amounts to ignoring the promise; and this promise must be construed, not ignored. The Court also

rejects another objection of the Brazilian Government to the effect that "according to the legislative financial system" of Brazil, a gold loan signifies a "foreign loan" in sterling, French francs or American dollars. For, as in the case of the Serbian loans, the Court holds that the promise to pay in gold obviously refers not to gold coin but to a gold standard of value.

What was this standard? Before answering this question, the Court, in the first place, observes that it must be a standard existing at the time of the bond issues, because the engagement would be meaningless if it referred to an unknown standard of a future day. Secondly, rejecting the Brazilian argument to the effect that the contracting Parties' sole object was to safeguard against the depreciation of Brazilian currency, a fall in French francs being unforeseeable at the time, the Court considers that the standard of value must have been intended as a safeguard against depreciation in value in general and not against that of any particular currency. Such being the nature of the standard of value, the Court concludes that it can be no other than the "gold franc" as defined by the French currency legislation at that time, that is to say, the twentieth part of the twenty franc gold piece weighing 6 grammes 45161, 900/1000 fine. This standard, which was also adopted by certain other countries, was in fact well adapted for selection by a Government for its external loans. Consequently, the bonds are to be construed as providing for payment in gold francs as thus defined.

It has however been argued—with the inference that the loan contracts contemplated payment in paper francs—that at all times before, during and after the war, payment was made in the ordinary manner, that is, in bank-notes, and it has been sought to apply the familiar principle that where a contract is ambiguous, resort may be had to the manner of performance to ascertain the intention of the Parties. But there is no ambiguity either in the contracts of 1910 and 1911, the terms of which are explicit, or in that of 1909, which must be read in conjunction with the prospectus. Moreover, where reference is had to the conduct of the Parties, it is necessary to consider whether that conduct permits of but one inference: this is not so in the present case. The acceptance by the bondholders of payment in French francs can be explained otherwise than as acquiescence. Moreover, the bonds are bearer bonds which entitle the bearer to claim, simply because he is a bearer, all the rights accruing under the bond.

The Brazilian Government has also argued that even if the conclusion were arrived at that the intention of the contracting Parties was to set aside the French franc and adopt a gold standard of value, the loans are governed by French law which would not permit payments in France on the basis of gold value. The Court holds that this is not so. Having regard to the nature of the obligations and the circumstances attendant upon their creation, there seems no doubt that it is Brazilian law which governs them, at all events as regards the substance of the debt and the validity of the clause defining it. There is neither an express provision nor any circumstances conclusively showing that it was Brazil's intention to subject the validity of her obligations to some foreign law. Of course, the currency in which payment must or may be made may be governed by French law. The application of this law involves no difficulty so long as it does not affect the substance of the debt to be paid and does not conflict with the law governing such debt. But in this case this situation need only be envisaged if French law rendered it impossible to claim payment otherwise than in bank-notes which are compulsory tender: this however is not so, for, as the Court has observed in the case of the Serbian loans, the doctrine of the French courts is that a gold clause is null and void in respect of a domestic transaction but not in respect of international contracts, even when payment is to be effected in France.

The Court however observes in this connection that, according to the terms of the Special Agreement, "in estimating the weight to be attached to any municipal law . . . the Court shall not be bound by the decisions of the respective courts". But this cannot alter the conclusion at which the Court has arrived on the basis of these decisions. For, having regard particularly to the implications of a proper appreciation of its nature and functions in relation to the problems arising in connection with the application by it of some municipal law, the Court construes this clause of the Special Agreement to

mean that, whilst the Court is authorized to depart from the jurisprudence of the municipal courts, it remains free to decide that there is no reason for so doing.

The Court concludes with the observation that the forced currency régime established in 1914 has been terminated by the currency law of June 25th, 1928; that, under this new law, no obstacle resulting from the forced currency régime will for the future exist and the reduction of the metallic value of the franc, as newly defined, to about one-fifth of its original value will not affect the payments involved by the Brazilian loans at issue which are undoubtedly international payments.

For these reasons the Court decides that with regard to the Brazilian Federal Government's 5% loan of 1909 (Port of Pernambuco), 4% loan of 1910, and 4% loan of 1911, payment of coupons which have matured and are not barred by prescription at the date of the Special Agreement and of coupons subsequently maturing, as also repayment of bonds drawn for redemption but not actually repaid which are not barred by prescription on the date of the present judgment, or of bonds subsequently to be redeemed, must be effected by delivery to the French holders, in respect of each franc, of the value corresponding in the currency of the place of payment at the rate of exchange of the day, to one-twentieth part of a gold piece weighing 6.45161 grammes, 900/1000 fine.

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*Dissenting opinions*

The Court's judgment was adopted by nine votes to two; MM. de Bustamante and Pessôa (judges), being unable to concur, delivered separate opinions which are appended to the judgment.

*Dissenting opinion by M. de Bustamante*

M. de Bustamante observes that, at the time when the Brazilian loans were issued, there was no legal difficulty in speaking of the gold franc or in deciding that payments should be made in gold francs. There was no binding rule of French law or of Brazilian law to prevent it.

With regard to the question of the law that governs the relevant contractual stipulations, he states that the task of the Court consists of endeavouring in the first place to establish in agreement with the rules of private international law, what this municipal law is, and after that to apply to each hypothesis the rule of municipal law by which it is governed. There is nothing in this task which does not come within the jurisdiction of the Court.

M. de Bustamante then turns to the question of the execution of the contract and particularly on the currency in which the payment had to be made. He considers that these matters are outside the will of the Parties and require the application of imperative and territorial legal provisions. Citing the Code of International Private Law, which states that "the local law regulates the conditions of payment and the money in which payment shall be made", he observes that, as regards France, the law in force is quite clear and does not require interpretation, as it states "the debtor must return the amount in figures lent, *and must return only this amount, in the specie in currency at the time of payment.*"

M. de Bustamante notes that the applicable law of the French Civil Code gave to the borrower the right, and imposed on him the duty, as regards payments to be made in France, of assuming, at the moment of each payment, the consequences arising from the increase or diminution of the value of the currency, in the one case to his own advantage, in the other to the advantage of his creditors. He concludes that this situation in law was an acquired right for the borrower and for the holders of bonds and coupons, and could not be changed by subsequent legislation which had no retroactive effect as regards these loans.

M. de Bustamante concludes that, if payment is subject to the law of the place where it is made, as concerns the currency in which the debtor must pay, Brazil can only be obliged to deliver gold in the cases where gold currency is legal tender at the date of each payment, at the place where payment is made, that is to say, at Paris so far as this case is concerned. And Brazil need only repay the amount in figures in the currency in circulation at the time of payment.

*Dissenting opinion by M. Pessôa*

M. Pessôa states that, for the Court to have jurisdiction, it is essential that the case, in itself, should be "of an international character" and should be governed by international law (Articles 13 and 14 of the Covenant and 38 of the Statute). He notes that the judgment itself admits that the Franco-Brazilian dispute "is *exclusively* concerned with relations between the borrowing State and private persons, that is to say, relations which are, in themselves, within the domain of *municipal law*", and he therefore concludes that the Court is not competent to deal with this dispute.

M. Pessôa affirms that the difference of opinion between the two Governments is the same as that existing between Brazil and the bondholders. As the controversy existing between the Brazilian Government and its creditors "is exclusively concerned with relations at municipal law" and consequently is outside the Court's jurisdiction, it is not easy to see why and how the difference of opinion between the two Governments can be within that jurisdiction.

Noting that, in support of its position, the Court cites Article 36, paragraph 2, of its Statute, M. Pessôa observes that the terms of this provision only apply in respect of the optional clause régime, a special régime, differing so widely from the normal régime, that the Statute specifies separately the cases in which the Court has jurisdiction under the two régimes. Additionally, he notes that in this case there is no fact which, if established, would constitute a breach of an international obligation.

M. Pessôa further observes that in this suit, a State is taking up a case on behalf of persons unknown and anonymous, and thus he questions whether the intervention of France is justified, since, if the Court is not competent, no agreement between the Parties can give it powers which its constitutional texts withhold from it.

Turning to the interpretation of the parties, M. Pessôa notes that from 1917–1927 the holders of the Brazilian loans, in spite of the enormous depreciation of the franc and the loss of millions which this depreciation represented for them, quietly accepted, without protest or claim, payment of the interest on their bonds in paper francs depreciated to the extent indicated. According to M. Pessôa, this seems to show that, in the eyes of the creditors themselves, the gold clause attached to the payment of interest and redemption of the loans had not the significance now attributed to it. M. Pessôa adds that the transferability of the bonds strengthens his argument, as it creates a presumption that the number of holders during the period of six years fixed by the judgment must have been really enormous and, in spite of this, there has been no opposition in any country to the payment of the Serbian loan in *paper.*

M. Pessôa asserts that at the date of the issue of the loans, the French bank-note had for a long time had the same value as gold and that the expressions *paper franc, French franc,* or *gold franc* were used indifferently. He holds that it is therefore an indisputable fact that the Parties, for many years, and in perfect harmony, interpreted and executed the contracts as *paper* loans, which they were generally understood to be. According to M. Pessôa, it is not the literal meaning of the terms of the Brazilian contracts to which regard must be had in order to arrive at a sound decision upon the case, but the *intention* of the Parties.

M. Pessôa considers that if the gold clause in the Brazilian contracts really constitutes an undertaking to pay in gold or its equivalent, to provide against the risks of depreciation in French currency

the gold clause would not be valid and the contracts could not be executed in France. Noting that the law which governs is the territorial law of the country where payment is made, he contends that Article 1895 of the French Civil Code could not be clearer: the debtor must return the *amount in figures* lent and must return this amount only *in the specie in currency at the time of payment*. Considering the question whether the Parties in this case may have intended to exclude payment in bank-notes and to provide for payment in gold alone, M. Pessôa considers that this would not be possible, given that the laws governing legal tender are laws appertaining to *public policy*.

M. Pessôa states that the majority judgment's reliance on the jurisprudence of French courts to support the point that the gold clause would not be void in the case of international contracts even if payment is to be made in France is misplaced; the jurisprudence of the French courts in this matter has not as yet that continuous, uniform and fixed character which is required in order to make it binding.

Finally, M. Pessôa also dispels the reference to the law of June 25th, 1928, as an act subsequent to the dispute and emanating exclusively from one of the Parties cannot be invoked against a right previously acquired by the other Party.

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## Sequel to the Judgment of July 12th, 1929[2]

**Tenth Annual Report of the Permanent Court of International Justice (15 June 1933—15 June 1934), Series E, No. 10, pp. 96–98**

Following the judgment given by the Court on July 12th, 1929, the Brazilian Government announced that, as from January 1st, 1930, it would provide, in the manner laid down in that judgment, for the service of the loans in question, namely the three following Brazilian loans issued in France: the 5% 1909 (Port of Pernambuco), the 4% 1910, and the 4% 1911. Nevertheless, owing to its financial situation, it was not yet in a position also to settle on a gold basis payments which had matured before that date.

The Brazilian Government, however, in an announcement published on October 19th, 1931, stated that the effects of the economic crisis upon the Brazilian exchange rendered it impossible for it to provide in foreign currency for the service of most of its loans, including the three loans to which the Court's judgment referred. This decision and the non-settlement of arrears in respect of the three loans on a gold basis formed the subject of negotiations between, on the one hand, the Brazilian Government, and, on the other hand, the *Association nationale des Porteurs français de Valeurs mobilières*, in conjunction with representatives of the British and American bondholders. As a result of these negotiations, a basis of agreement was reached which was approved by a decree of the Brazilian Government dated March 2nd, 1932[3].

On March 31st, 1932, the *Association nationale des Porteurs français de Valeurs mobilières* published two announcements at Paris, with the approval of the Brazilian Government; one of these announcements related to the settlement of arrears in respect of the loans referred to in the Court's judgment, and the other to the issue of consolidation bonds.

The first announcement is as follows:

[2] [ . . . ] The following information has been obtained from Communications No. 364 (March 21st, 1932) and No. 377 (February 2nd, 1934) of the *Association nationale des Porteurs français de Valeurs mobilières*, and from the relevant decrees of the Government of the United States of Brazil and official notices published on behalf of that Government.

[3] *Diario oficial, Estados Unidos do Brasil*, March 1932, p. 3978 (decree No. 21,113).

"The Government of the United States of Brazil has not hitherto been in a position to assemble the funds necessary to settle, in the manner laid down in the judgment of the Permanent Court of International Justice, matured coupons and bonds drawn for redemption prior to January 1st, 1930, of the loans specified above. The provision set aside for the payment at maturity, on the basis of their nominal amount in French francs, of these coupons and bonds, is available in the case of the 5% 1909 and 4% 1910 gold loans, but not in the case of the 4% 1911 gold loan.

In these circumstances, H.E. the Minister of Finance, in pursuance of decree No. 21,113 of March 2nd, 1932, has decided to settle the whole of these arrears in cash by payments spread over a period terminating on October 5th, 1934, at latest. For this purpose, he has authorized the issue of 'certificates representing arrears' divided into four series:

*First series.*—Certificates representing coupons of the 5% 1909 gold loan (Port of Pernambuco) matured up to August 1st, 1929, inclusive (coupon No. 41), and the 4% 1910 gold loan, matured up to September 1st, 1929, inclusive (coupon No. 39).

*Second series.*—Certificates representing bonds of the 5% 1909 gold loan (Port of Pernambuco) and the 4% 1910 gold loan drawn for redemption before January 1st, 1930.

*Third series.*—Certificates representing coupons of the 4% 1911 gold loan matured up to July 1st, 1929, inclusive (coupon No. 36).

*Fourth series.*—Certificates representing bonds of the 4% 1911 gold loan drawn for redemption before January 1st, 1930.

In exchange for their matured coupons or bonds drawn for redemption, those entitled to arrears in respect of the 5% 1909 or 4% 1910 gold loans will receive:

(*a*) an instalment in cash equal to the nominal amount in French francs indicated on these coupons or bonds;

(*b*) one or more 'certificates representing arrears' of the first or second series, as the case may be, the amount of which will be computed at the rate of 3.925 French francs for each franc of the nominal value indicated on coupons or bonds.

Holders who present lists signed by a legal representative appointed by the French courts and obtained when encashing their arrears in French francs in order to record that they reserve their right to payment in gold francs, shall also receive 'certificates representing arrears' in exchange for these lists, under the same conditions as holders of matured coupons or bonds drawn for redemption.

In exchange for their matured coupons or bonds drawn for redemption, those entitled to arrears in respect of the 4% 1911 gold loan will receive one or more 'certificates representing arrears' of the third or fourth series, as the case may be, the amount of which will be computed at the rate of 4.925 French francs for each franc of the nominal value indicated on coupons or bonds."

Then follow clauses regarding taxation, repayment, prescription, the financial houses which are to control the operations, etc.

The second announcement states that the Brazilian Government, having found itself obliged to suspend the interest and sinking fund service of certain loans, including the three loans referred to in the Court's judgment, has decided to consolidate the interest payable on these loans for a period of not more than three years. Further, with particular regard to the 4% 1911 gold loan (for which, as stated in the first announcement, the Brazilian Government had not been able to set aside the funds necessary for the payment of arrears in the manner laid down in the Court's judgment), arrears will also be

consolidated. The announcement goes on to state the conditions for the issue of consolidation bonds after giving the following definition:

> "In the present announcement, the expression 'gold franc', in accordance with the interpretation given by the Permanent Court of International Justice at The Hague in its Judgment of July 12th, 1929, means the equivalent of one twentieth part of a piece of gold weighing 6.45161 grammes and 900/1000 in fineness; the expression 'franc' or 'French franc' means the French monetary unit defined by the French law of June 25th, 1928, as constituted by 65.5 milligrammes of gold, 900/1000 in fineness."

For the calculation of the amount of the bonds relating to the loans referred to in the Court's judgment, five French francs are taken as equalling one gold franc.

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## 35. FREE ZONES OF UPPER SAVOY AND THE DISTRICT OF GEX

### Order of 19 August 1929 (Series A, No. 22)

**Sixth Annual Report of the Permanent Court of International Justice (15 June 1929—15 June 1930), Series E, No. 6, pp. 201–212**

*The Parties to a case before the Court may not depart from the terms of the Statute—Interpretation of the Special Agreement: ascertainment of the common intention of the Parties and the construction which will render it possible to comply with that intention whilst keeping within the terms of the Statute*

*Definition of the Court's task—Interpretation of Article 435 of the Treaty of Versailles—Fixing of a time-limit*

*Outline of the case*

The Treaty of Peace signed at Versailles on June 28th, 1919, contains the following article:

"*Article 435*

> The High Contracting Parties, while they recognize the guarantees stipulated by the treaties of 1815, and especially by the Act of November 20th, 1815, in favour of Switzerland, the said guarantees constituting international obligations for the maintenance of peace, declare nevertheless that the provisions of these treaties, conventions, declarations and other supplementary acts concerning the neutralized zone of Savoy, as laid down in paragraph 1 of Article 92 of the Final Act of the Congress of Vienna and in paragraph 2 of Article 3 of the Treaty of Paris of November 20th, 1815, are no longer consistent with present conditions. For this reason the High Contracting Parties take note of the agreement reached between the French Government and the Swiss Government for the abrogation of the stipulations relating to this zone which are and remain abrogated.
>
> The High Contracting Parties also agree that the stipulations of the treaties of 1815 and of the other supplementary acts concerning the free zones of Upper Savoy and the Gex district are no longer consistent with present conditions, and that it is for France and Switzerland to come to an agreement together with a view to settling between themselves the status of these territories under such conditions as shall be considered suitable by both countries."

There are two annexes to this article. The first reproduces in all essential respects a communication dated May 5th, 1919, whereby the Swiss Federal Council informs the French Government that after examining the provisions of Article 435, it has reached the conclusion that it was possible to acquiesce in it under certain conditions and reservations. In particular, it makes the most express reservations regarding the interpretation of the statement contained in the second paragraph of the article to the effect that the free zones are no longer consistent with present conditions: it would not wish that its acceptance of this wording should lead to the conclusion that it would agree to the suppression of a system intended to give neighbouring territories the benefit of a special régime which is appropriate to their geographical and economic situation and has been well tested. In the opinion of the Federal Council, the question is not the modification of the customs system of the zones, as set up by the treaties mentioned, but only the regulation in a manner more appropriate to the economic conditions of the present day of the terms of the exchange of goods between the regions in question. Lastly, the Federal Council observes that it is conceded that the stipulations of the treaties of 1815 and other supplementary acts relative to the free zones will remain in force until a new arrangement is come to between France and Switzerland to regulate matters in this territory.

The second annex to Article 435 is a note from the French Government dated May 18th, 1919, in reply to the Swiss Government's communication. The French Government notes the acceptance of the article by the Swiss Government; as regards the conditions and reservations made, it observes that the provisions of the last paragraph of Article 435 are so clear that their purport cannot be misapprehended, especially where it implies that no other Power but France and Switzerland will in future be interested. The French Government bears in mind the desirability of assuring to the French territories concerned a suitable customs régime; but it is understood that this must in no way prejudice the right of France to adjust her customs line in this region in conformity with her political frontier, as is done on the other portions of her territorial boundaries and as was done by Switzerland long ago on her own boundaries in this region. The French Government finally states that it has no doubt that the provisional maintenance of the régime of 1815, as to the free zones referred to in the Swiss note of May 5th, the object of which clearly is to provide for the transition from the present régime to the conventional régime, will cause no delay whatsoever in the establishment of the new situation which is recognized to be necessary by the two Governments.

*Special Agreement for arbitration*

Subsequently the two Governments entered into negotiations with a view to concluding the agreement contemplated by the second paragraph of Article 435 of the Treaty of Versailles. They were however unable to agree as to the interpretation of that paragraph, and failed to conclude an agreement. In these circumstances, on October 30th, 1924, they signed at Paris a Special Arbitration Agreement, the preamble of which states that "France and Switzerland have been unable to agree in regard to the interpretation to be placed upon Article 435, paragraph 2, of the Treaty of Versailles, with its annexes", and that "it has proved impossible to effect the agreement provided for therein by direct negotiations" and that they "have decided to resort to arbitration in order to obtain this interpretation and for the settlement of all the questions involved by the execution of paragraph 2 of Article 435 of the Treaty of Versailles". The Special Agreement contains the following clauses amongst others:

"*Article 1*

It shall rest with the Permanent Court of International Justice to decide whether, as between Switzerland and France, Article 435, paragraph 2, of the Treaty of Versailles, with its annexes, has abrogated or is intended to lead to the abrogation of the provisions of the Protocol of the Conference of Paris of November 3rd, 1815, of the Treaty of Paris of November 20th, 1815, of the Treaty of Turin of March 16th, 1816, and of the Manifesto of the Sardinian Court of Accounts of September

9th, 1829, regarding the customs and economic régime of the free zones of Upper Savoy and the Pays de Gex, having regard to all facts anterior to the Treaty of Versailles, such as the establishment of the Federal Customs in 1849, which are considered relevant by the Court.

The High Contracting Parties agree that the Court, as soon as it has concluded its deliberation on this question, and before pronouncing any decision, shall accord to the two Parties a reasonable time to settle between themselves the new régime to be applied in those districts, under such conditions as they may consider expedient, as provided in Article 435, paragraph 2, of the said Treaty. This time may be extended at the request of the two Parties.

*Article 2*

Failing the conclusion and ratification of a convention between the two Parties within the time specified, the Court shall, by means of a single judgment rendered in accordance with Article 58 of the Court's Statute, pronounce its decision in regard to the question formulated in Article 1 and settle for a period to be fixed by it and having regard to present conditions, all the questions involved by the execution of paragraph 2 of Article 435 of the Treaty of Versailles.

Should the judgment contemplate the import of goods free or at reduced rates through the Federal Customs barrier or through the French Customs barrier, regulations of such importation shall only be made with the consent of the two Parties."

The Special Agreement, which was ratified on March 21st, 1928, was notified to the Registrar of the Court on March 29th, together with the text of two notes interpreting the Special Agreement exchanged on October 30th, 1924, between the French Minister for Foreign Affairs and the Swiss Minister to France. These notes are to the effect that:

"(1) until the Court's definitive decision shall have been given, neither Party shall take any steps calculated to modify the *de facto* situation now prevailing at the frontier between Switzerland and the French territories mentioned in Article 435, paragraph 2, of the Treaty of Versailles;

(2) no objection shall be raised on either side to the communication by the Court to the Agents of the two Parties, unofficially and in each other's presence, of any indication which may appear desirable as to the result of the deliberation upon the question formulated in Article 1, paragraph 1, of the Arbitration Convention;

(3) the words 'present conditions' in Article 2, paragraph 1, of the Arbitration Convention refer to the 'present conditions' contemplated in Article 435, paragraph 2, with its annexes, of the Treaty of Versailles".

*Hearings*

The Parties each filed with the Registry of the Court, a Case, a Counter-Case and a Reply, within the times laid down by an order made by the President of the Court, and the case was entered in the list for the Seventeenth (ordinary) Session of the Court, which began on June 17th and ended on September 10th, 1929. The Court heard the oral arguments and replies of the representatives of the Parties on July 9th, 10th, 11th, 12th, 13th, 15th, 16th, 18th, 19th, 22nd and 23rd, 1929.

*Composition of the Court*

The Court on this occasion was composed as follows:

MM. Anzilotti, *President*; Loder, Nyholm, de Bustamante, Altamira, Oda, Huber, Pessôa, Hughes, Fromageot, *Judges,* MM. Negulesco, Wang, *Deputy-Judges*.

M. Dreyfus, appointed as judge *ad hoc* by the French Government, also sat on the Court for the purpose of this case.

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*Order of the Court (analysis)*

On August 19th, 1929, the Court made an order in the case.

In the order, after setting out the final submissions of the Parties and quoting Article 435 of the Treaty of Versailles and the relevant passages of the annexes to that article, the Court considers how it behoves it to carry out the mission entrusted to it. Under the second paragraph of Article 1 of the Special Agreement, it is simply asked to grant to the two Parties a reasonable time to settle between themselves a new régime for the free zones as soon as it has concluded its deliberations upon the interpretation of Article 435 of the Treaty of Versailles—which question is submitted to it by paragraph 1 of Article 1 of the Special Agreement—and before pronouncing any judgment; but, by notes exchanged on October 30th, 1924, the Parties have, amongst other things, agreed that no objection shall be raised on either side to the communication by the Court to the Agents of the two Parties, unofficially and in each other's presence, of any indications by which may appear desirable as to the result of the deliberations referred to. The spirit and letter of the Statute however do not allow the Court unofficially to communicate to the Parties the result of its deliberations upon a question submitted to it for decision, and in contradistinction to that which is permitted in regard to the Rules (Article 32) the Court cannot, on the proposal of the Parties, depart from the terms of the Statute.

Considering however that the obstacle to the agreement contemplated by Article 435 of the Treaty of Versailles appears in reality to be the failure of the Parties to reach an understanding regarding the interpretation to be placed on that article and its annexes, it would be useless to grant a time for the conclusion of an agreement without at the same time or previously indicating the meaning of the disputed text. Furthermore, the judicial settlement of international disputes, for which purpose the Court has been established, is simply an alternative to the direct and friendly settlement of such disputes between the Parties: accordingly, it behoves the Court to facilitate such settlement as far as is compatible with its Statute.

These considerations lead the Court to the conclusion that—since the clauses of a Special Agreement must, if it does not involve doing violence to their terms, be construed in a manner enabling them to have appropriate effects—it is possible to give effect in all essential respects to the common will of the Parties by indicating, in the grounds of the order which the Court must in any event make fixing a time-limit, the result of its deliberations upon the question of interpretation; moreover, orders, in contradistinction to judgments, although generally read in open Court, have no "binding" force (Article 59 of the Statute) or "final" effect (Article 60 of the Statute) in deciding the dispute brought before the Court. The Court adds however that henceforth Special Agreements submitting disputes to it should be formulated with due regard to the forms to be observed by the Court in accordance with the constitutional provisions governing its activity, in order that it may be able to deal with such disputes in the ordinary course, and without resorting, as in this case, to a construction which must be regarded as strictly exceptional.

After excluding as evidence at the present stage of the case a volume filed at the hearing by the Agent for the Swiss Government without the assent of the French Agent, the Court then proceeds to consider the question put to it by the Special Agreement, and first of all defines the function entrusted to it by that document.

As already indicated, the Special Agreement relates to the effects of the disputed clause of the Treaty of Versailles "as between France and Switzerland"; this phrase has the effect of limiting the function of the Court solely to that of determining the reciprocal rights and obligations arising under the said clause for the two countries in connection with the régime of the free zones, apart from the legal relations as between signatories of the Versailles Treaty resulting from this article. Again, the Special Agreement leaves the Court entirely free to interpret the disputed clause in respect both of the question whether it has abrogated the former provisions and of the question whether it has for its object their abrogation; accordingly, if the Court arrives at the conclusion that the clause has not abrogated these provisions, it is not obliged to say that it has for its object their abrogation, but may on the contrary say that this is not the intention of the article. That this is the case clearly appears from the aim of the Special Agreement as indicated in the preamble, from the fact that the real divergence between the Parties relates to the question whether the régime of the zones could be abolished without Switzerland's consent, and from the fact that the Court cannot as a general rule be compelled to choose between constructions determined beforehand none of which may correspond to the opinion at which it may arrive.

Lastly, the Court observes that if France and Switzerland succeed in reaching the agreement in view of which provision is made for the time-limit to be fixed by it, that agreement, whatever its contents may be, will have the formal effect of abrogating the provisions of 1815–1816, and that therefore the Court, in replying to the question whether the Treaty has for its object the abrogation of these provisions, must, if its answer is to serve any useful purpose, say whether or not Switzerland is obliged to accept as the basis of the future agreement the abrogation of the régime of the free zones, that is to say, in particular the transfer of the French customs barrier in these territories to the political frontier.

Having thus defined the meaning of the question submitted, the Court approaches the merits of the problem. Has Article 435, paragraph 2, of the Treaty of Versailles abrogated the provisions of 1815–1816? The Court replies that it has not. For the disputed clause draws from the statement that those provisions are not consistent with present conditions no conclusion other than that France and Switzerland are to settle between themselves the status of the free zones, a conclusion which is tantamount to a declaration of disinterestedness as regards that status, on the part of the contracting Parties to the Treaty of Versailles other than France. Moreover, in paragraph 1 of the same article, the similar statement regarding the neutralized zone also does not automatically involve the abolition of that zone, since it is followed by a declaration whereby the High Contracting Parties note an agreement already concluded between France and Switzerland "for the abrogation of the stipulations relating to this zone" adding that these stipulations "are and remain abrogated". Lastly, Article 435 of the Treaty of Versailles is not, in any event, binding on Switzerland, which is not a Party to this Treaty, except to the extent to which that country has itself accepted it. This extent is determined by the Swiss note of May 5th, 1919, an extract from which constitutes Annex I to the said article and in which it is expressly stated that "the Federal Council would not wish that its acceptance of the above wording [i.e. Article 435, paragraph 2, of the Treaty of Versailles] should lead to the conclusion that it would agree to the suppression of a system . . . which has been well tested".

Accordingly, the disputed clause could only be operative as between France and Switzerland if Switzerland's consent were unnecessary for abrogation. But this is not so: the actual terms of Article 435 would seem to presuppose the existence of a right on the part of Switzerland derived from the former stipulations; in the same connection, Switzerland's consent has in fact been sought; lastly, the contracting Parties to the Treaty of Versailles have inserted after Article 435 the Swiss note of May 5th, 1919, which, in the Court's opinion, is entirely based on the existence of such a right on the part of Switzerland. Again, with regard to the Sardinian zone, Switzerland, as a Party to the Treaty of Turin of March 16th, 1816, has acquired a contractual right to the withdrawal of the customs barrier in that district; as regards the zone of Saint-Gingolph, the Court is of opinion that the Manifesto of the Royal

Chamber of Accounts of Sardinia dated September 9th, 1829, is still effective, the above-mentioned Treaty of Turin not having been abrogated; lastly, with regard to the zone of Gex, all the instruments concerning it and the conditions in which they were executed show that the intention of the Powers was, *inter alia*, to create in favour of Switzerland a right on which she could rely.

With regard to Annex II to Article 435, which is a French note, dated May 18th, 1919, it cannot in any circumstances affect the conditions of the Federal Council's acquiescence, which is a unilateral act on the part of Switzerland.

The foregoing conclusion, as to Switzerland's right, is based on an examination of the situation of fact; it follows that the Court need not decide as to the extent to which international law takes cognizance of the principle of "stipulations in favour of third parties".

But, if the disputed clause has not abrogated the former stipulations, has it for object their abrogation? Again the answer is no. From their statement as to the inconsistency of the former stipulations with present conditions, the Powers have not drawn any conclusion other than that it is for France and Switzerland to settle by agreement the status of the territories in question, without in any way prejudging the question of the contents of this agreement which, therefore, may or may not, according to the common will of the Parties, lead to the abrogation of the régime of the free zones; and since Switzerland, in her note of May 5th, 1919, made an express reservation regarding abolition in the future of the régime of the free zones resulting from the former stipulations concerning them, it is impossible to conclude that as between France and Switzerland, the aforesaid article and its annexes is intended necessarily to lead to the abrogation of the said stipulations, thus compelling Switzerland to accept the abrogation of the régime of the free zones as the only possible basis of the future agreement between herself and France.

Under the terms of the Special Agreement, the Court was to have regard to all facts antecedent to the Treaty of Versailles, such as the establishment of the Federal customs in 1849, which might be considered relevant by it. In performing the function entrusted to it as defined above, the Court has had regard to those facts which, in its view, are clearly relevant in that they explain why the High Contracting Parties to the Treaty of Versailles, after their declaration to the effect that the stipulations at issue are no longer consistent with present conditions, have concluded that it rests with France and Switzerland to effect settlement by agreement. The Court does not consider that the view arrived at by it with regard to the interpretation of Article 435 is weakened by the facts referred to; on the contrary, it holds that this view is corroborated by the facts relating to the drafting of Article 435 of the Treaty of Versailles which have been cited before it.

Having thus given its opinion as to the true interpretation of Article 435, paragraph 2, of the Treaty of Versailles, with its annexes, the Court, holding that in the circumstances of the case, a period of about nine months seems sufficient to allow the Parties to establish the basis of an agreement which they have themselves on many occasions recognized as highly desirable, accords to the Government of the French Republic and to the Government of the Swiss Confederation a period expiring on May 1st, 1930, to settle between themselves, under such conditions as they may consider expedient, the "new régime" to be applied in the districts contemplated by Article 435, paragraph 2, of the Treaty of Versailles.

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*Dissenting opinions*

The Order of Court is followed by three separate opinions, delivered respectively by MM. Nyholm, judge, Negulesco, deputy-judge, and Dreyfus, judge *ad hoc*; these three judges, whilst agreeing with the operative part of the order, declared that they were unable to agree with the reasons to the extent indicated by themselves in their opinions. M. Pessôa, whilst agreeing with the order, attached thereto certain observations.

*Opinion by M. Nyholm*

M. Nyholm notes that the order of the Court, which is rather an interlocutory judgment, arrives at the conclusion that the provisions of 1815 involving the withdrawal of the French customs line in the District of Gex are not abrogated and cannot be abrogated without Switzerland's consent. In his view, this conclusion does not appear justified by the text of Article 435, paragraph 2, of the Treaty of Versailles.

M. Nyholm finds that the clause, as it stands, contains a sufficiently clear indication that an existing state of affairs is abolished and a new state of affairs established. He asserts that it follows that, from a textual interpretation of Article 435, the provisions of 1815 are abrogated.

As regards Switzerland's protest, he considers that any protest must be based on the existence of a right. To prove her right, Switzerland cannot rely on the mere *existence* of the note, which emanates from Switzerland herself. In this regard, M. Nyholm states that the Powers, in appending to Article 435 both the Swiss and the French notes, have set out two arguments which might be put forward in regard to interpretation. The two notes must be placed on an equal footing without it being possible, apart from sound reasons to the contrary, to give the preponderance to one of them.

M. Nyholm then turns to the arguments presented as to whether the rights claimed by Switzerland exist; he concludes that they do not. Firstly, he considers that the 1815 provisions are not a servitude as regards Switzerland. Secondly, Switzerland's argument that the provisions are for her stipulations *in favorem tertii* is without foundation. The stipulation *in favorem tertii* does not appear to be valid in international law, for it does not create a right in favour of the third State. Thirdly, Switzerland maintains that the new régime set up by Article 435 presupposes that, failing an agreement, recourse must always be had to the former system. But this interpretation is grammatically impossible. Fourthly, it is known that one draft of Article 435, paragraph *2,* contained the clause that the 1815 provisions were abrogated. But information as to the reasons for this removal and the circumstances connected therewith is entirely lacking. Even with the removal, the text of Article 435, however, remains clear.

M. Nyholm concludes that no fact and no argument can justify the Swiss contention that the provisions of 1815 are maintained in force.

*Opinion by M. Negulesco*

M. Negulesco states that the request made to the Court must be construed as meaning that, if the Court arrives at the conclusion that the provisions in question are not abrogated, it must consider whether Article 435, paragraph 2, "is intended to lead to the abrogation of" these provisions. According to M. Negulesco, the expression "as between France and Switzerland" can only be understood in one way, namely, that it is for the Court to ascertain the meaning of Article 435, paragraph 2, taken by itself, and then to see, after examining the annexes and the treaties of 1815, how far the terms of this article can be enforced as against Switzerland which took no part in the signature of the Treaty of Versailles.

Having traced the history of the 1815 Treaty and of the Treaty of Versailles, M. Negulesco finds that the expression "also", in paragraph 2 of Article 435 of the Treaty of Versailles, shows the need-

lessness of a declaration of abrogation which, in the first paragraph, is the consequence of the establishment of the fact that the stipulations of the treaties of 1815 are no longer consistent with present conditions. This paragraph indicates that the two States are placed on an equal footing by the abolition of the régime of the free zones, and consequently that it is for France and Switzerland to settle between themselves the régime of these territories.

M. Negulesco observes that the preparatory work further demonstrates France's unchanging intention to abrogate the provisions of the 1815 treaties concerning the free zones and the attitude adopted by Switzerland, which did not oppose the abrogation by asserting her right to the free zones.

M. Negulesco then turns to the two annexes attached to Article 435 of the Treaty of Versailles. He states that they must be looked upon as unilateral declarations possessing equal legal weight. The Swiss note of May 5th is a unilateral action that can only have one effect: to bind Switzerland within the limits of her own declaration. Within this note, the first reservation concerning the free zones of Upper Savoy and the District of Gex is that the Swiss Government does not desire to accede to the declaration by the Powers "that the stipulations of the treaties of 1815 are no longer consistent with present conditions", since "its acceptance of the above wording" might "lead to the conclusion that it would agree to the suppression of a system which has been well tested". According to M. Negulesco this means that the Swiss Government itself recognizes that the words "are no longer consistent with present conditions" mean the abrogation of the 1815 treaties. He continues that by its second reservation, Switzerland accepts the abrogation on condition that the zones régime remains in force until a new arrangement is made between Switzerland and France.

Addressing the French note in reply, M. Negulesco states that the French Government agrees with the Swiss Government to a "provisional" maintenance of the 1815 régime until the "conventional régime" between the two Powers comes into force. However, since the first reservation of the Swiss Government is in contradiction with the note of the French Government of May 18th, the inference is that the two notes mutually nullify each other and we are brought back to Article 435, paragraph 2, of the Treaty of Versailles.

As regards the latter provision, M. Negulesco states that what the Powers wished to effect by this article was the abrogation of the 1815 treaty stipulations. The question is whether they were entitled to do so without Switzerland's assent. This leads to a consideration of the question whether Switzerland took part in the 1815 treaties or whether, these treaties created a right in favour of Switzerland.

M. Negulesco considers that, as regards the free zone of Upper Savoy, Switzerland had a right by virtue of the Treaty of Turin of March 16th, 1816, which could not be abrogated by virtue of Article 435, paragraph 2, without Switzerland's assent. As regards the Gex zone, it was created by the Treaty of November 20th, 1815, and Switzerland did not participate in this Treaty. M. Negulesco determines that since Switzerland had no contractual right by virtue of the Treaty of November 20th, 1815, it must be considered whether the Powers stipulated a right in her favour by virtue of that Treaty. He notes that the adherence of a third State to a treaty already concluded can only take place where such a right has been provided for therein. But the Treaty of November 20th, 1815, does not provide in favour of any other State for any right of adherence. In addition, he adds that it is impossible, by reason of the silence of a treaty, to create rights in favour of third States.

M. Negulesco concludes that Article 435, paragraph 2, of the Treaty of Versailles, with its annexes, has abrogated the provisions of the Treaty of November 20th, 1815, regarding the free zone of the District of Gex, and has not abrogated the provisions of the Treaty of Turin of March 16th, 1816, regarding the free zone of Upper Savoy. In addition, the facts antecedent to the Treaty of Versailles which are considered relevant by the Court and which led to the drafting of Article 435, paragraph 2, containing the declaration of the High Contracting Parties to the effect that the old provisions "are no longer

consistent with present conditions", may, by application of the clause *rebus sic stantibus,* lead to the abrogation of the Treaty of March 16th, 1816, concerning the free zone of Upper Savoy, in virtue of an agreement freely concluded between France and Switzerland.

*Opinion by M. Eugène Dreyfus*

M. Dreyfus expresses his disagreement with the reasons in the order, since they involve an addition to the terms of the Special Agreement, and they lead to Article 435, paragraph 2, becoming, as between Switzerland and France, a provision void of meaning, a dead letter.

He posits that the Special Agreement only requests the Court to answer the question whether when the framers of the Treaty of Versailles provided in Article 435, paragraph 2, that the stipulations concerning the free zones were no longer consistent with present conditions and that a status established by agreement between the two countries should be substituted therefore in these territories, they had for their object the abrogation of these stipulations, i.e. to bring about their abrogation in the future by the Parties concerned.

M. Dreyfus avers that the question which should predominate in the whole discussion was whether Switzerland had a right to the maintenance of the free zones, and what was the nature of that right as regards each zone; this question was, however, only examined as a secondary consideration by the Court.

M. Dreyfus states that, as regards the Sardinian zone, Switzerland certainly draws her right from Article 3 of the Treaty of Turin of March 16th, 1816, signed by her with Sardinia, whose obligations must now be assumed by France; Switzerland must therefore, in principle, continue to enjoy that right in spite of Article 435, paragraph 2, of the Treaty of Versailles, but subject to any possible application of the clause *rebus sic stantibus*.

As regards the zone of the District of Gex, Switzerland cannot rely on any right under a treaty. M. Dreyfus highlights that it is important to note that neither in the Protocol of November 3rd, nor, above all, in Article 3 of the Treaties of November 20th, 1815, is Switzerland mentioned. The advantage of a free zone was granted to her by Austria, Great Britain, Russia, Prussia and later Portugal (identical treaty with France dated August 28th, 1817) by a stipulation in her favour; now these same Powers in Article 435, paragraph 2, of the Treaty of Versailles declare that the stipulations of the treaties of 1815 and of the other supplementary acts concerning the free zone of the District of Gex are no longer consistent with present conditions and that a régime to be established by agreement between France and Switzerland shall be put in their place.

M. Dreyfus considers the theory of the stipulation *in favorem tertii*, which the Court declared to be effective in the present case. He states that, in view of the diversity in the nature and legal effects or the stipulation *in favorem tertii* in municipal law, there can be no question of transferring it as such into international public law, nor in particular of giving it such an unlimited field of application as in the present case.

M. Dreyfus examines the different wording of the two paragraphs of Article 435. He observes that, if the first paragraph expressly abrogates the provisions relating to the neutral zone, this is solely because it merely constitutes a recognition of an agreement already arrived at; the word "also" in paragraph 2 further shows that the declaration of changed conditions should have the same meaning in the two paragraphs and should equally involve the abrogation of the provisions distinctly referred to therein.

*Observations by M. Pessôa*

M. Pessôa states that the object of orders, in the words of Article 48 of the Statute, is "the conduct of the case", the decision as to "the form and time in which each Party must conclude its arguments". He holds that in the present case there is no question of this. The *main* object of the order is to establish what is, in the opinion of the Court, the true construction of Article 435 of the Peace Treaty and to convey this opinion to the Parties in reply to their request for the opinion of the Court. The time-limit comes afterwards and cannot even be fixed unless the decision as to the interpretation has been given; this clearly shows that the time-limit is merely a *secondary* and *incidental* point in the order. According to M. Pessôa, the case is not one for judgment, since the Special Agreement expressly rules out a judgment; nor is it one for an advisory opinion, since neither the Council nor Assembly has asked for one; nor for an order, which is not required for the purpose of the conduct of the case; and since the Court can only express a decision by one of these three means, it follows that it should have refused to entertain the case, on the ground that the clause whereby the Special Agreement seeks the Court's opinion is not valid, having regard to the imperative terms of Article 14 of the Covenant and Article 72 of the Rules of Court.

Turning to the merits of the order, M. Pessôa concurs with the Court when it states that Article 435, paragraph *2,* of the Treaty of Versailles has not abrogated the provisions of the Treaty of 1815 and other supplementary instruments. However, as regards the other question put by the Special Agreement, he states that the intention of the Treaty is that such a régime should disappear. A régime which is no longer consistent with present conditions should not remain unaltered. But the new régime is to be created by mutual agreement between the two countries. The agreement will thus relate not to the actual fact of replacement, but solely to the form and conditions of replacement. M. Pessôa points out that Switzerland acquiesces in the abrogation contemplated by Article 435, for the replacement of a régime also involves its abrogation. Finally, M. Pessôa considers that the second question of the Special Agreement might have been answered by stating that Article 435 *has for its object the abrogation* as between France and Switzerland of the provisions of the Treaty of 1815 and other supplementary instruments, and the replacement of them, by means of an agreement between the two countries, by others which are consistent with present circumstances, the former régime remaining in force until the new one is adopted.

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*Course of events following the order*

Under the terms of Article 4 of the Special Agreement, by which the case was submitted to the Court, should the Court, failing an agreement between the Parties, be called upon itself to settle all the questions involved by the execution of Article 435, paragraph 2, of the Treaty of Versailles, it was to grant the Parties reasonable times for the production of all documents, proposals and observations which they might see fit to submit to the Court for the purposes of this settlement and in reply to those submitted by the other Party.

By a letter dated March 28th, 1930, the Swiss Federal Political Department informed the Registrar of the Court that the negotiations entered into in accordance with the order of August 19th, 1929, had not led to the discovery of the bases of an agreement, so that it appeared materially impossible for a convention to be concluded and ratified by the Parties before May 1st, 1930. The Federal Political Department's communication accordingly asked that the necessary steps should be taken to fix the times referred to in Article 4 of the Special Agreement.

Furthermore, on April 29th, the Agent for the French Government also informed the Court that it had proved impossible to conclude the agreement between the Parties.

In these circumstances, and after having ascertained the Parties' wishes with regard to the length of the times to be fixed, the President of the Court, by an order dated May 3rd, 1930, decided to grant the Governments concerned a first time-limit expiring on July 31st, 1930, and a second (for replies to the documents, proposals and observations filed within the first time-limit) expiring on September 30th.

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## 36. TERRITORIAL JURISDICTION OF THE INTERNATIONAL COMMISSION OF THE RIVER ODER

**Judgment of 10 September 1929 (Series A, No. 23)**

**Sixth Annual Report of the Permanent Court of International Justice (15 June 1929—15 June 1930), Series E, No. 6, pp. 213–222**

Judgment No. 16 and Orders of August 15th and 20th, 1929

*Orders relating to the evidence*

*Inadmissibility in evidence of preparatory work in which all the Parties to the case have not participated*

*Order as to the submissions*

*In a case submitted by Special Agreement, a Party cannot claim only to make submissions orally in regard to one of the questions put*

*Judgment on the merits*

*The inapplicability in the case under consideration of the Barcelona Convention; the Court's duty* ex officio *to consider any question of law even if not raised by the Parties; failing an express provision to that effect, a convention only acquires binding force after ratification—Jurisdiction of the Commission under the Treaty of Versailles—Conditions governing the interpretation of a text in the sense most favourable to the freedom of States—Basis of the fluvial law of the Treaty of Versailles*

*Outline of the case*

Part XII of the Treaty of Peace, signed at Versailles on June 28th, 1919, contains in Chapter III of Section II, clauses concerning certain European rivers. According to Article 331 in this chapter, these rivers—including the Oder—are declared international, from a point which is laid down in each case as also "all navigable parts of these river systems which naturally provide more than one State with access to the sea, with or without transhipment from one vessel to another; together with lateral canals and channels constructed either to duplicate or to improve naturally navigable sections of the specified river systems, or to connect two naturally navigable sections of the same river". Articles 332 to 337 lay down the navigation régime applicable to these river systems. Article 338 states that this régime "shall be superseded by one to be laid down in a general convention drawn up by the Allied and Associated Powers and approved by the League of Nations". Article 341, which deals specially with the Oder, places that river under the administration of an international commission which will include representatives

of Poland, Prussia, Czechoslovakia, Great Britain, France, Denmark and Sweden. Article 343 lays down that this commission is to meet within three months of the date of coming into force of the Treaty and is to prepare a project for the revision of the existing regulations. Lastly, Article 344 states that this project shall, *inter alia*, define the sections of the river or its tributaries to which is to be applied the international régime, that is to say the régime laid down by Articles 332 to 337 or that established by the general convention mentioned in Article 338.

The International Commission of the Oder met for the first time in 1920 and at once undertook to prepare the draft act of navigation contemplated by Article 343. Difficulties, however, arose when it came to the definition of the sections to which the international régime was to apply. In the course of the Commission's deliberations, the Polish delegate maintained that the Warthe (Warta) should be internationalized from its confluence within the Oder up to the Polish frontier, adding that the situation was the same as concerned the Netze (Noteć) in so far as it was navigable. The Prussian delegate, on the contrary, argued that if the principle of the internationalization of tributaries was to be adopted, it must be integrally maintained and the navigable portions of tributaries situated in Polish territory should not be excluded from the international river system. The other delegates, except the Polish delegate, more or less completely took the same view.

In January 1924, the Commission, in view of the failure to reach agreement, and holding that it could not proceed with its task, requested its members to approach their respective governments on the matter. Following upon this resolution, the British and French Governments asked that the questions should be submitted to the Advisory and Technical Committee for Communications and Transit of the League of Nations. This body, applying the procedure provided for by the Resolution of the Assembly of the League of Nations dated December 9th, 1920, and by Article 7 of the Rules for its organization, adopted in November 1924, by a majority vote, a "suggestion for conciliation" which was communicated to the International Oder Commission and to the governments represented thereon. The "suggestion" was however rejected by Poland, while Germany reserved her opinion. In view of the deadlock thus reached, the Advisory and Technical Committee declared the procedure of conciliation closed, and the Oder Commission once more invited its members to refer the matter to their governments.

*Special Agreement for arbitration*

The governments concerned then authorized their delegates on the Oder Commission to draft a Special Agreement to bring the matter before the Court. This Special Agreement was signed in London on October 30th, 1928, by the representatives of the Governments of His Britannic Majesty in the United Kingdom of Great Britain and Northern Ireland, of Czechoslovakia, of Denmark, of France, of Germany and of Sweden (hereinafter referred to as the Six Governments) of the one part, and the Polish Government of the other part. According to the Special Agreement, which was notified to the Court on November 29th, 1928, the Court is asked to decide the following questions:

> "Does the jurisdiction of the International Commission of the Oder extend, under the provisions of the Treaty of Versailles, to the sections of the tributaries of the Oder, Warthe (Warta) and Netze (Noteć), which are situated in Polish territory, and, if so, what is the principle laid down which must be adopted for the purpose of determining the upstream limits of the Commission's jurisdiction?"

The Parties each filed a Case and Counter-Case within the times fixed for the purpose by the Court; at their request, the submission of written replies was dispensed with. The case was then placed on the list for the Seventeenth (ordinary) Session of the Court, which opened on June 17th and terminated on September 10th, 1929.

*Composition of the Court*

The following judges composed the Court for the hearing of this case:

MM. Anzilotti, *President*; Huber, *Vice-President*; MM. Loder, Nyholm, de Bustamante, Altamira, Oda, Pessôa, Hughes, *Judges,* Negulesco, Wang, *Deputy-Judges*.

According to paragraph 4 of Article 31 of the Statute, should there be several Parties in the same interest, they will be reckoned as one Party only for the purpose of the provisions relating to the appointment of judges *ad hoc*. Accordingly, although the British, Czechoslovak, French, German and Swedish Governments had no judge of their nationality upon the Bench, they were not called upon to appoint one, since the Court included a Danish judge. Only the Polish Government possessed this right, which it duly exercised by appointing Count Rostworowski.

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*First order of the Court in regard to the evidence*

Before beginning the hearing of the case, the Court found it necessary to make two orders in regard to the evidence. The Polish Government had, in its Case, directly or indirectly referred in several places to the work done in the preparation of the relevant articles of the Treaty of Versailles. In their Counter-Case, the Six Governments replied by requesting the Court to follow its previous decisions and to refuse to admit any recourse to such preparatory work for the purpose of putting upon a text an interpretation different from the plain meaning of the language used; the Court was also asked to disregard the arguments based upon these references and to give a ruling upon this question at the hearing of the oral arguments.

The Court, as composed above, considering that before hearing the oral arguments upon the merits it must give a decision as to the admissibility as evidence in this case of the records cited, invited the Parties, by an order made on August 15th, 1929, to submit their observations and final submissions upon this question before arguing the case on its merits.

*Second order of the Court in regard to the evidence*

These observations and submissions were presented on August 20th, 1929. On the same date, the Court (again composed as above) made a second order disposing of the question. It ruled that any passages in the documents of the written proceedings quoted from the preparatory work in question, which was that performed by the Commission on Ports, Waterways and Railways of the Conference which prepared the Treaty of Versailles, should be excluded as evidence from the proceedings in the case. The Court bases this decision, firstly, on the fact that the Agent for the Polish Government had stated that he did not insist upon making use in his defence of the records quoted, though he reserved the right in the argument on the merits to avail himself of references to or citations from the said records, in so far as they had already been made public; secondly, on the fact that three of the Parties concerned in the case had not taken part in the work of the Conference referred to; that, consequently, the record of this work—whether previously published or not—could not be used to determine, in so far as they were concerned, the import of the Treaty, and that, in a given case, no account can be taken of evidence which is not admissible in respect of certain of the Parties to that case.

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*Order as to submissions*

The Court also found it necessary to make another order before the hearing. This order relates to the submissions of the Parties. By the Special Agreement, the Court was asked to decide two questions. The Polish Government, however in its Counter-Case, made submissions solely relating to the first question, and, in regard to the second, it confined itself to reserving the right to state its case in regard to the solutions proposed by the Six Governments in the course of the oral proceedings.

The Court (as composed above), by an order made on August 15th, 1929, invited the Polish Government to file its submissions as to the second question before the beginning of the hearing. The order states that in a case submitted to the Court by Special Agreement, and in which therefore there is neither Applicant nor Respondent, the Parties must have an equal opportunity reciprocally to discuss their respective contentions; that this is the reason for the provision laying down that in cases submitted in this way, the written documents are to be filed simultaneously by both Parties; and that, accordingly, the Six Governments must be enabled to discuss, in the first oral argument and not only in their reply, any alternative submissions of the Polish Government.

The submissions in question were duly filed within the time fixed.

*Hearings*

The hearing lasted from August 20th to 24th, 1929, inclusive, and the Court's judgment was given on September 10th, 1929.

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*The judgment of the Court (analysis)*

Before dealing with the questions submitted to it on their merits, the Court disposes of two preliminary points which had been argued by the Parties. The first relates to the meaning of the word "Oder" in Article 341 of the Treaty of Versailles. This article simply mentions the name of the river and not the "river system" alluded to in Article 331. The Polish Agent contended that, if reliance were placed on Article 341, the jurisdiction of the Commission extended to "the Oder" alone. The Court overrules this argument: whatever value it might have in relation to the provisions of the Treaty of Versailles, it is certain that it cannot be admitted to change the terms of the questions put to the Court which cannot be either modified or extended by one of the Parties; but these questions proceed on the assumption that the Oder Commission's jurisdiction also extends over the tributaries .

The second point relates to the applicability of the Statute annexed to the Convention relating to the régime of navigable waterways of international concern, signed at Barcelona on April 20th, 1921. This Convention—and this is not disputed by the Parties—is that which, under the terms of Article 338 of the Treaty of Versailles, is to supersede the régime of internationalization contained by Articles 332 to 337. The Six Governments based their principal argument upon this Convention. The Polish Government, on the other hand, had argued, before the opening of the proceedings before the Court, that that Convention not having been ratified by it, could not be invoked against it. The Polish Government did not re-advert to this argument in the documents of the written proceedings, but only at the hearing; whereupon the Six Governments asked the Court to reject *in limine* the Polish contention, which they believed to have been abandoned: they contended that it would be contrary to the letter and spirit of the Rules of Court to admit new contentions at an advanced stage of the proceedings and after the opposing Party had been led to believe that such arguments would not be put forward.

The Court considers that the objection of the Six Governments is untenable, since the matter is purely one of law such as the Court could and should examine *ex officio*.

Proceeding next to consider this matter, the Court observes that the applicability of the Barcelona Convention is governed by the interpretation of Article 338 of the Treaty of Versailles; the question is whether the supersession—provided for by that article—of the régime laid down in Articles 332 to 337 by that laid down in the Convention, depends on the ratification of the latter by the States concerned. The Court infers from the use of the word "Convention" in the article that the reference is to a convention to be made effective in accordance with the ordinary rules of international law, amongst which is the rule that conventions, save in certain exceptional cases, only become binding by virtue of ratification. If any doubt remained in this respect, it would be dispelled by the provisions of the Convention itself, which clearly make the coming into force of the Convention as regards each of the Parties depend upon ratification. It follows that the Barcelona Convention cannot be invoked against Poland in this case and that the questions submitted to the Court must be resolved solely on the basis of the Treaty of Versailles.

The Court next proceeds to examine the questions submitted to it by the Special Agreement. It observes first, having regard to the general arrangement of the relevant chapter of the Treaty of Versailles, that when a river commission is set up for an international river, its jurisdiction extends to all internationalized portions of the river and river system; accordingly, the question put must be answered on the basis of Article 331 which defines the territorial limits of the international régime on the Oder, amongst other rivers. The only point now in dispute is the meaning of the words "all navigable parts of these river systems which naturally provide more than one State with access to the sea". This clause, in the Court's opinion, proves that internationalization is subject to two conditions: navigability (which is not disputed in this case) and access to the sea for more than one State.

The Court holds that this latter condition is to be understood: it refers to tributaries as such, so that if a tributary in its naturally navigable course traverses or separates different States, it falls as a whole within the above definition. Accordingly, it does not solely refer to that part of each tributary which provides more than one State with access to the sea; and the upper part of the tributary or sub-tributary does not cease to be internationalized above the last frontier crossing its naturally navigable course.

In arriving at this conclusion, the Court in the first place relies to some extent upon arguments of a grammatical nature. In the next place, the Court observes that a text can only be construed in the way most favourable to the freedom of States if its meaning is really doubtful, and that the meaning cannot be affirmed to be doubtful until recourse has been had to all methods of interpretation and, in particular, to the principles underlying the matter to which the text refers. The Court therefore goes back to the principles governing fluvial law in general and considers what position was adopted by the Treaty of Versailles in regard to these principles.

Of course, the desire to provide the upstream States with the possibility of free access to the sea has played a considerable part in the formation of the principle of freedom of navigation on so-called international rivers. But the conception underlying international river law, as laid down by the Congress of Vienna and subsequently developed, is not the idea of a mere right of passage in favour of upstream States, but rather the idea of a community of interests, on which is based a community of legal right the essential features of which are the perfect equality of all riparian States in the user of the whole course of the river and the exclusion of any preferential privilege of any one riparian State in relation to the others. This community of right necessarily extends to the whole navigable course of the river and does not stop short at the last frontier.

The Treaty of Versailles, for its part, has yet further extended this idea by adopting the position of complete internationalization, that is to say, the free use of the river for all States, riparian or not. The

interest of all States is in the liberty of navigation in both directions, a fact which explains the introduction of the representatives of non-riparian Powers on the river commissions. Again, the Treaty of Versailles adopts geographical points in fixing the limit from which rivers are internationalized without taking any account of the last political frontier, and, in cases where this limit is not fixed, Article 344 makes it the duty of the international commissions set up, to define the sections of the river or its tributaries to which the international régime shall be applied. This provision, which places the river and its tributaries on the same footing, is easily understood if, in the case of the tributaries as in the case of the river, the delimitation depends on certain material circumstances, the application of which involves a more or less discretionary element; but it would have no meaning if the limit of internationalization of the tributaries was determined by the last political frontier.

Article 331, therefore, must be construed in the light of these principles, which leave no doubt that the internationalization of a waterway traversing or separating different States extends to the whole navigable river and does not stop short at the last political frontier. The answer to the first question put to the Court is consequently in the affirmative. As regards the second question, the Court is asked to say what is the law which should govern the fixing of the upstream limits of the Commission's jurisdiction. This law is to be found in Article 331 of the Treaty of Versailles, from the terms of which the Court infers that the jurisdiction of the Commission extends to the points at which the Warthe (Warta) and the Netze (Noteć) cease to be either naturally navigable, or navigable by means of lateral channels or canals which duplicate or improve naturally navigable sections or connect two naturally navigable sections of the same river.

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*Dissenting opinions*

The Court's judgment was adopted by nine votes to three. MM. de Bustamante and Pessôa, judges, and Count Rostworowski, judge *ad hoc*, declared that they were unable to concur in the judgment of the Court and availed themselves of the right conferred on them by Article 62 of the Rules of Court to attach to the judgment a statement of their dissent. They did not, however, use their right to append thereto their separate opinions. M. Huber, Vice-President, while agreeing with the judgment, made certain reservations concerning the reasons which led the Court to exclude all application of the Barcelona Convention and attached to the judgment his observations on this subject.

*Observations by M. Huber*

M. Huber considers that the reasons given by the Court for excluding all application of the Statute annexed to the so-called Barcelona Convention are not necessarily pertinent as regards the application of the Statute within the precise and restricted limits fixed by Article 338 of the Treaty of Versailles. It is difficult to admit that the carrying out of Article 338, which lays down imperatively the supersession of the "régime set up in Articles 332 to 337 . . . by one to be laid down in a general convention", can depend on the ratification of that convention as such by States which have already ratified the Treaty of Versailles.

M. Huber is of the opinion that the supersession of the régime contained in Articles 332 to 337 by that established by the General Convention is provided for only in regard to such Articles. The applicability of the Barcelona Convention as an independent convention is not affected by this consideration. The limits of internationalization as far as Chapter III is concerned, and consequently the limits of the jurisdiction of the International Commission of the Oder, therefore remain fixed, as the Court has said, by Article 331.

## 37. GRECO-BULGARIAN "COMMUNITIES"

### Advisory Opinion of 31 July 1930 (Series B, No. 17)

**Seventh Annual Report of the Permanent Court of International Justice (15 June 1930—15 June 1931), Series E, No. 7, pp. 245–254**

*Interpretation of the Convention between Greece and Bulgaria respecting Reciprocal Emigration, dated November 27th, 1919: the communities, their rights, their dissolution; the powers of the Mixed Commission*

Following upon the entry into force of the Greco-Bulgarian Convention respecting Reciprocal Emigration on August 9th, 1920, and in pursuance of a Resolution of the Council of the League of Nations, dated September 20th, 1920, the Mixed Emigration Commission, which was provided for in Articles 8 and 9 of the Convention, assembled at Geneva on December 18th, 1920. One of its very first tasks was to study the interpretation of the Emigration Convention, and it was not until it had adopted, on March 4th, 1922, at its ninety-sixth meeting, a set of "Rules", which were officially communicated to the governments concerned, that it was able to take in hand the work relating to the practical application of the Convention.

During the preliminary stages and in the first few years of its work, the Commission was led to adopt, more or less incidentally, a number of decisions affecting the interpretation of the Convention with respect to the position of the "communities". The Commission further put questions to the representatives of the governments concerned on various points affecting the interpretation of certain articles of the Convention. The Legal Section of the Secretariat of the League of Nations was asked to give its opinion, and negotiations were engaged: but it was impossible to reach a solution acceptable to both Parties. At this point, the President of the Mixed Commission suggested referring the matter to the Court. A long series of discussions in the Mixed Commission followed; finally, at the beginning of December 1929, they culminated in the sending by the two Governments to the President of written declarations whereby they mutually consented, in principle, to a procedure consisting in obtaining an advisory opinion from the Court; this consent, however, was given on both sides subject to an express reservation with regard to the final wording of the questions to be submitted to the Court. In pursuance of a formal decision of the Commission, its President prepared and submitted to his colleagues a draft list of questions. As this text was not accepted by the representatives of the two Governments concerned, it was agreed that the latter might send to the Commission any additions which they wished to make to it. Thus, the questionnaire of the Mixed Commission came to be successively supplemented by the Bulgarian Government's questionnaire and by that of the Greek Government.

*Request for an advisory opinion*

On December 19th, 1929, the President of the Mixed Commission requested the Secretary-General of the League of Nations to address to the Council a Request for the obtaining of an advisory opinion. The Request for the opinion was made in virtue of a Resolution of the Council, dated January 16th, 1930, to which were appended the three questionnaires, the origin of which has just been described.

*Notifications, written statements and hearings*

According to the customary procedure, the Request for an advisory opinion was notified to the Members of the League and to the States entitled to appear before the Court. Furthermore, the Registrar sent to the Bulgarian and Greek Governments, which were considered as likely, in accordance with Article 73, No. 1, second paragraph, of the Rules of Court, to be able to furnish information on the

question, a special and direct communication to the effect that the Court was prepared to receive from them written statements and, if necessary, to hear oral statements made on their behalf.

Written statements were filed by the Governments in question within the time-limits, which had been fixed and subsequently extended by the President, and the question was placed on the agenda of the Eighteenth (ordinary) Session of the Court, which began on June 16th and terminated on August 26th, 1930. Hearings took place on June 19th, 20th, 21st, 23rd, 24th, 26th, 27th and 30th to receive information furnished verbally on behalf of the two Governments. At the close of the hearings the Court further accepted, in virtue of a special decision, short written declarations addressed to it by the Agents of the two Governments. Finally, on June 30th, 1930, the Court requested the said Agents and the President of the Mixed Commission to reply to certain questions; these replies were furnished at a hearing held for that purpose on July 1st.

*Composition of the Court*

For this case, the following judges composed the Court:

MM. Anzilotti, *President*; Huber, *Former President*; Loder, Nyholm, de Bustamante, Altamira, Oda, Pessôa, Fromageot, Sir Cecil Hurst, *Judges,* M. Yovanovitch, *Deputy-Judge*.

MM. Caloyanni and Papazoff, appointed as judges *ad hoc* by the Greek and Bulgarian Governments respectively, also sat on the Court in this case.

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*The Court's opinion (analysis)*

The opinion of the Court, unanimously adopted, was delivered on July 31st, 1930.

After an introductory section giving the history of the question and reproducing the submissions of the interested Governments as an authoritative summary of the opposing contentions, the Court recalls the general object of the Emigration Convention and states the principles which, in the opinion of the Court, should govern its interpretation.

In this connection, the Court observes that the Convention is related to the general body of measures designed to secure peace by means of the protection of minorities, the particular aim of the Convention being to eliminate or reduce the centres of irredentist agitation by the reciprocal and voluntary emigration of the minorities in the two countries. With the same idea and in order to facilitate or stabilize emigration, the Convention seeks to save the interested parties from the material losses normally involved by their emigration whether in the future or in the past. The benefit of the clauses designed to protect private property is only extended to individuals and not to associations of persons. Nevertheless, bearing in mind the advantages which individuals in the East derive from uniting in "communities", the Convention allows them, when emigrating, to take away with them their movable property and to receive the value of the immovable property of communities dissolved as a result of their emigration.

The Court next passes to the question submitted to it on behalf of the Governments concerned, or on behalf of the Mixed Commission, examines them and replies to each of them in turn.

*I.–Questions drawn up by the Mixed Commission*

(1) *What is the criterion to be applied to determine what is a community within the meaning of the Convention,* inter alia*, under Article 6, paragraph 2?*

The criterion for determining what is a community within the meaning of the articles of the Convention, *inter alia*, of Article 6, paragraph 2, is the existence of a group of persons living in a given country or locality having a race, religion, language and traditions of their own, and united by this identity of race, religion, language and traditions in a sentiment of solidarity with a view to preserving their traditions, maintaining their form of worship, ensuring the instruction and up-bringing of their children in accordance with the spirit and traditions of their race and mutually assisting each other.

From the standpoint of the Convention the question whether, according to local law, a community is or is not recognized as a juridical person does not require consideration; in point of fact, communities can possess property; churches, convents, schools, hospitals or foundations, existing as separate entities, are assimilated to communities on the emigration of the persons who are members or beneficiaries thereof.

These replies are based upon the following reason: in the absence of special provisions to the contrary—and in this case no such provisions exist—the conception of community held in view in the Convention can only be the conception which is traditional in the East. Furthermore, and in conformity with this opinion, the existence of communities, as also that of property belonging to them, are questions of fact not dependent of any regulation resulting from the local law.

(2) *What conditions must be satisfied in order to cause the Mixed Commission provided for in the Convention to dissolve a community such as is meant by the Convention?*

The Mixed Commission provided for in the Convention is not called upon itself to dissolve communities. Within the meaning of the Convention, the dissolution of a community is a fact which must be verified by the Commission. It must result from the exercise of the right of emigration by the members of such community, and this emigration must involve the disappearance of the community or render it unable to carry out its mission or to fulfil its object.

The powers conferred by the Convention upon the Mixed Commission only relate to the measures to be adopted after the dissolution of a community has taken place. The Commission merely has to verify the occurrence of this dissolution in order then to carry out the measures prescribed in this event by the Convention. This verification consists in satisfying itself with regard to a number of questions of pure fact.

(3) *What is to be understood by such dissolution? What relations are to be dissolved? What is the period by reference to which the existence of such relations is to be established?*

By the dissolution of a community is to be understood the breaking up of the community and the cessation of its existence in all respects.

The "relations" dissolved are those which united the members of the community. Dissolution terminates the mutual relations of individuals as members of the community as well as their relations with the community itself, and the relations between the community and third parties. The existence of these relations should in principle be determined by reference to the moment of time immediately preceding the dissolution of the community.

(4) *What attitude is to be observed by the Mixed Commission in cases where it does not succeed in discovering the* ayants droit *(persons entitled) referred to in Article 10, paragraph 2, of the Convention?*

The idea of the Convention is not to admit the dissolution of a community and the liquidation of its property except where individuals, members of such community, express their desire to profit by the terms of the Convention; it is therefore difficult to see how the *ayants droit* (persons entitled) will not be known at the time of liquidation.

Should there be some who subsequently cannot be traced, notwithstanding the efforts of the Commission, the latter must inform the Governments concerned, with whom it will rest to take the necessary steps, in accordance with their respective laws, to ensure that the proceeds of liquidation are duly paid to the persons entitled to them under the Convention.

The Mixed Commission must not intervene to satisfy itself that a community is dissolved except on the application of individuals, made personally or on their behalf, establishing their right to avail themselves of the Convention; and when the property of a dissolved community is liquidated, the only *ayants droit* (persons entitled) are the emigrant members of that community who claim liquidation on the ground of dissolution.

*II.–Questions drawn up by the Bulgarian Government*

(1) *Seeing that the Convention deals with voluntary emigration and that a community, being a legal fiction, only exists in virtue of the law of the country in question, whose frontiers it cannot transcend, can it be admitted that a community may emigrate in virtue of the Convention, or does it not logically follow that, where the Convention speaks of the property of communities, this must be understood to mean any private property rights which emigrants may eventually possess in respect of such property?*

Private patrimonial rights which emigrants may have in respect of the property of the community form part of the "pecuniary rights" of emigrants, and these rights are expressly mentioned and protected by Article 2, paragraph 2, of the Convention; they are not to be confused with the property belonging to the community and dealt with in Article 6, paragraph 2, and in Article 7.

The various statements upon which this question is based are incorrect and irrelevant.

(2) *The Mixed Commission being an executive body entrusted with the duty of facilitating emigration and liquidating existing rights of emigrants, and not with the creation of fresh rights, what body would be competent to order the eventual dissolution of a community, and what laws would such body be required to observe in such a case?*

As the dissolution of a community is a fact, it has not to be pronounced by any competent body and, from the point of view of the Convention, there is no need to ascertain what particular law is applicable.

The assumption that the Mixed Commission is an executive organ entrusted with the duty of liquidating existing rights is not entirely correct.

(3) *Whichever views be adopted, i.e., whether the case is considered to be one of liquidation merely of emigrants' property rights over the property of the communities of one of liquidation in general of the property of the communities, must it not on either hypothesis be recognized that the liquidation must extend to the private property of the moral person which is constituted by a commune, a commune being the typical example of a community?*

The liquidation by the Mixed Commission of the property of a community within the meaning of Article 6, paragraph 2, and of Article 7, does not extend to the private property of the commune. Indeed, the conception of community, within the meaning of the Convention, is foreign to the unit of the internal organization of the country represented by the administrative commune, which is a territorial district.

*III.–Questions drawn up by the Greek Government*

(1) *What is, in view of their origin and development, the nature of the communities referred to in Article 6, paragraph 2, and Article 7 of the Convention of Neuilly? Do they enjoy, in law or in fact, a*

*personality which confers upon them some of the attributes of a moral person and in particular the right to possess a patrimony separate from that of their members?*

The reply to this question has been given in paragraphs 1 and 2 of the reply to the first question of the Mixed Commission.

(2) *Do the communities possess the characteristic of being connected as minorities and racial groups with the country in which the majority of the population is of the same race? What are eventually the consequences, as regards the allocation of their property, where their members, as contemplated by Article 10 of the Convention, are dispersed or absent (in the legal sense of the term)?*

The communities, within the meaning of the Convention, are of a character exclusively minority and racial. The State to which they are racially akin does not from this circumstance derive any right to the movable property or to the proceeds of the liquidation of the immovable property of a dissolved community whose members are dispersed or absent.

Whatever reasons may be advanced in support of the allocation, under the conditions contemplated by the question, to the State to which a community is racially akin, of the value of the property of a dissolved community, these reasons are foreign to the aim of the Convention.

(3) *On what conditions should the dissolution of the communities be made to depend?*

The reply has been given in connection with the second question drawn up by the Mixed Commission.

(4) *Does the Convention of Neuilly deal with communities dissolved before its entry into force? Should the same rules be applied as regards the dissolution of these communities and the allocation of the proceeds of the liquidation of their property as apply in the case of the communities referred to in Article 7 of the Convention?*

The Convention only applies to communities dissolved before its entry into force on the ground of emigration from the point of view of liquidation of their property. A dissolved community cannot get the benefit of Article 12, because it cannot satisfy the conditions of that article. Former emigrants are given the possibility of participating in the division of the proceeds of the liquidation of the property belonging to the community of which they were members before its dissolution.

The object of Article 12 is, indeed, to allow certain persons to have the benefit of the Convention to whom Articles 1 to 11 are not applicable. While it would be contrary to all sound rules of interpretation to change the system of these articles by extending their application to persons not contemplated by them, it seems, on the other hand, to be in harmony with the aim and spirit of this article to give to persons who have already emigrated in respect of "property left by them" the same economic advantages as are secured by the Convention to future emigrants.

(5) *If the application of the Convention of Neuilly is at variance with a provision of internal law in force in the territory of one of the two signatory Powers, which of the conflicting provisions should be preferred—that of the law or that of the Convention?*

If the proper application of the Convention should be in conflict with some local law, the latter would not prevail as against the Convention.

The generally accepted principle of international law, according to which, in the relations between the Powers who are contracting Parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty, would prevent the adoption of any other view. The same applies to certain special provisions of the Emigration Convention.

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*Effects of the advisory opinion*

At the first meeting of its Sixtieth Session (September 8th, 1930), the Council of the League of Nations took note of the opinion drawn up by the Court and instructed the Secretary-General to communicate it officially to the President of the Mixed Greco-Bulgarian Emigration Commission.

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## Eight Annual Report of the Permanent Court of International Justice (15 June 1931—15 June 1932), Series E, No. 8, pp. 213–214

Effects of advisory opinion No. 17 of July 31st, 1930

In the Seventh Annual Report, it was mentioned that on September 8th, 1930, the Council of the League of Nations had instructed the Secretary-General to communicate the Court's advisory opinion officially to the President of the Greco-Bulgarian Mixed Emigration Commission.

The following passage regarding the steps taken by the Commission to give effect to the Court's advisory opinion appears in a report (of December 1931) on the work achieved by the Commission signed by the two neutral members of that body, and addressed to the two Parties, signatories of the Convention of Neuilly, and to the Secretary-General of the League of Nations.

"The Permanent Court of International Justice delivered its advisory opinion on the subject (see Series B., No. 17) in July 1930.

The members, delegates of the two Governments, declared that they recognized the soundness of the Permanent Court's opinion; but when it came to drafting a decision enabling the Commission to regulate the application of the principles laid down in the opinion, it was apparent that the delegates of the two Governments held different views as to the purport of its principal passages.

At this period, the other labours of the Mixed Commission were drawing to a close. Plans for the final winding-up of the Commission's work had matured, and the representatives of both Governments showed a desire to bring its labours to an end as quickly as possible.

In these circumstances, the neutral members suggested that the two Parties should leave it to them to find a practical solution of the question of the communities, taking the Court's opinion as a basis, and adopting the same generous methods as had been employed by the Commission in regulating the liquidation of private property. This course was finally adopted by the Commission in a decision dated March 4th, 1931.

In July of the following year, the Commission, in pursuance of the above decision, sanctioned the proposal of the neutral members, to the effect that the pecuniary consequences of liquidating the communities' property should be shown in the form of an entry, in favour of the creditor Government, representing the balance of the values of the properties liquidated.

Finally, on August 19th, 1931, the neutral members presented to the Commission the draft of a general scheme for winding-up the work, together with the positive results of the studies which had been carried on for more than ten months in the light of the Permanent Court's advisory opinion.

The scheme submitted by the neutral members for the definitive settlement of the communities problem was prefaced by certain considerations, which may be epitomized as follows:

The Commission has been actuated throughout its work by the pacificatory aims of the Convention of Neuilly, and has throughout endeavoured to regard its mission in a large and liberal spirit.

The neutral members felt that the same spirit should likewise govern the settlement of a question so complex and important as that of the communities, if the Commission desired to effect a durable work of pacification, and to eliminate from the field of international affairs a delicate problem, fraught with so great possibilities of friction between the two countries.

The neutral members have therefore adopted the principle that, in dealing with the problem of the communities, the Commission should regard the issues as questions of fact, and should take a11 the circumstances into account. In particular, the Commission should place a wide construction on the term 'communities', as used in the Convention, and give consideration to all the existing facts.

Taking this principle as a basis, the neutral members felt that the Commission was justified, having regard to all the facts and circumstances, in placing on record the dissolution of the communities whose liquidation had been applied for, either directly or through the representatives of the two Parties. The bodies affected would be about 67 Greek communities in Bulgaria, and about 300 Bulgarian communities in Greece.

The liquidation of the property of those communities which possessed it, should, in the opinion of the neutral members, be the factor to be taken into account by the Mixed Commission when proceeding to the general settlement which, in principle, it had decided in March 1931 to effect.

Founding itself on the foregoing considerations, the Commission adopted a decision to the effect that the liquidation of properties of communities in the two countries, under the Convention of Neuilly, should appear in the form of an entry of about one million dollars, to the credit of the Greek Government, this amount representing the balance of the values of properties belonging to these communities.

By adopting this solution of a contractual nature, the Mixed Commission has definitively settled a grave and complicated dispute between the two countries."

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## 38. FREE CITY OF DANZIG AND INTERNATIONAL LABOUR ORGANIZATION

### Advisory Opinion of 26 August 1930 (Series B, No. 18)

**Seventh Annual Report of the Permanent Court of International Justice (15 June 1930—15 June 1931), Series E, No. 7, pp. 255–260**

*Interpretation of the question raised—Compatibility of the special legal situation of the Free City with membership of the International Labour Organization: conduct by Poland of the foreign affairs of the Free City, nature of the Organization's activities—Admissibility of the Free City of Danzig in virtue of an agreement between Poland and the Free City approved by the League of Nations*

*Outline of the case*

In the year 1929, the Senate of the Free City of Danzig would seem to have taken steps with a view to the Free City's admission as a Member of the International Labour Organization. In January 1930, the Polish member of the Governing Body of the International Labour Office asked the Director of the Office to place a request for the Free City in this sense on the agenda for the forty-seventh session of the Governing Body. In a document dated March 15th, 1930, which was forwarded by the Polish member to the Director of the Office, the Senate of the Free City explained the legal considerations on which the request was based. In communicating these requests, the Polish member, however, reserved the right to submit to the Governing Body a detailed statement of the question at issue or to give his opinion on the contentions set forth by the Free City.

The request of Danzig was duly placed on the agenda for the forty-seventh session of the Governing Body, and the matter came up for discussion there on February 3rd, 1930. On that occasion it was understood that the International Labour Office would submit a legal memorandum on the question to its Governing Body for consideration at its forty-eighth session. The memorandum, which was communicated to the Court together with a letter from the German member of the Governing Body, concluded in favour of referring to the Court—which was alone capable of solving the intricate legal problem involved—the question whether the Free City possessed the capacity to become a member of the International Labour Organization. It added that the adoption of this course would be entirely justifiable in view of the very wide terms of Article 423 of the Treaty of Versailles, and it proposed that the question should be formulated in the following terms:

"Is the special legal status of the Free City of Danzig such as to enable the Free City to become a Member of the International Labour Organization?"

The matter again came before the Governing Body of the International Labour Office at its forty-eighth session, and it decided on April 26th, 1930, to cause the question set forth in the Labour Office memorandum to be submitted to the Court for an advisory opinion.

*Request for an advisory opinion*

The Director of the International Labour Office accordingly wrote to the Secretary-General in this sense. The Council of the League was then duly seized of the question, and on May 15th, 1930, it adopted a resolution requesting the Court to give an advisory opinion on the question, which it formulated in the same terms as had been proposed in the above-quoted report of the International Labour Office.

*Notifications, written statements, and hearings*

In accordance with the customary procedure, notice of the Request for an advisory opinion was given to Members of the League of Nations and to the States entitled to appear before the Court. Furthermore, the Registrar sent to the Senate of Danzig, the Polish Government and the International Labour Office, considered as likely, in accordance with Article 73, No. 1, second paragraph, of the Rules of Court, to be able to furnish information on the question, a special and direct communication to the effect that the Court was prepared to receive from them written statements and if necessary to hear oral statements made on their behalf.

Lastly, the Registrar wrote to all the States or Members of the League indicated by the Director of the International Labour Office, as being Members of the International Labour Organization, drawing their attention to the rights conferred on them by Article 73, No. 1, third paragraph, of the Rules of Court.[1]

Within the time-limits fixed and subsequently extended by the President, written statements were duly filed on behalf of the Senate of the Free City, the Polish Government, and the International Labour Office; the question was placed in the list for the Eighteenth (ordinary) Session of the Court, which began on June 16th and terminated on August 26th, 1930. Public sittings were held on August 4th, 5th, 6th and 7th for the purpose of receiving verbal information from the representatives of the Senate of the Free City, the Polish Government and the International Labour Office.

*Composition of the Court*

The Court was composed as follows for the consideration composition of the question:

MM. Anzilotti, *President*; Huber, *Vice-President*; Nyholm, de Bustamante, Altamira, Oda, Fromageot, Sir Cecil Hurst, *Judges*, M. Yovanovitch, *Deputy-Judge*.

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*The Court's opinion (analysis)*

The opinion of the Court was given on August 26th, 1930. The Court first draws attention to two points in connection with the wording of the question submitted to it. In the first place, it is on the special legal status of the Free City of Danzig that stress is laid. It is the effect which that special legal status may have upon the admissibility of the Free City to the International Labour Organization which is the subject of the question. The Court is therefore only asked to take into consideration difficulties arising from circumstances which are peculiar to the status of the Free City.

Secondly, the question is so worded as to ask only whether the Free City can become a Member of the International Labour Organization. The Court, however, considers that the intention is not thereby to limit the question to that of the admissibility of the Free City to the International Labour Organization, but to include the question whether the Free City, if admitted, could participate in the activities of the International Labour Organization and fulfill the duties incumbent upon its Members.

It is not impossible that the intention of the Parties to the Treaty of Versailles—Part XIII of which created the International Labour Organization—was that no State or community should be a Member of the International Labour Organization unless it was also a Member of the League. This question, however, is not one which is connected with the special legal status of Danzig. It has not been dealt

[1] "Should any State or Member referred to in the first paragraph have failed to receive the communication specified above, such State or Member may express a desire to submit a written statement, or to be heard; and the Court will decide."

with in the written statements nor in the oral arguments addressed to the Court, and therefore the Court has not taken it into consideration. The case has been considered solely from the point of view of whether the special legal status of the Free City is compatible with membership of the International Labour Organization; but the fact that the Court has given its answer to the question upon this basis must not be taken as prejudicing in any way its opinion upon the larger question, if at any time that question should be put to it.

In order to ascertain the meaning of the expression "special legal status" of the Free City, the Court then analyses the relevant texts—namely Articles 102 to 104 of the Treaty of Versailles and certain provisions of the Convention concluded on November 9th, 1920, between Poland and the Free City, under the above-mentioned Article 104 of the Treaty of Versailles. It comes to the conclusion that this status comprises two elements: the special relation of the Free City of Danzig to the League of Nations, under whose protection the Free City is placed and which guarantees Danzig's constitution; and the special relation of the Free City to Poland, whose Government is entrusted with the conduct of Danzig's foreign relations.

Neither the protection of the Free City nor the guarantee of its constitution by the League of Nations would prevent Danzig from becoming a Member of the International Labour Organization.

As regards the right for Poland to conduct the foreign relations of Danzig—a right which, so far as it imposes a restriction upon the independence of the Free City, constitutes an essential feature of her political structure—the situation is as follows. It is now admitted that this right cannot be considered as absolute: Danzig is entitled to care for her own interests and to see that nothing is done which is prejudicial to them; but Poland, for her part, is entitled to refuse to take any action which would be prejudicial to her own interests. On the other hand, certain of the activities of the International Labour Organization—e.g. the ratification of a draft convention or the filing of a complaint against another Member State for failure to observe the provisions of a convention—belong to the field of foreign relations; therefore, in all such cases, no steps could be taken by the Free City without the consent of Poland, and such consent could be refused.

Now the Court has not found any provision which absolves a Member of the International Labour Organization from participating in the normal activities of the Organization if it cannot first obtain the consent of some Member of the Organization. Consequently, the Free City of Danzig could not participate in the work of the International Labour Organization without having made some arrangement with Poland ensuring that no objection could be made by the Polish Government to any action which the Free City might undertake as a Member of the Organization. If an agreement of this kind involved any modification of the special legal status of the Free City, it might nevertheless be subject to a veto on the part of the authorities of the League of Nations, under the right of protection which is vested in them; and therefore it might be desirable that it should not be concluded without the concurrence of the Council of the League.

No such agreement exists at the present moment, and the Court feels bound to answer the question upon which it is asked to give an advisory opinion on the basis of the existing situation, i.e. to answer it in the negative.

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*Dissenting opinions*

The advisory opinion was adopted by six votes to four. MM. Anzilotti, President, and Huber, Vice-President, declaring themselves unable to concur in the Court's opinion, delivered separate opinions. M. Loder, former President, attached to the opinion a statement of his dissent.

*Individual opinion by M. Anzilotti*

M. Anzilotti does not concur in the opinion of the Court. He considers that the first question to be decided is whether Part XIII of the Treaty of Versailles allows membership of the International Labour Organization to be acquired by other means than admission to the League of Nations. To this question, M. Anzilotti's answer is definitely in the negative. In his view, the intention of the Parties to the Treaty of Versailles was that membership of the League of Nations and that of Member of the International Labour Organization should coincide, and to prevent a State or political community from becoming a Member of the International Labour Organization without at the same time being a Member of the League of Nations. He observes that there is no way of entering the International Labour Organization other than that indicated by Article 387, paragraph 2, in Part XIII of of the Treaty of Versailles. M. Anzilotti therefore reaches the conclusion that the hypothesis upon which the request for an advisory opinion proceeds cannot be accepted by the Court, because it is in contradiction with the Treaty of Versailles. The Court should, in his opinion, have declared that it could not give the opinion for which it was asked.

M. Anzilotti then considers whether the question put to the Court cannot be interpreted as though, leaving aside the matter of the admission of the Free City into the International Labour Organization, it only related to the compatibility of the features peculiar to the legal status of the Free City with the exercise by the Free City of the rights and the fulfillment by it of the obligations of Members of the International Labour Organization. In his opinion, only by adopting this standpoint could the Court deal with the question submitted to it. According to M. Anzilotti, the fact that the Free City only enjoys a limited freedom in the field of international relations is not in itself incompatible with membership of the International Labour Organization. On the other hand, M. Anzilotti states that the Free City can only be a Member of the International Labour Organization if Poland were to consent to its admission and if the competent organs of the League of Nations were not to make use of their right of veto.

M. Anzilotti first examines the question whether Poland has the right to consent to the admission of the Free City to the International Labour Organization, even if such consent must involve a modification of the special legal status of the Free City as at present in force. In his view, nothing prevents Poland from exercising the rights conferred upon her by the Convention of Paris.

M. Anzilotti then considers what modifications the membership of the International Labour Organization would involve in the Free City's status as it is at present. He indicates that consent validly given by Poland would have the effect of authorizing the Free City to do all that is necessary to fulfil its duties under Part XIII of the Treaty of Versailles, even if that implied a limitation of the rights at present belonging to Poland with regard to the conduct of Danzig's foreign relations. On the other hand, there is nothing to prevent Poland from retaining in relation to the Free City the powers and prerogatives conferred upon her by the stipulations in force.

Lastly, M. Anzilotti refers by way of example or as an instance of application to some of the questions which have been discussed by the interested Parties. With regard to the appointment of Danzig delegates, he considers there is nothing to prevent the Free City from undertaking to submit the appointment of its own delegates for previous approval by the Polish Government. As regards the judicial settlement of disputes, if it be held that the jurisdiction established by Article 423 of the Treaty of Versailles takes precedence of any other jurisdiction provided for by particular agreements between

Members, Poland, by giving her consent to the admission of the Free City, would consent to the substitution of the jurisdiction of the Court for that provided for in Article 103 of the Treaty of Versailles and Article 39 of the Convention of Paris, of course only as regards the disputes to which Article 423 relates. With respect to the ratification of draft conventions prepared by the General Conference, he observes that each Member is free to ratify or not; it is also certain that the reason why a convention is not ratified has no juridical importance.

Subject to the reservations and with the restrictions resulting from the foregoing M. Anzilotti arrives to the conclusion that the special legal status of the Free City of Danzig is such as to enable the Free City to be a Member of the International Labour Organization.

*Individual opinion by M. Huber*

According to M. Huber, the reply to be given to the question submitted to the Court depends on the manner in which that question is interpreted, and in particular on the meaning to be given to the words "enable" and "special legal status". The answer will be in the affirmative if it is a question whether the special legal status of the Free City of Danzig, as arising out of the Treaty of Versailles, makes it possible for the Free City to become a Member of the International Labour Organization; on the other hand, it would be in the negative if the question related to a right for Danzig, without Poland's consent, to obtain admission to, and thereby to take part in the work of, the Organization. According to M. Huber, it is for the Court to consider the different situations which may arise within the legal framework established by the Treaty of Versailles.

M. Huber observes that any of three parties concerned by the Treaty of Versailles, namely the Free City, the League of Nations and Poland, may be holders of a right and must be regarded as entitled to waive that right, unless such waiver should affect the system itself with a view to which the right was created. He further notes that Part XII does not lay down that only States possessed of complete sovereignty in foreign relations and as regards domestic legislation can be Members of the Organization, and that therefore it is not possible *prima facie* to exclude the Free City from the International Labour Organization owing to its special status. Finally, he observes that the Covenant of the League of Nations and Part XIII do not merely belong to the same Treaty, but are also organically connected. As, therefore, the Free City lies entirely within the framework of the League of Nations, its admission to the International Labour Organization and its adhesion to conventions emanating therefrom cannot, in principle, be contrary either to the interests of the League of Nations or to those of a State Member of the League.

On this basis, M. Huber then states that the fact that the adhesion of the Free City necessarily depends on the intervention of Poland, and that that State may possibly oppose it, does not exclude the possibility of the Free City's being a Member of the International Labour Organization. According to M. Huber, the difficulty of the problem submitted to the Court lies in the incompatibility which there may be between the special legal status of the Free City and the rights and obligations which would arise for it from its position as Member of the Organization. In this respect, it is important to ascertain (1) if and to what extent participation in the International Labour Organization comes within the field of foreign relations and therefore of the rights of Poland; and (2) if and to what extent the intervention of Poland, by virtue of this right, in the relations between the Free City and the Labour Organization would be contrary to the provisions of Part XIII. In so far as there would be incompatibility, the admission of the Free City would depend on Poland's consent. But if, as he believes, this consent is not contrary to the special status, that status cannot be regarded as being such as not to enable the Free City to become a Member of the International Labour Organization. On the other hand, if the consent of Poland was granted through the abandonment of her rights under Article 104, paragraph 6, of the

Treaty of Versailles the Free City would be in the same position as Members who conduct their foreign relations in entire independence.

M. Huber then turns to the principal points in regard to which an incompatibility might exist. Firstly, he notes that the appointment of the Danzig delegates might be submitted for approval to the Polish Government and would be forwarded by it; but once it had been so forwarded, the independent situation of the delegates, under Article 390, would be entirely in conformity with the system of the International Labour Organization. Secondly, the act of ratification of conventions drawn up by the Conference involves an act of foreign policy and consequently belongs to the domain in which Poland has the right to act for and on behalf of the Free City. Thirdly, as regards the procedure by enquiry and judicial procedure mentioned in Articles 411 and following M. Huber makes a distinction between disputes which might arise between Poland and the Free City, on the one hand, and between the Free City and other Members of the Organization, on the other. For the former, he considers that the conflict between the jurisdiction referred to in Article 103 and that provided for by Part XIII of the Treaty of Versailles must and can be given a legal solution based on the relative values of the conflicting clauses of this same Treaty. For the latter, even if the filing of a complaint or the institution of proceedings against a State falls within the sphere of foreign relations, he believes that nothing prevents the Free City from coming to an agreement with Poland as to the conditions in which it would make use of that right; this would permit Poland not to refuse her consent to the admission, on that ground. Fourthly, M. Huber observes that the question of economic measures does not seem capable of giving rise to difficulties, unless it be on account of the customs union between Poland and the Free City, which in any event would not raise any obstacle as far as the Labour Organization is concerned.

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*Effects of the advisory opinion*

The Council of the League of Nations formally took cognizance of the Court's opinion at the second meeting of their Sixtieth Session (September 9th, 1930), and instructed the Secretary-General to transmit it officially to the Director of the International Labour Office for communication to the Governing Body of that Office. The Governing Body took cognizance of the Court's opinion at their fiftieth session, which was held at Brussels, October 7th to 12th, 1930; they instructed the Director of the International Labour Office to transmit it to the Free City of Danzig, through the intermediary of the Polish Government, and they expressed a hope that further endeavours to find a solution would prove successful.

## 39. FREE ZONES OF UPPER SAVOY AND THE DISTRICT OF GEX (SECOND PHASE)

### Order of 6 December 1930 (Series A, No. 24)

**Seventh Annual Report of the Permanent Court of International Justice (15 June 1930—15 June 1931), Series E, No. 7, pp. 233–240**

*Interpretation of Article 435 of the Treaty of Versailles: the Order of August 19th, 1929—Respect for the treaty rights of Switzerland; respect for the sovereignty of France—Mission of the Court in virtue of the Special Agreement; interpretation of the Special Agreement—Fixing of a further time-limit, after the expiry of which the final judgment will be rendered*

*The first phase of the case*

The Special Agreement of October 30th, 1924, by which the Court had been seized of the case of the Free Zones of Upper Savoy and the District of Gex, requested the Court to say whether as between Switzerland and France, Article 435, paragraph 2, of the Treaty signed at Versailles on June 28th, 1919, had abrogated or was intended to abrogate certain provisions of the treaties of 1815 and 1816 relating to the economic and customs systems of the free zones, having regard to all facts anterior to the Treaty of Versailles (such as the establishment of the Federal Customs in 1849) considered relevant by the Court.

By the terms of letters exchanged with each other and notified at the same time as the Special Agreement, the Parties authorized the Court, after concluding its deliberation on this question, to communicate to them unofficially and in each other's presence the results of its deliberation and requested it to grant them a further period to settle between themselves, under such conditions as they might consider expedient, the new régime to be applied in those districts. Lastly, failing the conclusion and ratification of a convention between the Parties within the time specified, the Court was requested to give its decision on the interpretation of Article 435, paragraph 2, of the Treaty of Versailles, and at the same time, having regard to present conditions, to settle all the questions involved by the execution of that paragraph.

In an Order dated August 19th, 1929, the Court had brought the first of these two phases to an end by fixing May 1st, 1930, as the date of the expiration of the time-limit granted with a view to enabling the Parties to agree. In this Order the Court pointed out that its Statute would not allow it to communicate unofficially to the Parties the result of its deliberation on a question submitted to it for decision; at the same time, the Court considered that it would be useless to fix a time-limit without indicating at the same time the solution of the question of interpretation which had hitherto rendered an agreement impossible between the Parties, and it therefore declared, in the recital clauses of its Order, that Article 435 of the Treaty of Versailles had not abolished the former provisions and was not intended necessarily to lead to their abrogation.

In a letter dated March 28th, 1930, the Swiss Federal Political Department informed the Court that the negotiations entered into in conformity with the Order of August 19th, 1929, had not led to the discovery of a basis for agreement, so that it appeared materially impossible for a convention to be concluded and ratified by the Parties before May 1st, 1930. The Federal Political Department's letter accordingly requested the Court to proceed to apply Article 4 of the Special Agreement. That article lays down that should the Court, owing to the failure of the Parties to agree, be called upon itself to settle all the questions involved by the execution of Article 435, paragraph 2, of the Treaty of Versailles, it would grant the Parties reasonable times for the production of all documents, proposals and observa-

tions which they might see fit to submit to the Court for the purposes of this settlement and in reply to those submitted by the other Parties.

Similarly, the Agent of the French Government informed the Court on April 29th, 1930, that it had not been possible to reach an agreement between the Parties.

In these circumstances, and after ascertaining the wishes of the Parties in regard to the length of the time-limits to be fixed, the President of the Court decided by an Order dated May 3rd, 1930, to allow the Governments concerned a first time-limit expiring on July 31st, 1930, and a second time-limit (for the replies to the documents, proposals and observations submitted during the first time-limit) expiring on September 30th, 1930.

The documents of the written proceedings were duly deposited within the time-limits thus laid down, and the Court was convoked in extraordinary session for October 22nd, 1930.

*Composition of the Court*

The Court, on this occasion, was composed as follows:

MM. Anzilotti, *President*; Loder, Nyholm, Altamira, Oda, Huber, Sir Cecil Hurst, Mr. Kellogg, *Judges*, MM. Yovanovitch, Beichmann, Negulesco, *Deputy-Judges*.

M. Dreyfus, who was appointed judge *ad hoc* by the French Government and who had already sat in the first phase, also sat on the Court for the purposes of this case.

The composition of the Court was not the same as in the first phase. At the first hearing, on October 23rd, before calling on the Agents of the Parties, the President asked them if they had any observations or declarations to make in regard to this point[2]. They declared that they agreed to the continuation of the proceedings, but the French Agent added that in the opinion of his Government the solution of the question which was now to be argued was not dependent on the solution given in regard to the question argued in the first phase of the case; the Agent of the Swiss Government, on the contrary, declared that in the opinion of his Government the first and second phases of the case were interdependent, and that the question argued during the first phase of the proceedings appeared to it to have been decided.

*Hearings*

The representatives of the Parties made their oral statements at the hearings on October 23rd, 24th, 25th, 27th, 28th, 29th and 31st, and on November 1st, 3rd and 4th.

On the latter date the President, according to custom, declared the hearing closed, subject to the right of the Court to ask the Agents for any supplementary explanations which it might subsequently think necessary.

[2] The statement made by the President on October 23rd, 1930, contained the following passage: "To comply with the provisions of Article 13, paragraph 3, of the Statute, the composition of the Court should, for the present session, have been the same as in 1929, when the first stage of the case had been taken. Circumstances had however rendered this impossible. Three members of the Court who had sat in the first stage of the case being unable at the present time to attend, the number of judges who had taken part in the session in 1929, already reduced by the resignation of Mr. Hughes, had fallen below the quorum required by Article 25 of the Statute in order to constitute the Court. Accordingly, I have been obliged, for the purposes of the present case, to reconstitute the Court in accordance with the principles of Article 25 of the Statute, that is to say, to summon all the regular judges available and the number of deputy-judges, in the order of the list, whose presence was necessary to make up the number of eleven laid down by the Statute."

After having deliberated, the Court availed itself of this right and on November 20th asked to be informed as to the manner in which the Parties understood one of the provisions (paragraph 2 of Article 2) of the Special Agreement in virtue of which the Court had been seized of the case.

The explanations of the representatives of the Parties on this point were given at a hearing on November 24th, after which the Court continued to deliberate.

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*Order of Court (analysis)*

On December 6th, 1930, the Court made an Order.

This Order begins by stating the mission of the Court according to the terms of the Special Agreement: namely to declare by a single judgment, first, whether Article 435 of the Treaty of Versailles abrogated or was intended to abrogate the former provisions, and secondly to settle, having regard to present conditions, all the questions involved by the execution of that article.

In regard to the first point, the recital clauses of the Order of 1929 showed that the deliberation of the Court had led to a negative conclusion; that conclusion, based on the interpretation of Article 435 and on the existence of a Swiss right to the free zones in virtue of the former provisions, has now been confirmed by the Court, as at present composed, and must be regarded as established for the purposes of the continuation of the proceedings; accordingly it must serve as a basis for the settlement contemplated as a second step by the Special Agreement.

The above conclusion is supported by the following reasons: The Special Agreement does not give the Court power—even assuming that such power were not incompatible with the Statute—to disregard rights and only to take into account considerations of pure expediency; further, it is hardly conceivable that a settlement made by the Court should disregard or conflict with the interpretation of a text as given by the Court itself; lastly, it is asked, what would the Parties have gained by being given a ruling on a point of law prior to the negotiations if, in the event of the failure of the negotiations, the Court was free to give its judgment on a basis other than that which it had itself indicated to the Parties?

Moreover, the Special Agreement and the history of the negotiations between the Parties show that the real difference of opinion which had prevented an agreement between the Parties related to the question whether the régime of the zones might be abolished without the consent of Switzerland: in other words, whether Switzerland has a right to the free zones. It was, in reality, that difference of opinion which was submitted to the Court, and it is from this standpoint that the Special Agreement must be construed. Switzerland might, if she had chosen, have renounced that right, in the course of the negotiations with France, by accepting an agreement abolishing the free zones; but it in no way follows that the Court enjoys freedom to abolish the zones: such a freedom would be contrary to the proper functions of the Court and could in any case only be enjoyed by it if it resulted from an explicit provision; but no such provision is to be found in the Special Agreement.

But, though the settlement which the Special Agreement required the Court to prescribe must respect the rights of Switzerland over the zones, it must also respect the sovereignty of France over these territories; and this sovereignty, except in so far as it is limited by the former treaties, is complete and unimpaired. It follows from this principle that France is entitled to have a police cordon at the political frontier of the zones and to collect duties and taxes at this frontier, analogous to those which may be imposed on the like articles produced or manufactured in France, provided always that there is no abuse of that right; such abuse cannot, however, be presumed by the Court. It follows also from this principle that the Court's judgment could not, without the consent of the French Government, modify

the territorial delimitation of the zones or the powers of the French administration in these territories, as was proposed in certain respects by the draft settlement submitted by the Swiss Government.

In view of the foregoing considerations, it is practically in the domain of the terms of the exchange of goods between the regions concerned, and in that of the importation into Switzerland, free of customs duty, of the zones' products that a settlement should be sought, which would bring the zones régime into closer harmony with present conditions, without disregarding the rights of the two Parties.

But Article 2, paragraph 2, of the Special Agreement lays down clearly that the importation of goods free of duty, if provided for in the judgment, can only be regulated with the consent of the two Parties. This text does not state definitely at what moment the consent is to be given: whether previously or subsequently to the judgment. However, the latter solution could not be entertained, for it would certainly be incompatible with the character of the judgments rendered by the Court and with the binding force attaching to them for it to be possible for either of the Parties to render a judgment inoperative. On the other hand, there seems nothing to prevent the Court from embodying in its judgment an agreement previously concluded between the Parties (judgment by consent).

At the present time no agreement exists, since the Agent of the French Government has not, like the Agent of the Swiss Government, declared that he would accept in advance any provision which the Court might adopt in this respect. In these circumstances, if the Court were now to render its judgment, it would have to confine itself to answering the legal questions relating to the execution of Article 435, a solution which would hardly seem desirable, having regard to the important position occupied by importations free of duty in the Swiss draft. Accordingly, it appears desirable to invite the Parties to come to an agreement on the regulation of importations free of duty or at reduced rates across the Federal customs line.

A resumption of the negotiations appears also desirable from other points of view: thus, the Parties might also consider a settlement covering the whole problem even though departing from strict law; the Court, being a Court of Justice, could not itself contemplate a solution of pure expediency, or disregard rights recognized by itself; but there is nothing to prevent it from offering the Parties a further opportunity of achieving this end.

Nevertheless, the fact of granting further time for negotiations in order to enable an agreement to be reached would not prevent the Court from subsequently giving judgment on the points of law raised if the negotiations should prove fruitless. Indeed, to leave the dispute unsettled owing to the absence of an agreement in regard to importations free of duty would be contrary to the intention of the Parties, who doubtless desire that the case should be settled.

With a view to facilitating an agreement, the Court gives its opinion at once on two questions in regard to which the Parties disagree. The first relates to the meaning of the expression "present conditions" used in the Special Agreement; these conditions, which the Special Agreement directs the Parties to take into account, are those existing at the time of the conclusion of the agreement. An agreement which only took account of conditions existing at a previous period would not be in accordance with the real intention of the Parties. Nevertheless, no account may be taken of changes which have occurred since November 1923 as a result of the transfer of the French customs cordon to the political frontier. The other question relates to the legal character of the Manifesto of the Sardinian Court of Accounts, dated September 9th, 1829, in regard to the zone of Saint-Gingolph; that Manifesto gives effect to an agreement which confers on the zone of Saint-Gingolph the character of a treaty stipulation, which France is bound to respect as she has succeeded Sardinia in the sovereignty over that territory.

In its operative clause the Order grants the Parties a further time-limit expiring on July 31st, 1931, to settle between themselves the matter of importations free of duty, or at reduced rates, across the Federal customs line and also any other points concerning the régime of the free zones. At the expiry

of this period, which may be prolonged by the President of the Court, the latter will deliver a judgment at the request of either Party, and after having, if necessary, afforded the Parties an opportunity of submitting further observations.

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*Dissenting opinions*

The Court's Order is followed by a dissenting opinion signed by MM. Nyholm, Altamira, and Sir Cecil Hurst, judges, by MM. Yovanovitch and Negulesco, deputy-judges, and by M. Eugène Dreyfus, judge *ad hoc*, who, while agreeing with the operative clause of the Order and with the recitals which correspond to that clause, declare that they are unable to concur in the other recitals of the Order, as is set forth by themselves in their dissenting opinion.

Another judge, Mr. Kellogg, has also added observations regarding certain points of the Order with which he is, however, in agreement.

*Joint dissenting opinion of MM. Nyholm, Altamira, and Sir Cecil Hurst, judges, MM. Yovanovitch and Negulesco, deputy-judges and M. Eugène Dreyfus, judge* ad hoc

While supporting the proposal that the Parties should be given a further opportunity of reaching an amicable settlement of the dispute relating to the free zones, the dissenting judges are unable to concur in the statement of the legal situation of the position of the Court embodied in the recitals of the Order.

The point upon which the parties to the present opinion feel unable to agree with the majority is whether, in carrying out its task, the Court is bound under the Special Agreement and irrespective of the merits of the question, to maintain the free zones in being. In the opinion of the majority, the Court, after recognizing the rights of Switzerland in the recitals of the Order of August 19th, 1929, is bound to do so, unless and until Switzerland agrees to their suppression. In the opinion of the dissenting judges, no such limitation is imposed upon the Court.

With reference to paragraph 2 of Article 435 of the Treaty of Versailles, the dissenting judges consider that the task of the Court under Article 2, paragraph 1, of the Special Agreement is to settle every question which France and Switzerland would have had to settle in concluding an agreement on the subject of the status of the territories constituting the free zones. In their view, the reason why France and Switzerland were charged with the duty of coming to this agreement is that the stipulations of the old treaties, so far as they relate to the free zones, are no longer consistent with present conditions. In this regard, the dissenting judges explain that it is the withdrawal from the political frontier of the French and Sardinian customs line which in fact created the free zones. If the signatories of the Treaty of Versailles stated that in their opinion the provisions in the old treaties were no longer consistent with present conditions, they must have meant that what was no longer consistent with present conditions was the withdrawal of the customs line from the political frontier.

The dissenting judges then proceed to determine Switzerland's position and the measure of her rights *vis-à-vis* France and the other signatories of the Treaty of Versailles. Pursuant to the recitals of the Court's Order of August 19th, 1929, Switzerland possessed a right or interest in the zones which could not be taken away without her consent. According to the note of the Federal Council dated May 5th, 1919, annexed to Article 435, she was not disposed to acquiesce in the suppression of the zones. So long as she refused to be a party to any new agreement settling the status of these territories, paragraph 2 of Article 435 of the Treaty of Versailles could not be executed and the zones would remain in existence.

However, the dissenting judges explain that the subsequent negotiations between Switzerland and France led to the conclusion of a draft convention in 1921 by which the Swiss Government agreed to the suppression of the zones. This convention was rejected by the Swiss people and therefore never went into effect, but it is important to observe that the third paragraph of the Preamble of the convention shows that the Parties regarded themselves, when concluding the convention, as concluding the agreement provided for in Article 435, paragraph 2.

The dissenting judges observe that it was after the failure of this convention that France, acting upon the belief that Article 435 of the Treaty of Versailles with its annexes, had abrogated the old treaties, which were the foundation of the Swiss right to the maintenance of the zones and that this right had ceased to exist, moved her customs line to the political frontier, thereby suppressing the zones by a unilateral act. The dissenting judges recall that the conclusion reached by the Court in the recitals of the Order of August 19th, 1929, shows that this act of the French Government was without legal justification and that, in dealing with the dispute, the Court must leave out of account any consequences which have resulted from it.

The dissenting judges observe that it is the settlement of the questions arising in the execution of what should have been an action of the two Parties together, viz. the making of the agreement contemplated in Article 435, that is now entrusted to the Court by the two Powers through the Special Agreement. The fact that the recitals of the Order of 1929 recognized the right of Switzerland to the maintenance of the zones as against singlehanded action by France affords no reason why the same rule must obtain when the Court is fulfilling the task laid upon it on behalf of the Powers jointly.

It is contended that the powers of the Court cannot be so wide as those of the Parties, however, the dissenting judges see no sound reason why the liberty enjoyed by the Court in settling every question involved in the execution of Article 435, paragraph 2, is more restricted than that which the Parties themselves would have enjoyed in determining the effect of "present conditions" upon the stipulations of the treaties of 1815 and 1816. In their opinion, the Court is not prevented from placing the French customs line at the political frontier, if satisfied that this would be the régime most in conformity with present day requirements. They also disagree with the contention that in settling the questions involved in the execution of Article 435, paragraph 2, the Court cannot go beyond the limits which Switzerland herself laid down. In their opinion, Switzerland, by Article 2 of the Special Agreement, gave the Court power to settle every question involved in the execution of Article 435, paragraph 2.

The dissenting judges conclude that it is a mistake to suppose that the advantages which Switzerland has enjoyed under the régime of the zones would not be safeguarded if the Court should ultimately be led to the conclusion that the wisest solution of the problem would be to place the French customs line at the political frontier. What Article 435, paragraph 2, provided for was an agreement between France and Switzerland, "under such conditions as shall be considered suitable by *both* countries". Manifestly it would therefore be the duty of the Court under Article 2 of the Special Agreement to see that the arrangement was so framed as not to prejudice the interests of Switzerland.

*Observations by Mr. Kellogg*

Mr. Kellogg states that he is in agreement with the action taken by the Court and considers that, in view of the unsatisfactory and contradictory provisions of the Special Agreement by which the Parties have submitted this case to the Court, it is perhaps the only course by which the Court could, under its statute, aid the Parties in arriving at a wholly satisfactory solution of their dispute.

Mr. Kellogg observes that the question of the competence of this Court which has been raised by the present case and a direct decision of which the Court has avoided by the making of the present Order, is, from the point of view of the future of this Court and the development of the judicial settle-

ment of international disputes, by far the most important question which has ever been brought before the Permanent Court of International Justice.

He notes that the principal point of divergence between the positions maintained by the two Parties in the present phase of the case was as to the interpretation which should be given to the first paragraph of Article 2 of their Special Agreement, and, in particular, in regard to the relation to, and the effect upon the present proceedings, of the finding of the Court in regard to the legal rights of the Parties as expressed in its Order which followed the first phase of the proceedings. According to Mr. Kellogg, little could be usefully added to the language used in the Order of the Court upon this point. Although it cannot, perhaps, be stated that, upon its face, the meaning of the language used in the first paragraph of Article 2 of the Special Agreement is clear beyond dispute, it cannot be seriously contended that a proper interpretation of this language would require the Court, in one and the same judgment, to determine the legal rights of the Parties and then establish a new customs and economic régime for the territories in question in disregard of such legal rights.

Mr. Kellogg sets out that the holding of the Court as to the effect of the first clause of the sentence forming the first paragraph of this article, inevitably restricts and limits the mission of the Court under the second clause of the sentence composing the first paragraph of Article 2 of the Special Agreement.

He declares that even had there been no such limitation upon the power of the Court as that contained in paragraph 2 of Article 2 of the Special Agreement, the Court would not, under its Statute, which forms the fundamental law governing its jurisdiction, be competent to decide such questions as those presented by the task of setting up a special and complicated customs régime between two sovereign States. Every Special Agreement submitting a case to this Court must be considered to have, as tacitly appended clauses thereto, all the pertinent articles of the Court's Statute and must, in case of doubt as to its meaning, be interpreted in the light of such provisions of the Statute of the Court.

Mr. Kellogg sets out that the Court is a court of justice as that term is known and understood in the jurisprudence of civilized nations. He indicates that, in view of the need this Court was created to fulfil, and of the circumstances surrounding its organization, it is scarcely possible that it was intended that, even with the consent of the Parties, the Court should take jurisdiction of political questions, should exercise the function of drafting treaties between nations or decide questions upon grounds of political and economic expediency.

Mr. Kellogg notes that it may be contended that the language used in Article 36 of the Court's Statute opens the Court to any and all disputes voluntarily submitted to it by the Parties, regardless of the nature of the questions involved. However, Mr. Kellogg finds that when these provisions are viewed in the proper perspective of the frame of the Court's Statute and are construed in conjunction with the provisions of Article 38, it is deemed impossible to avoid the conclusion that this Court is competent to decide only such questions as are susceptible of solution by the application of rules and principles of law.

Mr. Kellogg concludes that the competence of the Court in this case extends only to the determination of the legal rights of the Parties, and that it could not, even with their consent and at their request, settle such political questions as may be involved in the execution of paragraph 2 of Article 435 of the Treaty of Versailles.

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## 40. ACCESS TO GERMAN MINORITY SCHOOLS IN UPPER SILESIA

### Advisory Opinion of 15 May 1931 (Series A/B, No. 40)

**Seventh Annual Report of the Permanent Court of International Justice (15 June 1930—15 June 1931), Series E, No. 7, pp. 261–266**

*German minorities in Polish Upper Silesia—The educational system, admission to Minority schools, declaration concerning the language of children—The Geneva Convention of May 15th, 1922, between Germany and Poland, Articles 69, 74, 131, 132 and 149—Resolutions of the Council of the League of Nations of March 12th and December 8th, 1927, institution by way of exception of language tests—Judgment of the Permanent Court of International Justice of April 26th, 1928, the German Government v. the Polish Government, interpretation of the Convention, retroactive operation—Purpose and effect of the language tests instituted in 1927 by the Council—Conclusive character of the language declarations*

*History of the question*

Under Article 69 of the Convention of May 15th, 1922, between Germany and Poland, concerning Upper Silesia, the German minority in Polish Upper Silesia is granted adequate facilities for ensuring that in the primary schools instruction shall be given in their own language to children belonging to the minority. Under Article 74 of the same Convention, the question whether a person does or does not belong to a minority may not be verified or disputed by the authorities. Article 131 adds that in order to determine the language of a child, account shall only be taken of the verbal or written declaration of the person legally responsible for such child's education. This declaration may not be verified or disputed by the authorities.

In 1926, difficulties arose between the *Deutscher Volksbund* representing the German minority, and the Polish authorities following upon a rush of applications for the admission of children to the German schools for the school year 1926–1927, and as the result of an administrative enquiry held by the Polish authorities into the regularity of these applications and the rejection of a large number of them by those authorities on the ground that they were irregular or that the children did not belong to the German minority.

On February 12th, 1927, the *Deutscher Volksbund* appealed to the Council of the League of Nations on the subject, and the latter, by a Resolution of March 12th, 1927, whilst reserving the question of law—i.e., the question of the interpretation of Articles 74 and 131 of the Convention—instituted for the school year in question a language test designed to ascertain whether the children could usefully receive instruction imparted in German. As a result of further difficulties and a fresh appeal, a similar decision was given by the Council on December 8th, 1927, for the school year 1927–1928.

On April 26th, 1928, the Court, before which proceedings were instituted by an application from the German Government, gave a judgment determining the interpretation of the provisions of the Geneva Convention governing admission to Minority schools. According to this judgment, the declarations mentioned in Article 131 of the Convention must be in accordance with the facts, but they may not be subjected to any form of verification, dispute, pressure or hindrance on the part of the authorities, this prohibition also applying to declarations regarding membership of the minority.

In May, 1928, requests for admission to the German Minority schools were submitted on behalf of 172 children who, at the time when entries for the minority schools were being made for the year 1928–1929, had undergone the language test provided for by the Council's resolutions and had been found not to possess an adequate knowledge of German. These applications, like the preceding ones,

were rejected by the Polish authorities. Once more, in November-December 1929, this time with reference to the school year 1929–1930, the same questions were raised in regard to sixty children who had been excluded as a result of the language tests of 1927–1928.

*The request for an opinion*

In consequence of these events, the *Deutscher Volksbund* once more appealed to the Council of the League of Nations which, by a Resolution taken on January 24th, 1931, decided to submit to the Court for an advisory opinion the following question:

> "Can the children who were excluded from the German Minority schools on the basis of the language tests provided for in the Council's Resolution of March 12th, 1927, be now, by reason of this circumstance, refused access to these schools?"

*Notifications, statements and hearings*

In accordance with the usual procedure, the request for an advisory opinion was communicated to members of the League of Nations and to States entitled to appear before the Court. Furthermore, the Registrar, by means of a special and direct communication, informed the German and Polish Governments, which were regarded as likely, in accordance with the terms of Article 73, No. 1, paragraph 2, of the Rules, to be able to furnish information on the question, that the Court was prepared to receive from them written statements and, if they so desired, to hear oral statements made on their behalf. Both of these Governments availed themselves of this authorization and filed a written statement within a time-limit fixed by the President. A second time-limit was fixed for the optional filing of a second written statement, but only the German Government took advantage of it.

Public sittings were held on April 15th, 16th, 17th, 18th, 20th and 22nd, 1931, at which were heard the oral arguments submitted on behalf of the two Governments and also the replies given by them to questions put by the Court.

*Composition of the Court*

The Court for this case was composed as follows:

MM. Adatci, *President*; Guerrero, *Vice-President*; Kellogg, Baron Rolin-Jaequemyns, Count Rostworowski, MM. Fromageot, Altamira, Anzilotti, Sir Cecil Hurst, MM. Schücking, Negulesco, Jonkheer van Eysinga, *Judges*.

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*The Court's opinion (analysis)*

The Court's opinion was delivered on May 15th, 1931. After indicating the facts leading up to the Council's request for an opinion, the Court first of all determined the character, force and scope of the arrangement adopted on March 15th, 1927, by the unanimous vote of the Members of the Council. It is not disputed that this arrangement, as accepted, was valid and binding for both countries. But the Council declared in its Resolution that it did not intend to modify the Geneva Convention. The system of language tests instituted by the Resolution of March 12th, 1927, was expressly described, with the acquiescence of the two Governments concerned, as an "exceptional" measure, solely intended to meet a temporary situation, namely the existence of a large number of children whose admission to the German school had been applied for but had been refused. The system of tests was restricted (1) to children in respect of whom applications for admission to the German schools for the school year 1926–1927

had been made and who had been excluded by the Polish authorities on the ground of failure on the part of the parents to appear at the administrative enquiry or that they did not belong to the German minority, and (2) to children whose parents had not yet submitted an application and whose cases seemed doubtful. By the Council's Resolution of December 8th, 1927, the system of tests was, within similar limits, also sanctioned for children in respect of whom applications for admission had been made for the school year 1927–1928. The only object of the language tests and its only consequence was to ascertain whether children could usefully attend schools in which literary German was the language of instruction. The Council did not intend to replace the system of declarations provided for by the Convention by another system. Moreover, it cannot be argued that the tests did in fact take the place of the declarations, since the purpose of the declarations was different from that of the tests. The Court holds, therefore, that the Council did not create a special and permanent situation for the children in question; it simply adopted a measure intended to disappear when the interpretation of the Convention was determined by the solution of the questions of law left open: and the solution of these questions formed the subject of the application made to the Court in 1928 and of the judgment given by it on April 26th of that year. To admit that the result of the tests held in 1927 could subsequently be invoked to invalidate a declaration made—say—in 1931 under the Convention, would be to admit the possibility of adducing evidence against such a declaration; but this is prohibited by the Convention. To attach such an effect to the language tests would be tantamount to modifying both the Convention and the Council Resolution itself which expressly disavowed any idea of doing this.

Moreover, in a district where the language which children commonly use to express their thoughts is usually a local dialect, it may happen that some children do not know their "own language" (in the sense of the minority treaties) well enough usefully to receive instruction imparted in that language. But while the language tests were simply intended to ascertain whether a child could profit by instruction imparted in German, the declarations provided for by the Convention have a different purpose, namely to determine both whether a child belongs to the minority and what its "own language" is. These declarations are conclusive and, as a matter of fact, there is nothing to prevent a child who was unable in 1927 to profit by instruction imparted in the language of his minority, from being able to do so some years later.

Though in accordance with the rules of law, the interpretation given by the Court to the terms of the Convention has retrospective effect—in the sense that the terms of the Convention must be held to have always borne the meaning placed upon them by this interpretation—it does not follow that the results of the purely practical measures to which the Council legitimately had recourse in order temporarily to obviate the difficulties resulting from the uncertainty prevailing as to the meaning of the rules to be applied, are necessarily null and void.

These results were operative for the period during which the provisional measures of a practical nature existed; all the more so because those measures were, after all, independent of the interpretation of the Convention. But from the moment when these measures ceased to be applicable—i.e. from the end of the school years 1926–1927 and 1927–1928, and practically speaking from the time when the legal interpretation of the Convention had been determined by the judgment given on April 26th, 1928—they could not be invoked in order to deduce from them consequences incompatible with the provisions of the Convention as duly interpreted.

For these reasons, the Court answers in the negative the question submitted to it for advisory opinion.

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The Court's opinion was adopted by eleven votes to one. Count Rostworowski, judge, declared himself unable to concur in the Court's opinion and attached thereto a statement of his separate opinion.

*Dissenting opinion by Count Rostworowski*

Count Rostworowski first examines the legal significance of the two Resolutions of the Council of March 12th and December 8th, 1927. He states that the character of the arrangement provided for therein as a departure from the terms of the Geneva Convention resulted less from the introduction of an international system of language tests, which could not be said to be excluded by the terms of the Convention, than from the institution of a new decisive criterion for the admission or exclusion of children—a criterion which was to be applied, notwithstanding the terms of Article 131, paragraph 1, which laid down that account was only to be taken of the declarations made by persons legally responsible for the education of children. He holds that this arrangement is an exceptional measure designed to meet a *de facto* situation not covered by the Geneva Convention. He observes that this exceptional system derogating from the ordinary one was, from the outset, even understood to be temporary, but its duration was not strictly defined. According to Count Rostworowski, the effects of that system should continue after the system itself has ceased to operate—subject only to the existence of legal provisions to the contrary expressly indicating that these effects should not make themselves felt afterwards.

Count Rostworowski then turns to an examination of the relevant provisions from the point of view of whether they can now be validly relied upon to resist the free operation of these legal effects. He finds that neither the resolutions of March 12th, 1927, and of December 8th, 1927, nor the German Application and the Court's judgment of April 26th, 1928, nor the Convention of Geneva of 1922 contain any clause providing or prescribing that the results of the tests ordered were to be entirely without operative effect in years subsequent to that in which they were held.

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*Action taken upon the opinion*

On May 23rd, 1931, (6th meeting of its Sixty-Third Session) the Council of the League of Nations had before it the opinion given by the Court on the question. It decided to adjourn the question until its September session at the request of the Polish representative, as the Polish Government had not yet had sufficient time to study the grounds of the Court's opinion.

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**Eight Annual Report of the Permanent Court of International Justice (15 June 1931—15 June 1932), Series E, No. 8, p. 215**

*Effects of the Advisory Opinion of May 15th, 1931*

The Council had decided at its meeting on May 23rd, 1931, to postpone the question forming the subject of the Court's opinion until its next session. The report of the Japanese representative, which had been presented at that meeting, submitted that the Council would no doubt see fit to decide that the sixty children, to whom the appeal related, should forthwith be transferred to the minority school to which their admission had been requested. On September 19th, 1931, during its 65th Session, the Council adopted this report. In the discussion which preceded its adoption, the Polish Minister for

Foreign Affairs said that the parents of these children had already been informed that the children could be admitted to the minority school without any further formality.

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## 41. CUSTOMS RÉGIME BETWEEN GERMANY AND AUSTRIA (PROTOCOL OF MARCH 19th, 1931)

### Advisory Opinion of 5 September 1931 (Series A/B, No. 41)

**Eighth Annual Report of the Permanent Court of International Justice (15 June 1931—15 June 1932), Series E, No. 8, pp. 216–220**

*Treaty of Peace of Saint-Germain of September 10th, 1919, Article 88 and Geneva Protocol No. 1 of October 4th, 1922—Inalienability of the independence of Austria—Acts calculated to compromise this independence. Projected Austro-German Customs Union—Question of compatibility*

*History of the question*

Germany and Austria had agreed, in virtue of a Protocol drawn up at Vienna on March 19th, 1931, to conclude a treaty with a view to assimilating the tariff and economic policies of the two countries on the basis of and according to the principles laid down in the said Protocol, with the result that a customs union régime would be established. This Protocol was communicated, in particular, to the British, French and Italian Governments. Doubts immediately arose as to whether the contemplated régime was compatible with Article 88 of the Treaty of Peace of Saint-Germain and with Protocol No. 1, signed at Geneva on October 4th, 1922; these instruments, though not absolutely prohibiting Austria from alienating her independence or from taking any action likely to compromise it, obliged her, in brief, to abstain from certain acts, or, in particular cases, to secure the assent of the Council of the League of Nations. No provision for the obtaining of this assent had been made in the Protocol of Vienna.

*The request for an advisory opinion*

The British Government brought the matter before the Council. The latter, on May 19th, 1931, adopted a resolution requesting the Court, under Article 14 of the Covenant, to give an advisory opinion upon the following question:

> "Would a régime established between Germany and Austria on the basis and within the limits of the principles laid down by the Protocol of March 19th, 1931, the text of which is annexed to the present request, be compatible with Article 88 of the Treaty of Saint-Germain and with Protocol No. 1, signed at Geneva on October 4th, 1922?"

The Court was invited to treat the request as a matter of urgency.

*Communication, statements and hearings*

According to the customary practice, the request for an opinion was communicated to the Members of the League of Nations and to States entitled to appear before the Court. Furthermore, the Registrar, by means of a special and direct communication, informed the governments of States bound by the Treaty of Saint-Germain or by Protocol No. 1 signed at Geneva, or by the Austro-German Protocol, which States were regarded as likely, in accordance with the terms of Article 73, paragraph 1, subparagraph 2, of the Rules, to be able to furnish information on the question submitted to the Court for

an advisory opinion, that the Court was prepared to receive from them written statements and, if they so desired, to hear oral arguments made on their behalf.

Within the period fixed by the President, written statements were filed by the German, Austrian, French, Italian and Czechoslovak Governments. In the course of public sittings held on July 20th, 21st, 22nd, 23rd, 24th, 25th, 27th, 28th, 29th, 31st, and August 1st, 2nd, 4th and 5th, 1931, the Court heard the oral arguments of the representatives of the five Governments mentioned above.

*Composition of the Court*

For the examination of this case, the Court was composed Composition as follows:

MM. Adatci, *President*; Guerrero, *Vice-President*; Mr. Kellogg, Baron Rolin-Jaequemyns, Count Rostworowski, MM. Fromageot, de Bustamante, Altamira, Anzilotti, Urrutia, Sir Cecil Hurst, MM. Schücking, Negulesco, Jhr. van Eysinga, M. Wang, *Judges*.

The Court having been called on to consider the question of the application of Article 31 of the Statute and Article 71 of the Rules of Court in the case, decided, by an Order delivered on July 20th, 1931, that the question submitted to it did, in fact, relate to an existing dispute within the meaning of Article 71, paragraph 2, of the Rules of Court, but that there was no ground in the present case for the appointment of judges *ad hoc*, either by Austria or by Czechoslovakia. This decision was based on the following considerations: Article 31, paragraph 4, of the Statute lays down that when several Parties are in the same interest they are reckoned as one Party only, for the purposes of the application of the said Article. In the Court's opinion, all the governments before the Court who come to the same conclusion must be held to be in the same interest for the purposes of the advisory procedure. As the arguments advanced by the German and Austrian Governments led to the same conclusion, while the arguments of the French, Italian and Czechoslovak Governments led to an opposite conclusion, the Court held that the Austrian and German Governments, on the one hand, and the French, Italian and Czechoslovak Governments on the other hand, were in the same interest within the meaning of Article 31 of the Statute; and the Court already included, on the Bench, judges of German, French, and Italian nationality.

M. Adatci, Count Rostworowski, MM. Altamira, Anzilotti and Wang attached a dissenting opinion to the Court's order, stating that, whereas Austria is a Party to the dispute with reference to which the Court's opinion is asked, whereas Germany is not, and whereas, accordingly, the question whether, Germany and Austria being in the same interest, Article 31, paragraph 4, of the Statute should be applied, does not arise, they consider that Austria was entitled to appoint a judge ad hoc in accordance with paragraph 2 of the said Article 31.

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*Opinion of the Court (analysis)*

The Court's opinion was delivered on September 5th, 1931.

It first interprets the request for an opinion in the sense that the question which the Court was called upon to settle was whether, from the point of view of law, Austria could, in the absence of the Council's consent, conclude with Germany the Customs Union contemplated in the Vienna Protocol, without thereby committing an act incompatible with the obligations she had assumed. The Court then proceeds to analyse the texts giving rise to these obligations, namely, Article 88 of the Treaty of Saint-Germain and Protocol No. 1 of Geneva.

The independence of Austria, according to Article 88 of the Treaty of Saint-Germain, must be understood to mean the continued existence of Austria within her present frontiers as a separate State, with sole right of decision in all matters economic, political, financial or other; it follows that this independence is violated as soon as there is any infringement of it, whether in the economic, political, or any other field—since these different aspects of independence are in practice one and indivisible. By alienation must be understood any voluntary act by the Austrian State which would cause it to lose its independence, or would modify its independence, in the sense that its sovereign will would be subordinated to the will of another Power. Finally, the undertaking given by Austria to abstain from "any act which might directly or indirectly by any means whatever compromise her independence" can only be interpreted to refer to "any act calculated to endanger" that independence, in so far, of course, as can be reasonably foreseen.

In the Geneva Protocol, Austria undertook certain obligations in the economic sphere. That these obligations fall within the scope of those undertaken by Austria in Article 88 of the Treaty of Saint-Germain is apparent from the express or implied reference made in the Protocol to the terms of that Article. Thus, the undertaking given by Austria not to violate her economic independence by granting any State a special régime or exclusive advantages calculated to threaten that independence is covered by the undertaking already given by Austria in Article 88 to abstain from acts which might compromise her independence. But this in no way prevents these undertakings, which were assumed by Austria in a special and distinct instrument, from possessing a value of their own, and on that account a binding force, complete in itself, and capable of independent application.

The Court next proceeds to analyse the Protocol of Vienna, and observes that the régime it provides for fulfils the conditions of a Customs Union. In the Court's view, what has to be considered is not any particular clause of the Protocol, but the régime, as a whole, which is to be established in pursuance of the Protocol. The establishment of this régime does not in itself constitute an act alienating Austria's independence, and it may be said that, legally, Austria retains the possibility of exercising her independence. Austria's independence is not, strictly speaking, endangered within the meaning of Article 88 of the Treaty of Saint-Germain, and there is not therefore, from the point of view of law, any inconsistency with that Article.

On the other hand, the projected system constitutes a special régime, and it affords Germany, in relation to Austria, "advantages" which are withheld from third Powers. Finally, it is difficult, in the view of the Court, to maintain that this régime is not calculated to threaten the economic independence of Austria, and that it is, consequently, compatible with the undertakings specifically given by Austria in the Protocol of Geneva with regard to her economic independence.

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The Court's opinion was adopted by eight votes against seven.

Of the eight judges forming the majority, seven declared that, in their opinion, the régime contemplated was incompatible not only with the Protocol of Geneva, but also with Article 88 of the Treaty of Saint-Germain, since—as six of the said judges (M. Guerrero, Count Rostworowski, MM. Fromageot, Altamira, Urrutia and Negulesco) stated in a joint declaration which they signed—it would be calculated to threaten the independence of Austria in the economic sphere, and would thus be capable of endangering the independence of that country. M. Anzilotti, while concurring in the operative portion of the opinion, declared that he was unable to agree in regard to the grounds on which it is based, and drew up an individual opinion.

*Individual opinion by M. Anzilotti*

M. Anzilotti states that the dispute upon which the Court is asked to give its opinion relates to the applicability of the provisions of Article 88 of the Treaty of Saint-Germain and the Geneva Protocol to this particular case.

M. Anzilotti lays out that the idea that Austria's independence is inalienable except with the consent of the Council of the League of Nations has its origin in Article 80 of the Treaty of Versailles, which was adopted in order to secure Austria's existence against the danger of incorporation within the German Reich. He holds that this article was not adopted in the interests of Austria, but in the interests of Europe as a whole, and thus it will be readily understood that Article 88, far from granting Austria rights, only imposes upon her obligations.

The opinion turns to define the meaning and scope of the terms "independence" and "inalienable" in the first part of Article 88. On the term "independence", M. Anzilotti states that, within the meaning of Article 88, it is nothing else but the existence of Austria, within the frontiers laid down by the Treaty of Saint-Germain, as a separate State and not subject to the authority of any other State or group of States. Independence as thus understood is really no more than the normal condition of States according to international law; it may also be described as sovereignty, or external sovereignty, by which is meant that the State has over it no other authority than that of international law. As to the term "inalienable", it expresses the idea that Austria must not voluntarily lose her existence as an independent State otherwise than with the consent of the Council of the League of Nations. M. Anzilotti notes that Article 88 thus marks a twofold departure from ordinary international law. According to ordinary international law, every country is free to renounce its independence and even its existence; this rule does not apply to Austria. Similarly, according to ordinary international law, each country must respect the independence of other countries, but it is not forbidden to agree to another State's voluntarily renouncing its independence in its favour. This is not allowed in the case of Austria.

After having also interpreted the second part of Article 88, M. Anzilotti reaches the conclusion that Article 88 contemplates two kinds of acts from which Austria is to abstain except with the consent of the Council of the League of Nations: (a) so-called acts of alienation of independence; and (b) acts which, while leaving Austria her independence, would have the effect of exposing that independence to danger.

M. Anzilotti observes that it is above all on the Geneva Protocol of October 4th, 1922 that he is at variance with the grounds of the Court's opinion. He declares that the régime established between Austria and Germany can only be incompatible with the Geneva Protocol if it is incompatible with Article 88 of the Treaty of Saint-Germain, since the Geneva Protocol does not impose on Austria, as regards her independence, any obligation which does not already ensue from that article.

It follows, according to M. Anzilotti, that the Austro-German Customs régime will only be compatible with the provisions mentioned in the Council's request provided that (a) it is not in the nature of a so-called alienation of Austria's independence; or (b) it is not capable, so far as can reasonably be foreseen, of exposing that independence to any danger. In this regard, M. Anzilotti observes that the said régime is established on a footing of complete legal equality and reciprocity. As to the question whether the Austro-German Customs Union contemplated by the Vienna Protocol must be considered as an act susceptible of endangering Austria's independence, he considers that the answer depends on considerations which are for the most part, if not entirely, of a political and economic kind. It may therefore be asked whether the Council really wished to obtain the Court's opinion on this aspect of the question and whether the Court ought to deal with it. In M. Anzilotti's view, the Court must either refuse to give the opinion asked for, or it must give it on the question as a whole.

Taking into account, in particular, the movement towards the political union of the two countries, M. Anzilotti considers that the Austro-German Customs Union must be considered a fact which might compromise Austria's independence. For these reasons, M. Anzilotti comes to the conclusion that the customs régime would be incompatible with Article 88 of the Treaty of Saint-Germain, and that Austria is therefore obliged to abstain from it or to ask the consent of the Council of the League of Nations. He also finds that the said régime would also be incompatible with the Protocol of Geneva, which only applies the provision of Article 88 to the matters there in issue.

*Dissenting opinions*

The seven judges in the minority (MM. Adatci and Kellogg, Baron Rolin-Jaequemyns, Sir Cecil Hurst, M. Schücking, Jhr. van Eysinga and M. Wang) appended a joint dissenting opinion to the opinion of the Court.

*Joint dissenting opinion by M. Adatci, Mr. Kellogg, Baron Rolin-Jaequemyns, Sir Cecil Hurst, M. Schücking, Jhr. van Eysinga and M. Wang*

According to the dissenting judges, the purpose of Article 88 was to ensure the continued existence of Austria as a separate State, which was achieved by securing the assent of all Parties to the Treaty, including that of Austria herself, to the principle that the independence of Austria must not be alienated or compromised save with the consent of the Council.

The dissenting judges turn to the interpretation of the terms "independence" and "alienation". They explain that a state would not be independent in the legal sense if it was placed in a condition of dependence on another Power, if it ceased itself to exercise within its own territory the *summa potestas* or sovereignty, i.e. if it lost the right to exercise its own judgment in coming to the decisions which the government of its territory entails. According to the dissenting judges, restrictions on its liberty of action which a State may agree to do not affect its independence, provided that the State does not thereby deprive itself of its organic powers. The "alienation" of the independence of a State implies that the right to exercise these sovereign powers would pass to another State or group of States. For an act to "compromise" the independence of Austria it must be one which would imperil the continued existence of Austria as a State capable of exercising within its territory all the powers of an independent State within the meaning of independence given above.

As to the Geneva Protocol No. 1 of 1922, the dissenting judges consider that any act which is a violation of the obligations of Austria set out therein must also be a violation of Article 88. If the régime to be established under the Vienna Protocol is compatible with Article 88, it cannot in the opinion of the dissenting judges be incompatible with the Geneva Protocol.

The dissenting judges infer from the language of the Opinion that the other members of the Court consider that the régime under the Vienna Protocol would violate the economic independence of Austria because it would be the grant to Germany of a special régime or of exclusive advantages calculated to threaten this independence. In their view, it is not enough that the arrangement should be the grant of a special régime or of exclusive advantages. The grant must be calculated to threaten Austria's independence.

The dissenting judges consider that no material has been placed before the Court in the course of the present proceedings for the purpose of showing that States which have concluded customs unions have thereby endangered their future existence as States. The dissenting judges accept the statement of the Opinion that the régime fulfils the requirements of a customs union, but in their opinion it is a union which is organized on the basis of a customs association, and not on that of a customs fusion;

that is to say, each of the States concerned preserves the right to enact its own legislation on customs matters and to enforce that legislation in its own territory by its own customs service.

Having interpreted the various provisions of the Vienna Protocol, the dissenting judges reach the conclusion that none of its provisions, when considered individually, are inconsistent with the maintenance of Austria's position as a separate and independent State.

For these reasons, the dissenting judges conclude that a régime established between Germany and Austria on the basis and within the limits of the principles laid down by the Protocol of March 19th, 1931, would be compatible both with Article 88 of the Treaty of Saint-Germain and with Protocol No. 1 signed at Geneva on October 4th, 1922.

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*Effects of the advisory opinion*

On September 3rd, 1931, at a meeting of the Commission of Enquiry for a European Union, the representatives of Germany and Austria had announced their intention of not pursuing the project for a Customs Union. In these circumstances, the Council passed a resolution on September 7th, 1931, taking note of the Court's opinion, and declaring that there could no longer be any occasion for it to proceed further with its consideration of this item of its agenda. At the same time it expressed its thanks to the Court.

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## 42. RAILWAY TRAFFIC BETWEEN LITHUANIA AND POLAND (RAILWAY SECTOR LANDWARÓW-KAISIADORYS)

### Advisory Opinion of 15 October 1931 (Series A/B, No. 42)

**Eighth Annual Report of the Permanent Court of International Justice (15 June 1931—15 June 1932), Series E, No. 8, pp. 221–225**

*Transit by railway—Covenant of the League of Nations, Article 23 (e); Convention of Paris concerning Memel of 1924, Annex III, Article 3; Convention of Barcelona of 1921 on Transit; Statute, Articles 2 and 7—Relations between Lithuania and Poland; Resolutions of the Council of the League of Nations of December 10th, 1927, and December 14th, 1928*

*History of the question*

The railway sector Landwarów-Kaisiadorys is a part of the line running from Vilna towards Libau, via Kovno. According to the information supplied to the Court, this portion of the line was destroyed during the war 1914–1918, at a period when the Lithuanian, Polish and Latvian States had not yet come into being, and when all three towns were in Russia. With various alternations, due to the vicissitudes of the military operations, this situation persisted after the above-mentioned States had been created, and continued subsequently during the hostilities between Russia and Poland. During this period, the line seems to have been temporarily restored at times for the purposes of local traffic; later on again, these repairs were destroyed after the occupation of Vilna on October 9th, 1920, by the Polish General Zeligowski. Since that time, i.e. for more than ten years, there has been no change in the situation.

On October 15th, 1927, Lithuania, acting under Article II of the Covenant, brought a new dispute between the two Governments regarding events in the Vilna Territory before the Council of the League

of Nations, which had already on several occasions had to consider the relations between Lithuania and Poland. On December 10th, 1927, the Council adopted a resolution, with the concurrence of the Parties concerned.

As a result of this resolution, negotiations took place between the two Governments at Königsberg in the spring and autumn of 1928; these negotiations related *inter alia* to railway communications, but in regard to that particular point they proved fruitless.

On December 14th, 1928, the Council decided to refer to the Advisory and Technical Committee for Communications and Transit the question of the obstacles which, according to the documents before the Council, were in the way of freedom of communications and transit between Lithuania and Poland.

Accordingly, on September 4th, 1930, the Committee submitted to the Council a report recommending, amongst other things, measures for the re-establishment on the railway between Vilna and Kovno, via Landwarów-Kaisiadorys, of a through service satisfying the requirements of international transit. This report failed—though for different reasons—to obtain the acceptance of the two Governments, a fact of which the Council was informed at its meeting on January 23rd, 1931.

*The request for an advisory opinion*

On the following day, the Council passed a resolution requesting the Court to give an advisory opinion on the following question:

> "Do the international engagements in force oblige Lithuania in the present circumstances, and if so in what manner, to take the necessary measures to open for traffic or for certain categories of traffic the Landwarów-Kaisiadorys railway sector?"

*Communication, statements and hearings*

In observance of the customary procedure, the request for an opinion was communicated to the Members of the League of Nations and to States entitled to appear before the Court. Furthermore, the Registrar, by a special and direct communication, informed the Lithuanian and Polish Governments, which were regarded by the Court as likely, in accordance with Article 73, paragraph 1, sub-paragraph 2, of the Rules, to be able to furnish information on the question submitted to the Court for an advisory opinion, that the Court was prepared to receive from them written statements and, if they so desired, to hear oral arguments made on their behalf.

In pursuance of a decision taken by the Court on July 17th, 1931, the Registrar sent the communication provided for in Article 73, paragraph 1, sub-paragraph 2, of the Rules to the Advisory and Technical Committee for Communications and Transit of the League of Nations, through the Secretary-General.

Lastly, the Registrar addressed a communication to all States parties to the Covenant of the League of Nations, or to the Convention of Barcelona of 1921 regarding freedom of transit, or to the Convention of Paris of 1924 concerning Memel, or to the Germano-Lithuanian Treaty of commerce and navigation of October 30th, 1928, drawing their attention to the rights conferred on them under Article 73, paragraph 1, sub-paragraph 3, of the Rules of Court.

Written statements were filed on behalf of the Lithuanian and Polish Governments and accepted by the Court. The latter held sittings on September 16th, 17th, 18th, 19th, 21st and 22nd, 1931, to hear a statement by the President of the Advisory and Technical Committee for Communications and Transit and the oral arguments submitted on behalf of the two Governments.

*Composition of the Court*

For the examination of this case, the Court was composed as follows:

MM. Adatci, *President*; Baron Rolin-Jaequemyns, Count Rostworowski, MM. Fromageot, de Bustamante, Altamira, Anzilotti, Urrutia, Sir Cecil Hurst, MM. Schücking, Negulesco, Wang, *Judges*.

M. Stašinskas, appointed a Judge *ad hoc* by the Lithuanian Government, also sat on the Court for the purposes of the case.

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*Opinion of the Court (analysis)*

The Court's opinion was delivered on October 15th, 1931.

The Court begins by examining the declaration made by the representatives of the Lithuanian Government before the Court that Lithuania, on the ground of her present relations with Poland, does not intend to restore to use the Landwarów-Kaisiadorys railway sector in her territory, and that she was adopting this attitude as a form of pacific reprisals. On this point the Court observes that the argument based on the alleged right of Lithuania to engage in pacific reprisals only arises if the international engagements in force oblige Lithuania to open this sector for traffic.

As regards "international engagements", the question put to the Court, in the opinion of the latter, refers solely to contractual engagements which might create the obligation in question for Lithuania. In this connection, Article 23 (e) of the Covenant of the League, certain provisions of the Convention of Paris of May 8th, 1924, concerning Memel, and the resolution of the Council of the League dated December 10th, 1927, had been brought to the attention of the Court.

The last-named resolution, which had been adopted by the Council with the concurrence of the Lithuanian and Polish representatives, recommended the two Governments to enter into direct negotiations as soon as possible in order to establish such relations between the two neighbouring States as would ensure the good understanding on which peace depends.

According to the Polish submission, the two States, in accepting that recommendation, undertook not only to negotiate but also to come to an agreement, with the result—it was alleged—that Lithuania had incurred an obligation to open the Landwarów-Kaisiadorys railway sector to traffic. But, in the view of the Court, an engagement to negotiate does not imply an obligation to reach an agreement, nor in particular does it imply that Lithuania has assumed an engagement, and is in consequence obliged, to conclude the administrative and technical agreements necessary for the re-establishment of traffic on the railway sector in question.

In regard to Article 23 (e) of the Covenant, the Polish Government, founding itself in particular on the opinion of the Advisory and Technical Committee for Communications and Transit, had contended that this Article constituted an international engagement obliging the Lithuanian State to open this line. The Court holds, however, that specific obligations can only arise under the said clause from "international conventions existing or hereafter to be agreed upon" (Art. 23 of the Covenant), for instance from "general conventions to which other Powers may accede at a later date" (Preamble of the Barcelona Convention on freedom of transit). It is therefore impossible for the Court to deduce from the general rule contained in Article 23 (e) of the Covenant an obligation for Lithuania to open the Landwarów-Kaisiadorys railway sector to international traffic or to a part of such traffic.

Lastly, as regards the application of the Memel Convention, the Court observes that, by the terms of that instrument, some of the provisions of the Statute of Barcelona have become applicable to Lithu-

ania, although Lithuania is not a Party to that Statute. Thus, Lithuania is bound, under Article 2 of the said Statute, to facilitate "free transit by rail or waterway on routes in use convenient for international transit". The Court notes however that the very terms of the request for an advisory opinion show that the Landwarów-Kaisiadorys sector of the railway is not in use; furthermore, the said sector can scarcely be described as convenient for international transit to or from Memel, since it only affords communication with Memel by a roundabout route, or by transshipment to barges at Kovno.

The Court further points out that, under the last paragraph of Article 3 of Annex III of the Memel Convention, the Lithuanian Government undertakes to permit and grant all facilities for traffic on the river to or from the port of Memel, and not to apply the provisions of Articles 7 and 8 of the Barcelona Statute to such traffic on the ground of the present political relations between Lithuania and Poland. This clause of the Convention applies solely to waterways, and not to railways. Lithuania would therefore be free to avail herself of Article 7 of the Barcelona Statute with regard to railways of importance to the Memel Territory.

Accordingly, even if the Landwarów-Kaisiadorys railway sector were in use and could serve Memel traffic, Lithuania would be entitled to invoke Article 7 of the Barcelona Statute as a ground for refusing to open this sector to traffic, in case of an emergency affecting her security and vital interests; and Lithuania considers that her relations with Poland have brought about such a situation.

Not having been able to find in the engagements invoked any obligation for Lithuania to open the Landwarów-Kaisiadorys railway sector to traffic, the Court reaches the conclusion that, in the present circumstances, the obligation which is alleged to be incumbent upon Lithuania does not exist.

The opinion was adopted unanimously. MM. Altamira and Anzilotti, while concurring in the Court's conclusion, declared themselves unable to agree with some parts of the reasons given in support of it.

M. Altamira expressed his disagreement with the arguments concerning the interpretation and application in the present case of the Memel Convention and of Articles 2 and 7 of the Convention of Barcelona. M. Anzilotti expressed the opinion that the reasons adopted, particularly those relating to Article 23 (e) of the Covenant, do not adequately support that conclusion. In his opinion, the real question before the Court is whether Lithuania can refuse to have railway communications with Poland, and nothing but the "present circumstances" which are mentioned in the question can justify an attitude on the part of Lithuania which in itself would be scarcely compatible with the duties of Members of the League of Nations.

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*Effects of the opinion*

At the fourth meeting of its Sixty-Sixth Session (January 28th, 1932) the Council took note of the opinion drawn up by the Court.

# 43. ACCESS TO, OR ANCHORAGE IN, THE PORT OF DANZIG, OF POLISH WAR VESSELS

## Advisory Opinion of 11 December 1931 (Series A/B, No. 43)

**Eighth Annual Report of the Permanent Court of International Justice (15 June 1931—15 June 1932), Series E, No. 8, pp. 226–231**

*Relations between Poland and the Free City of Danzig: free and secure access to the sea for Poland through the port of Danzig; protection of Danzig by the League of Nations (defence of the Free City)—Treaty of Versailles, Articles 102–104—Danzig-Polish Convention of November 9th, 1920, Articles 20, 26, 28—Resolutions of the Council of the League of Nations of November 17th, 1920, and June 22nd, 1921*

*History of the question*

By the Treaty of Versailles, Danzig was severed from Germany and constituted as a Free City, the reason being—as stated in the reply of the Principal Allied and Associated Powers to the German delegation dated June 16th, 1919, regarding the conditions of peace—to ensure for Poland free and secure access to the sea. In conformity with Article 104 of that Treaty, a convention—the Convention of Paris of November 9th, 1920—was negotiated by the Conference of Ambassadors between Poland and the Free City. This Convention was intended, as is apparent from the terms of Article 104 of the Treaty of Versailles, to secure for Poland the enjoyment of a series of rights, with the object of safeguarding her position at Danzig. The Polish Delegation had asked for the insertion in the Convention of clauses devoted to military and naval affairs, in particular of a clause giving Poland the right to use the port of Danzig for her warships. This clause was not inserted in the Convention, but the Conference of Ambassadors decided to draw the attention of the Council of the League of Nations to the question of the defence of Danzig. As Article 102 of the Treaty of Versailles had placed Danzig under the protection of the League of Nations, this was a question for the Council to deal with. At its session in November 1920, the Council confined itself to declaring that "the Polish Government appears particularly fitted to be, if circumstances require it, entrusted with the duty of ensuring the defence of the Free City".

In June 1921, the Council, which had received a request from the Polish Government seeking, among other matters, to obtain a *"point d'attache"* in the port of Danzig for its maritime police vessels, again took up the question of the defence of Danzig. On June 22nd, 1921, it adopted a resolution requesting the High Commissioner to "examine the means of providing in the port of Danzig, without establishing there a naval base, for a *'port d'attache'* for Polish warships". This resolution was also to apply to maritime police vessels. In his report, which was submitted on September 10th, 1921, the High Commissioner concluded that the question was a matter rather for consideration by the League's naval experts. The question was therefore referred to the latter; they submitted a report suggesting the adoption of certain rules to govern the utilization of the port of Danzig by Polish war vessels.

In the meanwhile, on October 8th, 1921, a provisional arrangement had been concluded between the Parties with the aid of the High Commissioner, acting upon instructions from the President of the Council; it provided that Poland was to continue to use the port of Danzig for her warships, subject to certain conditions and without prejudice to the legal issues, until such time as the question of a *"port d'attache"* should be decided by the Council. In these circumstances the Council decided on January 12th, 1922, to postpone consideration of the question, which on several occasions it subsequently declared to be still open. The provisional arrangement continued in force till September 19th, 1931, when it was replaced by a regulation which had practically the same purport and substance, but was issued by the High Commissioner, pending the final settlement of the question.

From 1925 onwards, the Senate of the Free City had repeatedly expressed the view that the provisional arrangement should be abrogated, as Polish ships could now find in the port of Gdynia the shelter and facilities they needed. Poland did not concur in this view, and on August 2nd, 1927, the Senate applied to the Council to decide the question of the *port d'attache*. It was however subsequently agreed to continue the régime of 1921 in force, and its operation was prolonged from time to time.

*The request for an advisory opinion*

It was in these circumstances that on September 19th, 1931, the Council adopted a resolution asking the Court to give an advisory opinion under Article 14 of the Covenant, on a question which was stated in the following terms in the request for an opinion:

> "Do the Treaty of Peace of Versailles, Part III, Section XI, the Danzig-Polish Treaty concluded at Paris on November 9th, 1920, and the relevant decisions of the Council of the League of Nations and of the High Commissioner, confer upon Poland rights or attributions as regards the access to, or anchorage in, the port and waterways of Danzig of Polish war vessels? If so, what are these rights or attributions?"

*Communication, statements and hearings*

According to the customary procedure, the request for an opinion was communicated to the Members of the League of Nations and to States entitled to appear before the Court; furthermore, by a special and direct communication, the Registrar informed the Polish and Danzig Governments, regarded by the Court as likely, in accordance with Article 73, paragraph 1, sub-paragraph 2, of the Rules of Court, to be able to furnish information on the question submitted for an advisory opinion, that the Court was prepared to receive from them written statements, and if they so desired, to hear oral arguments made on their behalf. Lastly, the Registrar addressed to all States, parties to the Treaty of Versailles, a communication drawing their attention to the rights conferred on them by Article 73, paragraph 1, sub-paragraph 3, of the Rules of Court.

Written statements were filed on behalf of the Polish and Danzig Governments within the periods fixed by the President. The Court held public sittings on November 9th, 10th, 11th, 12th, 13th and 14th, 1931, and heard oral arguments presented on behalf of the respective Governments.

*Composition of the Court*

For the examination of this case, the Court was composed as follows:

MM. Adatci, *President;* Guerrero, *Vice-President;* Baron Rolin-Jaequemyns, Count Rostworowski, MM. Fromageot, Altamira, Anzilotti, Urrutia, Sir Cecil Hurst, MM. Schücking, Negulesco, Jhr. van Eysinga, M. Wang, *Judges*.

Dr. Bruns, who had been appointed Judge *ad hoc* by the Senate of the Free City, also sat on the Bench of the Court for the purposes of this case.

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*Opinion of the Court (analysis)*

The opinion of the Court was delivered on December 11th, 1931.

The Court first observes that, according to the Polish submissions Polish warships were entitled to go into the port of Danzig and remain there as of right, without obtaining the consent of the authori-

ties of the Free City, and were at liberty, while in the port, to ship such stores and execute such repairs as they might need. What Poland is claiming, in the Court's opinion, is a right peculiar to herself at Danzig, a right which results from the special position she occupies in relation to the Free City; this right, which she claims to derive from the principles underlying the various treaty stipulations now in force, would give her warships a special position, different from that enjoyed by the warships of foreign Powers.

On this point the Court observes that the port of Danzig is not Polish territory, and therefore the rights claimed by Poland would be exercised in derogation of those of the Free City. Such rights, if any, must be established on a clear basis. The Court proceeds to make a study of the provisions adduced in the arguments, namely, the Treaty of Versailles, the Convention of Paris, and the Council's Resolution of June 22nd, 1921, from this point of view.

In the Court's opinion, there is no clause in the Treaty of Versailles which, either expressly or by implication, confers a special right upon Polish warships. In particular, as regards Article 104, paragraph 2, which mentions, as one of the purposes of the treaty to be negotiated, that of "ensuring to Poland without any restriction the free use and service of all waterways, docks, basins, wharves and other works within the territory of the Free City necessary for Polish imports and exports", the Court holds that the natural interpretation of these words is that Poland is only to enjoy the unfettered use of the port and its equipment for commercial purposes.

It is true that, in the Polish submission, the right thus claimed is derived, not from the terms of the Treaty of Versailles, but from the principles underlying the establishment of the Free City, in accordance with Section XI of Part III of that Treaty. These principles were, it was argued, three in number, namely the necessity for ensuring free access to the sea for Poland, the intimate relations which were to exist between Poland and Danzig, and the necessity for providing for the defence of the Free City. Their combined effect was such, it was contended, that they conferred upon Poland the right of access to and anchorage in the port of Danzig. In this regard the Court is not prepared to adopt the view that the text of the Treaty of Versailles can be enlarged by reading into it stipulations which are alleged to result from the proclaimed intentions of the authors of the Treaty, but for which no provision is made in the text itself.

Proceeding, the Court examines the relevant articles of the Convention of Paris. It considers, in brief, that like the relevant clauses of the Treaty of Versailles, they cannot be considered as conferring any general right of access and anchorage.

Lastly, as regards the Council's Resolution of June 22nd, 1921, this was intended, in the Polish submission, to constitute a definite acceptance in principle of the Polish claim, leaving over for future regulation the details as to how practical effect was to be given to the rights involved. On the contrary, in the opinion of the Court, the resolution is no more than what its terms imply—a direction to the High Commissioner to examine how Poland could be given a *"port d'attache"* at Danzig for her war vessels without creating a naval base. It constituted the initiation of a study which was interrupted by the conclusion of the Provisional Arrangement of October, 1921; and the result of this interruption is that no final and definitive decision has ever yet been given.

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*Dissenting opinions*

The Court's opinion was adopted by eleven votes against three. Count Rostworowski attached a dissenting opinion. M. Fromageot added a declaration, and M. Urrutia contented himself with attaching a statement of his dissent.

*Declaration by M. Fromageot*

M. Fromageot declares that the recognition, made in the written negotiation preceding the Treaty of Peace, of a right on the part of Polant to "free and secure access to the sea", a right inherent in the creation of the State of Poland and of the Free City of Danzig, renders it impossible equitably to exclude from such free access, for the purposes of their nautical requirements, Polish war vessels or any other Polish ships other than merchant ships.

*Dissenting opinion by Count Rostworowski*

Count Rostworowski identifies the starting point for the Court's investigations as being the precise meaning of the expression: "access and anchorage for war vessels". He examines the practice of more than ten years, originating with the agreement concluded on October 8th, 1921, between Poland and the Free City, under the auspices of the League of Nations, distinguishing the Council's work in connection with a provisional *modus vivendi* and the final settlement of the matter.

Count Rostworowski concludes that, rightly interpreted, Article 104, paragraph 2, of the Treaty of Versailles confers on Poland in principle rights in regard to the access and anchorage of Polish warships in the port and waterways of Danzig, which are substantially similar to the attributions which were and remain granted to Poland by the relevant decisions of the Council dated January 12th, 1922, and September 19th, 1931, together with the relevant decision of the High Commissioner dated September 19th, 1931. However, the regulation of the aforementioned rights and attributions, under Article 102 of the Treaty of Versailles, rests with the League of Nations in so far as any given use of the port by Polish warships, authorized in principle by Article 104, paragraph 2, of the Treaty of Versailles, would be likely to threaten the security of Danzig, which is placed under the protection of the League of Nations.

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*Effects of the opinion*

At the sixth meeting of its Sixty-Sixth Session (January 29th, 1932), the Council adopted the following resolution:

"The Council:

Adopts the advisory opinion given by the Permanent Court of International Justice on December 11th, 1931, on the question of the access to, or anchorage in, the port of Danzig of Polish war vessels;

Requests the Secretary-General to communicate the text of this opinion to the High Commissioner, in reply to the question raised in his special report of August 20th, 1931;

Considers that, in view of the fact that the legal points on which a divergence of views between the Parties had been revealed have now been elucidated by the opinion of the Court, the practical questions raised in the Polish Government's note of January 25th, 1932, should be settled directly between the Parties;

Notes with satisfaction the statements made on this matter by the President of the Senate in his note of January 28th, 1932, and the statements of the Polish representative in his note of that date;

Is gratified to be in a position to note that the question will thus be finally settled."

The practical questions raised by the Polish note of January 25th, 1932, related to the granting of harbour facilities to Polish warships. The President of the Senate had announced that the Danzig Government was prepared to grant certain special facilities, appropriate to the local conditions, for these vessels.

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**Ninth Annual Report of the Permanent Court of International Justice (15 June 1932—15 June 1933), Series E, No. 9, pp. 117**

EFFECTS OF THE ADVISORY OPINION OF DECEMBER 11th, 1931

By a Resolution adopted on January 29th, 1932, the Council expressed the opinion that since the legal points had been elucidated by the Court, the practical questions should be settled directly by the Parties. These practical points, which had been raised by the Polish Government's note of January 25th, 1932, concerned the harbour facilities to be granted to Polish war vessels. On August 13th, 1932, a protocol was signed at Danzig under the auspices of the High Commissioner of the League of Nations. This protocol settles these points and defines the facilities which Polish war vessels and all other Polish ships not used for commercial purposes may enjoy with reference to the generally recognized international rules, as applied at Danzig, concerning the access of warships of all nations to the port of Danzig and Danzig waters, and their stay in that port and in those waters.[1]

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## 44. TREATMENT OF POLISH NATIONALS AND OTHER PERSONS OF POLISH ORIGIN OR SPEECH IN DANZIG TERRITORY

### Advisory Opinion of 4 February 1932 (Series A/B, No. 44)

**Eighth Annual Report of the Permanent Court of International Justice (15 June 1931—15 June 1932), Series E, No. 8, pp. 232–237**

*Legal status of the Free City of Danzig—Treaty of Versailles of June 28th 1919; Convention on Paris between Poland and the Free City of Danzig of November 9th 1920; Constitution of the Free City; guarantee of the Constitution by the League of Nations—The right of Poland to submit to the High Commissioner of the League of Nations at Danzig disputes concerning the Constitution (Treaty of Versailles, Art. 103; Convention of Paris, Art. 39)—Interpretation of Articles 104:5 of the Treaty of Versailles; relation between that provision and Article 33, paragraph 1, of the Convention of Paris; interpretation of the latter provision*

[1] The text of this protocol is reproduced in the *Official Journal of the League of Nations*, 1933, pp. 142–143.

*History of the question*

On September 30th, 1930, the diplomatic representative of Poland at Danzig wrote to the High Commissioner of the League of Nations, asking him for a decision, under Article 39 of the Polish-Danzig Convention, concluded at Paris on November 9th, 1920, "in regard to the unfavourable treatment of Polish nationals and other persons of Polish origin or speech in the territory of the Free City of Danzig". At the same time the diplomatic representative submitted a series of conclusions, accompanied by a statement of reasons, relating to the following points: public and private education, recognition of school certificates, freedom to use the Polish language, nationality, paid labour, acquisition of landed property, allotment of dwellings, police registration, liberty of domicile and establishment. In his explanatory memorandum, the Polish diplomatic representative had emphasized that it had become clear that the position of the Polish population at Danzig, as established by Article 104 (5) of the Treaty of Versailles and Article 33 of the Convention of Paris, was imperilled.

This Polish request gave rise to very detailed written proceedings, in the course of which the High Commissioner wrote to the Secretary-General of the League of Nations that "it would serve no useful purpose to examine the numerous concrete points submitted to the High Commissioner for decision in the request of the Polish Government of September 30th before the legal points involved have been settled beyond dispute". Accordingly, with the consent of the Parties, he drew the Council's attention to "the eminent desirability of asking the Permanent Court of International Justice to give an advisory opinion forthwith on the legal points on which the two Governments differ".

*The request for an advisory opinion*

The Council accepted this suggestion, and on May 22nd, 1931, adopted a resolution asking the Court to give an advisory opinion on the two following questions:

> "(1) Is the question of the treatment of Polish nationals and other persons of Polish origin or speech in the territory of the Free City of Danzig to be decided solely by reference to Article 104 (5) of the Treaty of Versailles and Article 33, paragraph 1, of the Convention of Paris (and any other treaty provisions in force which may be applicable), or also by reference to the Constitution of the Free City; and is the Polish Government accordingly entitled to submit to the organs of the League of Nations, by the method provided for in Article 103 of the Treaty of Versailles and Article 39 of the Convention of Paris, disputes concerning the application to the above-mentioned persons of the provisions of the Danzig Constitution and other laws of Danzig?
>
> (2) What is the exact interpretation of Article 104 (5) of the Treaty of Versailles and of Article 33, paragraph 1, of the Convention of Paris, and, if the reply to question (1) is in the affirmative, of the relevant provisions of the Constitution of the Free City?"

*Communications, statements and hearings*

According to the customary procedure, the request for an advisory opinion was communicated to Members of the League of Nations and to States entitled to appear before the Court. Furthermore, the Registrar, by means of a special and direct communication, informed the Governments of the Polish Republic and of the Free City of Danzig, which were regarded by the Court as likely, in accordance with Article 73, paragraph 1, sub-paragraph 2, of the Rules, to be able to furnish information on the question submitted to the Court for an advisory opinion, that the Court was prepared to receive from them written statements and, if they so desired, to hear oral arguments presented on their behalf. Lastly, the Registrar addressed to all States parties to the Treaty of Versailles a communication drawing their attention to the rights conferred upon them by Article 73, paragraph 1, sub-paragraph 3, of the Rules of Court.

Within the periods fixed by the President, and subsequently extended, memorials were filed on behalf of the Danzig and Polish Governments. In the second of these periods Danzig alone filed a reply.

*Composition of the Court*

For the examination of this case, the Court was composed as follows:

MM. Adatci, *President;* Guerrero, *Vice-President;* Baron Rolin-Jaequemyns, Count Rostworowski, MM. Fromageot, Altamira, Anzilotti, Urrutia, Sir Cecil Hurst, M. Schücking, Jhr. van Eysinga, M. Wang, *Judges*.

Dr. Bruns, appointed by the Free City as a Judge *ad hoc*, also sat on the Court for the purposes of the case.

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*Opinion of the Court (analysis)*

The Court delivered its opinion on February 4th, 1932.

After recapitulating the origin and evolution of the Constitution of Danzig, and of Article 33 of the Convention of Paris, the Court proceeds to examine the first question.

It points out, to begin with, that the two parts of which it is composed are not two separate questions, but constitute a single question, namely, the Polish Government's right to resort to the procedure laid down in Article 103 of the Treaty of Versailles and in Article 39 of the Convention of Paris—that is to say, to the jurisdiction of the High Commissioner of the League of Nations at Danzig—to settle disputes concerning the application of the provisions of the Danzig Constitution and other laws of Danzig to Polish nationals and other persons of Polish origin and speech.

In regard to this point, the Court observes that the Danzig Constitution presents certain peculiarities. Thus, the League of Nations, as guarantor of the Constitution, has the right and the duty of intervening in the event of a wrong application of the Constitution by Danzig. The question put to the Court does not, however, relate to Poland's right to have recourse to the League, in the latter's capacity as guarantor of the Danzig Constitution, but solely to the right of the Polish Government, acting in its own name, to submit to the organs of the League, by the method provided for in Article 103 of the Treaty of Versailles and Article 39 of the Convention of Paris, disputes concerning the application of the provisions of the Constitution and other Danzig laws to Polish nationals and other persons of Polish origin or speech—in other words, to resort to the compulsory arbitral jurisdiction of those organs. As regards the procedure referred to in the above-mentioned Articles, the Court holds that the Constitution is not one of the instruments for which the compulsory arbitral jurisdiction of the High Commissioner is provided under Article 103 of the Treaty of Versailles. The same remark applies to Article 39 of the Convention of Paris. As the Court observes in this connection, the general principles of international law apply to Danzig, in spite of its special legal status, subject however to the treaty provisions binding upon the Free City; and the peculiar character of the Danzig Constitution only affects the relations between the Free City and the League of Nations.

The Court adds that the application of the Danzig Constitution may, however, result in the violation of an international obligation incumbent on Danzig towards Poland, whether under treaty stipulations or under general international law. Should such a case arise, Poland would be entitled to submit it to the organs of the League under Article 103 of the Treaty of Versailles and Article 39 of the Convention of Paris.

Before entering on an interpretation of Article 104, Section 5, of the Treaty of Versailles, the Court points out that Article 104 contains a mandate conferred on the Principal Allied and Associated Powers to negotiate a treaty between Poland and Danzig, with certain objects which are specified in the Article. The terms of the Resolution of the Conference of Ambassadors, dated May 5th, 1920, admit of the conclusion that, in the opinion of that Conference, the advantages guaranteed to Poland by Article 104 were to be secured to her by the convention to be concluded, and that the guarantee only became effective between Poland and Danzig in virtue of the said convention.

The object of Section 5 of Article 104 is to ensure that there shall be no discrimination to the detriment of Polish nationals and other persons of Polish origin or speech at Danzig. In the opinion of the Court, what this clause forbids is discrimination because of the Polish character of these persons. This prohibition must have the effect of eliminating discrimination in fact as well as in law. On this point the Court observes that the question whether a measure is, or is not, in fact directed against the persons indicated by the Article must be decided on the merits of each case. The object of the prohibition is to prevent any unfavourable treatment, and not to grant a special régime of privileged treatment. The Court holds that the clause is purely negative, and is confined to a prohibition of all discrimination; it is for this reason unable to read into it any standard of comparison.

In regard to the binding force of Article 104 (5) of the Treaty of Versailles, and the relation between that clause and Article 33 of the Convention of Paris, the Court observes that what is provided in Article 104 (5) is a rule of law, which has become binding upon the Free City, but only because this clause has been reproduced in the Convention of Paris, and not because it is a provision of the Treaty of Versailles. From the standpoint of the relations between Danzig and Poland, the Convention of Paris is the instrument which is directly binding upon the Free City; but in case of doubt, recourse may be had to the Treaty of Versailles to elucidate the meaning of the Convention; and, as an authentic expression of the mandate conferred on the Principal Allied and Associated Powers, and of the objects of the Convention, the Article may be adduced against the Free City.

Proceeding next to interpret Article 33 of the Convention of Paris, the Court, in considering the origin of this provision, observes, to begin with, that in its first form it merely accorded the régime of minority protection, and that the Conference of Ambassadors believed that the application of this régime would fulfil the objects of Article 104 (5) of the Treaty of Versailles. However, Article 33 underwent various modifications, and its second part, in the form finally adopted, repeats the terms of Article 104 (5) of the Treaty of Versailles. The Polish Government holds that Article 33 now accords national treatment to Polish nationals and other persons of Polish origin or speech, whereas the Danzig Government considers that the Article still contains nothing more than an undertaking to apply the minority régime to such persons.

The Court does not adopt either of these views. In its opinion, the Article should be considered as containing two undertakings of Danzig: one to apply to minorities, in her territory, provisions similar to those applied by Poland in Polish territory; and the other, to provide against discrimination to the detriment of persons of Polish origin, nationality, or speech, on the ground of their Polish character.

This second engagement may be considered as a further guarantee that the Free City—whether applying to the minorities in her territory provisions similar to those applied to minorities in Poland, or granting more extensive rights to these minorities, or to foreigners not belonging to a minority—will allow of no differential treatment to the prejudice of Polish nationals or other persons of Polish origin or speech on account of their Polish character.

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*Dissenting opinions*

The Court's opinion was adopted by nine votes to four. Two of the judges belonging to the majority (Baron Rolin-Jaequemyns and Sir Cecil Hurst) stated that they did not concur in the grounds of the Court's opinion. Sir Cecil Hurst drew up a separate statement of the grounds, in which Baron Rolin-Jaequemyns concurred.

The four judges composing the minority (M. Guerrero, Count Rostworowski, MM. Fromageot and Urrutia) appended a dissenting opinion to the opinion of the Court. It is apparent from the terms of this dissenting opinion that the Court was unanimous in regard to the reply to the first question, and only differed upon the second question.

*Dissenting opinion of M. Guerrero, Count Rostworowski, MM. Fromageot and Urrutia*

While agreeing, in substance, with the Court's reply to the first question submitted to the Court, the dissenting judges differ from the majority in regard to the reply given to the second question.

They observe that Article 104 of the Treaty of Peace of Versailles contains an engagement whereby the Principal Allied and Associated Powers undertook to negotiate a convention between Poland and Danzig. Therefore, the resulting Convention of Paris is an executive Convention, which implements the Treaty, and consequently leaves intact the force of the latter.

Citing several sources in support, the dissenting judges find that it is difficult to see how it can be maintained that the provisions of Article 104 do not contain treaty law governing the relations between Poland and Danzig. They assert that the authors of the Peace Treaty, the Council of the League of Nations, the High Commissioner, the Free City, and lastly the Court itself, have always hitherto taken this view.

The dissenting judges state that according to Article 104 (5), no discrimination is permitted at Danzig to the detriment of Polish nationals or other persons of Polish origin or speech. That is a provision of an absolutely general character. They hold that there is nothing to justify the addition thereto of any restrictions—whether directly or indirectly. In their view, the only difference between the Polish and Danzig elements at Danzig is that Poles who are not nationals of the Free City do not possess, by reason of that circumstance, any of the rights and duties of a political character which are an essential element of allegiance. They further hold that Article 33, paragraph 1, not only provides for the protection of the minority elements of the Danzig population—including the members of the Polish minority—but also for the full application of the régime, laid down in the Treaty of Peace, to all Poles in general.

The dissenting judges therefore conclude that, as regards Polish nationals and other persons (including Danzig nationals) of Polish origin or speech, Article 104 (5) of the Treaty of Versailles and Article 33 (1) of the Convention of Paris ensure in the fullest possible way that in the territory of the Free City of Danzig, there may be no discrimination to the detriment of these various Polish elements, as compared either with foreigners in general or with Danzig nationals who are not of Polish origin or speech, except as regards rights of a political character inherent in the capacity of a citizen of Danzig, no matter what the basis of such discrimination may be or the intention underlying it.

*Separate opinion by Sir Cecil Hurst*

Sir Cecil Hurst states that he accepts the answers which the Court is giving to the questions put to it by the Council, but is not satisfied with some of the reasoning on which those answers are based.

He shares the view that Article 104 (5) of the Treaty of Versailles is purely negative in character in the sense that it does not establish any standard of comparison for the application of the prohibition of discrimination. He notes, however, that the discrimination to the prejudice of Polish citizens which is prohibited by Article 104 (5) of the Treaty of Versailles and Article 33 (1) of the Paris Convention covers discrimination to their prejudice as compared with Danzig citizens, and is not limited to discrimination to their prejudice as compared with other foreigners. Consequently, where absence of discrimination results in equality of treatment, it is equality as between Polish citizens and Danzig citizens, and not only as between Polish citizens and other foreigners.

Sir Cecil Hurst further considers that Article 104 of the Treaty of Versailles has a more far-reaching effect than the Opinion of the Court suggests. In his view, Article 104 is not a mere transitory or ephemeral provision which passed out of existence when the new convention was concluded. It is much more. Its paragraphs constitute "the restrictions limiting the political independence of the Free City which are the outcome of the Treaty of Versailles". This means that the paragraphs of Article 104, including paragraph 5, were intended to remain in operation after the Convention of Paris.

With regard to the interpretation of Article 33 of the Convention of Paris, Sir Cecil Hurst observes that, with respect to the two undertakings contained therein, the text becomes so clear that a reference to the "*travaux préparatoires*" of the Conventions seems scarcely justifiable. The first undertaking of the Free City is to apply to "minorities" in Danzig provisions similar to those applied in Poland under Chapter I of the Minorities Treaty of 1919. The only doubt here is as to whether this undertaking obliges the Free City to assure to Polish nationals, as well as to the rest of the inhabitants, the full and complete protection of life and liberty and the free exercise of their religion provided for by Article 2. As the Constitution of Danzig assures greater rights to all the inhabitants than those provided for in Article 2, and as it is agreed that the guarantee of the Constitution by the League of Nations implies that the constitutional life of Danzig must always be in accordance with the terms of the Constitution, the question whether Poland is entitled to claim on behalf of her nationals at Danzig the benefit of Article 2 is only of theoretical interest.

The second undertaking in Article 33 is a repetition of the rule laid down in paragraph 5 of Article 104 of the Treaty of Versailles. The result is that the sentence embodies a reaffirmation of the non-discrimination principle, but with the difference that it now becomes a direct treaty obligation of the Free City, and not merely a condition of the Free City's existence resulting from the establishment of the Free City on the terms and conditions laid down in the Treaty of Versailles. Sir Cecil Hurst notes that Poland is entitled to claim equality of treatment at Danzig for her citizens and also for Poles by origin or language.

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*Effects of the opinion*

At the ninth meeting of its Sixty-Sixth Session (February 6th, 1932), the Council adopted a resolution instructing the Secretary-General to communicate the text of the Court's opinion to the High Commissioner of the League of Nations at Danzig.

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**Ninth Annual Report of the Permanent Court of International Justice (15 June 1932—15 June 1933), Series E, No. 9, pp. 118**

EFFECTS OF THE OPINION OF FEBRUARY 4th, 1932

The Agreement concluded on November 26th, 1932, between Poland and the Free City of Danzig contains the following provisions concerning the question upon which the Court rendered its Opinion:

"The Parties accept the conclusions of the Opinion given by the Permanent Court of International Justice of February 4th, 1932 (Appendix). The Polish request submitted to the High Commissioner on September 30th, 1930, and the documents relating to the procedure to which this gave rise have been replaced by the following provisions:

1. The Parties will enter into direct negotiations under the auspices of the High Commissioner (who will, if necessary, call in the assistance of experts) regarding the questions which the Polish Government wishes to be discussed. The Polish Government will communicate its desiderata in the matter to the Danzig Senate before December 20th, 1932.

2. The Polish Government reserves the right, should the negotiations not be completed before April 1st, 1933, to have recourse to the procedure laid down in Article 39 of the Treaty of Paris. In this case, an accelerated procedure will be applied."

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**Tenth Annual Report of the Permanent Court of International Justice (15 June 1933—15 June 1934), Series E, No. 10, pp. 99–105**

SEQUEL TO THE OPINION OF FEBRUARY 4th, 1932

The Ninth Annual Report (p. 118) mentioned the Agreement concluded on November 26th, 1932, whereby Poland and the Free City of Danzig accepted the conclusions of the Court's Opinion of February 4th, 1932, and agreed to enter into direct negotiations under the auspices of the High Commissioner regarding the questions which the Polish Government wished to be discussed. These negotiations resulted in the drawing up of an Agreement which was initialled on August 5th, 1933, and signed on September 18th, 1933[2]. This Agreement is as follows[3]:

"In pursuance of the Agreement of November 26th, 1932, between Danzig and Poland, the Polish Government and the Senate of the Free City of Danzig have concluded, under the auspices of the High Commissioner of the League of Nations, the following Agreement relating to the treatment of Polish nationals and other persons of Polish origin or speech in the territory of the Free City of Danzig:

[2] On August 5th, 1933, besides this Agreement, an arrangement was concluded between Poland and Danzig concerning the utilization of the port of Danzig by Poland. Under a protocol likewise signed on the same occasion, the two Governments reserved the right, up to September 15th, 1933, to request the High Commissioner to resume the procedure in progress before him concerning the question of the use of the port. If the Parties did not resort to this procedure by September 15th, the agreement concerning the treatment of Polish nationals, etc., was to come into force on that date. This time-limit was extended until September 18th, 1933. On that date a protocol was signed at Warsaw, settling the question of the use of the port and, at the same time, the agreement concerning the treatment of Polish nationals, etc., was finally signed.

[3] *Official Journal of the League of Nations*, October 1933, pp. 1157–1161. The terms of Article 20 of the Agreement, which had not been drawn up when the Agreement was initialled, are set out in the letter to the Secretary-General of the League of Nations by which the High Commissioner at Danzig announces the conclusion of the negotiations between the Free City and Poland. (*Official Journal of the League of Nations*, January 1934, p. 27.)

## *A.—PUBLIC ELEMENTARY EDUCATION*

*Article 1*

1. Public elementary schools at which the language of instruction is Polish shall be set up in Danzig on application being made in writing by the persons legally responsible for the education (*Erziehungsberechtigte*) of at least forty children of school age, being Danzig nationals of Polish origin or speech and residing in (*a*) the same commune, or (*b*) the same school district (wherever the school district is more extensive than the commune) or, in exceptional cases, (*c*) neighbouring communes within a radius of 3½ kilometres. Applications shall be made on the form shown in the Appendix hereto.

In exceptional cases, where, for special reasons, the opening of a school would be inadvisable, classes shall be organized.

Children of Danzig nationals of Polish origin or speech living outside a radius of 3½ kilometres may also attend such schools or classes, provided that transport facilities are such as to enable them to attend regularly or that their conveyance can be arranged for by their parents or by other persons.

A liberal attitude shall be maintained in regard to the admission of the children of Polish nationals and other persons of Polish origin or speech to the afore-mentioned schools or classes in so far as the available accommodation allows.

2. If application is made in respect of at least twelve children, courses in religious instruction conducted in the Polish language and comprising the same number of hours per week as the religious teaching in the German language shall be introduced in the Danzig public elementary schools. From the second school-year onwards, courses in the Polish language comprising four hours weekly shall also be introduced. Such instruction shall be given within the framework of the normal time-table of the school, so that children may not be obliged to return to school on any given day for the sole purpose of such teaching. The programme of such courses shall be adapted to the normal curriculum of teaching in Polish and of religious instruction in the Polish language, as applied in Danzig public elementary schools where the vehicle of instruction is the Polish language.

A liberal attitude shall be maintained with regard to the admission of the children of Polish nationals and other persons of Polish origin or speech to such schools.

3. Public elementary schools at which Polish is the language of instruction shall constitute independent school units and shall have their own directing authorities.

*Article 2*

1. No public elementary school or class where Polish is the language of instruction may be closed unless the number of pupils falls below forty in three successive school-years and there is reason to fear that this figure will continue to diminish.

2. Courses in the Polish language may not be abolished during the school-year unless the number of children attending the courses in Polish and in religious instruction falls below six during the school-year.

3. The management of any public elementary school at which Polish is the language of instruction and which ceases in the manner specified above to satisfy the conditions necessary for its continuance as a school of a public character, may be taken over by any interested persons or

institutions and conducted as a private school. In that case, it shall enjoy facilities in respect of the premises and school material of which it previously had the use.

These provisions shall apply, *mutatis mutandis*, to the aforementioned classes in the Polish language and to the teaching of religious knowledge in that language.

4. Persons legally responsible for the education of children of Polish origin or speech attending public elementary schools at which German is the language of instruction or the Polish institutions concerned shall be entitled to organize, at their own expense, instruction in the Polish language or in religious knowledge in the Polish language, irrespective of the number of children affected.

In this case, such persons or institutions shall enjoy facilities with regard to the use of school premises by arrangement with the headmaster or headmistress of the school.

*Article 3*

Public elementary schools where the language of instruction is Polish shall be maintained and directed in accordance with the same principles and conditions as public elementary schools at which the language of instruction is German; they shall benefit to an equal extent by all funds and other grants for public education.

*Article 4*

1. No persons shall be appointed as teachers at public elementary schools at which the language of instruction is Polish, or in the classes specified in Article 1, No. 2, unless they have a thorough knowledge of the Polish language and possess the necessary qualifications for teaching in schools at which the language of instruction is Polish; such teachers shall preferably be selected from among persons of Polish origin and speech.

2. Teaching certificates issued in Poland shall be regarded as a sufficient qualification for the post of teacher in such schools. Should the persons appointed be Polish nationals, they may subsequently be required to obtain Danzig nationality.

3. Supplementary courses, at which special attention shall be given to the Polish language, shall be periodically arranged for teachers employed at public elementary schools at which the language of instruction is Polish, as is the custom with regard to teachers at the other public schools in Danzig.

*Article 5*

1. All text-books and other teaching material employed in the public elementary school or classes at which the language of instruction is Polish shall be written in Polish and shall not contain anything likely to offend Polish sentiment.

2. A uniform curriculum of instruction and a uniform scheme of study shall be drawn up for all such schools.

*Article 6*

Instruction in the German language as a subject of study in schools or classes in which the normal language of instruction is Polish shall not begin until the second school-year.

*Article 7*

1. In the case of all public elementary schools or classes in which the language of instruction is Polish, the co-operation of parents and representatives of the Polish population shall be secured

by the creation of bodies similar to those set up in connection with the other public schools in Danzig.

2. As regards the public elementary schools to which are attached classes or courses in which the language of instruction is Polish, the parents and representatives of the Polish population shall be afforded appropriate facilities for making known their wishes.

3. Official inspections of the public elementary schools or classes and courses (Art. 1, No. 2) in which the language of instruction is Polish shall be carried out by an inspector possessing the necessary qualifications for the post of teacher at schools at which the language of instruction is Polish, as specified in Article 4.

*Article 8*

The Polish language may be used in all communications with the parents of pupils and at all meetings or lectures relating to school matters.

*Article 9*

1. Applications for the opening of public elementary schools at which the language of instruction is Polish or of courses (see Appendix), which must be filed by January 31st of each year, shall be considered as expeditiously as possible, and the decision thereon shall be taken in time to enable the school or course to be opened at the beginning of the school-year referred to in the application.

2. The closing of a school or of courses may not take place until after the end of the school-year.

*B.—PRIVATE EDUCATION*

*Article 10*

1. Persons of Polish origin or speech shall be entitled to establish, direct, inspect and maintain at their own expense private schools and private educational establishments of any type or grade and also to give private instruction, provided always that such private schools are not inferior to public schools in their curriculum and organization and the academic qualifications of their teaching staffs, and that they do not have the effect of setting up barriers between pupils in accordance with the social position of their parents. In all other respects, the provisions of the Danzig Constitution shall apply.

2. Such schools may be attended both by the children of Danzig nationals of Polish origin or language and by the children of any other persons of Polish origin or language.

3. At private schools at which the language of instruction is Polish, nothing may be taught to the prejudice of the Free City. On the contrary, every effort shall be made to foster the pupils' feelings of loyalty to Danzig.

4. The stipulations of paragraph 1 shall cease to apply in the event of private education being no longer permitted both in Danzig and in Poland.

*Article 11*

The children of persons, being Danzig nationals of Polish origin or speech, who receive private education at home, in a private school or in private Polish establishments, shall be exempted from attendance at public schools or establishments.

*Article 12*

Should subsidies of any kind be paid out of Danzig public funds to private schools and educational establishments of any type or grade (save in cases where such subsidies result from liabilities

at private law), grants shall also be made to private schools of the same category at which the language of instruction is Polish.

### *C.—INTERMEDIATE AND HIGHER EDUCATION*

*Article 13*

1. If the education at the private schools specified in Article 10, at which the language of instruction is Polish, corresponds to that given in the intermediate or higher public schools of the Free City of Danzig, the Free City shall grant to such schools rights identical with those enjoyed by public schools of the same type (*Staatliche Anerkennung*). Such rights shall also apply to certificates issued by such schools.

2. The public rights specified in paragraph 1 above shall be granted without further formality to the private Polish *Gymnasium* already established at Danzig.

The Senate reserves to itself the right to supervise examinations and the issue of certificates through delegates to be appointed by it.

### *D.—COMPULSORY, OCCUPATIONAL AND SUPPLEMENTARY EDUCATION*

*Article 14*

1. In order to guarantee to Danzig nationals of Polish origin or speech the use of their mother-tongue in supplementary occupational education also, classes shall be organized, in which the language of instruction will be Polish, under the same conditions as those governing the organization of such classes in which the language of instruction is German, provided always that in towns at least twenty-five and in country district; at least fifteen Danzig nationals of Polish origin or speech are entered for such classes.

Polish nationals and other persons of Polish origin and language may also be entitled to attend such classes.

2. In the event of the opening, in the manner prescribed in Article 10, of private schools or classes, attendance at which takes the place of the compulsory supplementary instruction at the public schools, the aforementioned private schools or classes shall be granted the same rights as public schools (*Staatliche Anerkennung*).

### *E.—THE POLYTECHNIC SCHOOL*

*Article 15*

Polish nationals and other persons of Polish origin or speech shall enjoy the same treatment at the Danzig Polytechnic School as Danzig students of German nationality.

### *F.—DIPLOMAS*

*Article 16*

The Free City of Danzig undertakes to recognize the corresponding certificates and diplomas issued by schools and higher educational establishments in Poland and to raise no objection on this account to the exercise of the vocations for which such certificates and diplomas are a qualification.

The above clause shall also apply to the certificates issued by artisan associations and other occupational organizations.

As regards the legal profession, Polish diplomas shall be recognized, provided always that the practitioners concerned have made a supplementary study of Danzig law and hold satisfactory certificates to that effect.

The settlement of this question shall in no way affect the right of the Free City of Danzig to deal, under the Constitution and the agreements and conventions in force, with the admission to the Danzig labour market of all trades and professions.

### *G.—LANGUAGE*

*Article 17*

1. The Free City of Danzig guarantees the free use of the Polish language, both in persona1 relations and for economic and social purposes. The foregoing stipulation shall apply to the use of the Polish language in the Press, in publications of all kinds and at public and private meetings.

2. The Free City of Danzig guarantees that the use of the Polish language shall be both permissible and practicable in communications with the authorities: administrative bodies, judicial authorities, municipal authorities and other public bodies. Any written document or verbal statement submitted to the Danzig authorities or made before them in the Polish language shall have the same validity at substantive law as documents or statements in the German language. Verbal statements made in Polish before the authorities shall be inserted in the records in that language whenever the importance of the statement so requires.

Persons communicating with the authorities in Polish, and parties to legal proceedings employing the Polish language, shall be entitled to receive, without delay and free of charge, a translation of the operative part of the replies, decisions or orders of the authorities or courts of law. The foregoing stipulation shall be without prejudice to the status of the Polish language as recognized in the special provisions of the laws of Danzig.

The provisions of the present Article shall be construed reasonably and shall not imply any obligation on the part of the Free City to maintain a bilingual administration.

### *H.—GENERAL PROVISIONS*

*Article 18*

1. Danzig nationals employed in the public services or Polish services in the territory of the Free City of Danzig shall enjoy complete liberty as regards the choice of the schools to be attended by their children. No influence shall be exerted over such choice by the Polish authorities or services. Employees shall not lie under any disadvantage from the point of view of the service to which they belong in consequence of their exercising their right of free choice in regard to schools.

2. The Free City of Danzig gives a similar undertaking as regards the persons of Polish origin or speech employed in its service.

*Article 19*

In concluding the present Agreement, the Parties reserve their respective legal points of view.

*Article 20*

After the expiration of one year, the Agreement may be denounced at twelve months' notice. If so denounced, it shall remain in force until it has been replaced by another agreement or by a decision of the organs of the League of Nations.

Done at Danzig, on August 5th, 1933.

For and on behalf of the Polish Republic:

(Initialled) P.

For and on behalf of the Free City of Danzig:

(Initialled) R.

APPENDIX TO THE AGREEMENT

As the party entitled to decide with regard to the education of. . . . being of Polish origin or having Polish as his/her mother-tongue, I hereby make application for him/her to be admitted to a school or class having Polish as the language of instruction.

Should it not be possible to give effect to this application, it is to count as an application for admission to a section for Polish language and religious instruction.

Name and Christian name. . . .
Occupation. . . .
Address. . . ."

The Council of the League of Nations noted the Agreement on September 28th, 1933 (3rd meeting of the 76th Session).[4]

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## 45. INTERPRETATION OF THE GRECO-BULGARIAN AGREEMENT OF DECEMBER 9th, 1927 (CAPHANDARIS-MOLLOFF AGREEMENT)

### Advisory Opinion of 8 March 1932 (Series A/B, No. 45)

**Eighth Annual Report of the Permanent Court of International Justice (15 June 1931—15 June 1932), Series E, No. 8, pp. 238–243**

*Interpretation of the Caphandaris-Mollof Agreement. Competence of the Council of the League of Nations under Article 8 of the aforesaid Agreement—Bulgarian reparations debt (Treaty of Peace of Neuilly of November 1919, Art. 121; Agreement of The Hague of January 20th 1930; Trust Agreement of March 5th, 1931)—Greek debt to Bulgaria for reciprocal and voluntary emigration (Convention of Neuilly of November 27th, 1919; Emigration Regulation of March 6th, 1922; Plan of Payments of December 8th, 1922; Caphandaris-Mollof Agreement of December 9th, 1927)—Application of the Hoover proposal of June 20th, 1931, to the aforesaid debts (Report of the Committee of Experts of August 11th, 1931); Resolutions of the Council of the League of Nations of September 19th, 1931; Greco-Bulgarian Arrangement of November 11th, 1931)—Jurisdiction of the Court in advisory procedure (Art. 14 of the Covenant of the League of Nations)*

*History of the question*

In a letter dated August 7th, 1931, the Bulgarian Government submitted to the Council a question which had arisen between Bulgaria and Greece on the ground that the latter country, considering that it was "entitled to connect its debt to the Bulgarian refugees with the Bulgarian Government's debt on reparation account", had failed to make payment on July 31st, 1931, of a sum due on that date, in respect of the former of the above-mentioned debts, under Article 4 of the Caphandaris-Molloff Agreement of December 9th, 1927.

[4] Official Journal of the League of Nations, November 1933, pp. 1330 *et sqq*.

In regard to these two debts, the following facts should be borne in mind:

The Bulgarian reparation debt had its origin in Article 121 of the Peace Treaty of Neuilly. By that Article, Bulgaria agreed to pay a sum of 2¼ milliard gold francs under the head of reparation; the same Article laid down the way in which this sum had to be paid. Subsequently, both the sum to be paid and the way in which it was to be paid underwent various modifications; they were finally fixed by the Agreement on the payment of Bulgarian reparations concluded at The Hague on January 20th, 1930. This Agreement provided for the payment by Bulgaria of a certain number of annuities, payable in two equal half-yearly instalments on the 30th of September and the 31st of March in each year. On March 5th, 1931, a "Trust Agreement" was entered into between the Governments, creditors of the payments for Bulgarian reparations, and the Bank for International Settlements at Basle. By this agreement, the Bank became the Trustee of the creditor Governments to receive, manage and distribute the reparation annuities payable by Bulgaria after the coming into force of the agreement. This agreement was accepted by Bulgaria.

The distribution among the creditor Powers of the sum paid by Bulgaria is effected by the Bank for International Settlements. The Greek share is about 75%.

The Greek Emigration debt had its origin in the Convention between Greece and Bulgaria signed at Neuilly on November 27th, 1919, in pursuance of Article 56 of the Peace Treaty of Neuilly. This Convention was intended to facilitate the reciprocal and voluntary emigration of members of the racial, religious or linguistic minorities in Greece and Bulgaria to the country to which they were ethnically akin. The financial aspects of the system had been settled by a *Règlement*, which was drawn up by the Mixed Commission instituted by the Convention of Neuilly and came into force on March 6th, 1922. This *Règlement* was modified, first by a "Plan of Payments" promulgated by the Commission with the concurrence of the two Governments on December 8th, 1922, and subsequently by an arrangement—the Caphandaris-Molloff Agreement—concluded between these Governments on December 9th, 1927.

Under this system, which was the last in force, the property of emigrants leaving one of the States concerned was liquidated and acquired by that State. The emigrant received payment, partly in cash (as a rule 10%), and the balance in bonds issued by the State in whose territory he settled. Each Government was to become the creditor of the other for the total amount of the debt it had contracted towards the emigrants coming to settle in its territory. Finally, the State which had the larger claim against the other—in this case, Bulgaria—was to become the creditor of the other for the balance. It is this balance which constitutes the Greek emigration debt.

On June 20th, 1931, President Hoover made his proposal for a moratorium in respect of certain war debts. The first part of this proposal was worded as follows:

> "The American Government proposes the postponement during one year of all payments on inter-governmental debts, reparations, and relief debts, both principal and interest, of course, not including obligations of governments held by private Parties."

The Greek Government considered that, if this proposal was to cover not only German reparations but also what are known as Eastern reparations, it was fair that the moratorium should include the Greek emigration debt, as being an intergovernmental debt. The Bulgarian Government, for its part, considered that the Hoover proposal certainly covered its own reparation debt, but that its claim against Greece on account of emigration, being essentially in the nature of a private debt, was not covered by it. The two Governments had communicated their difference of opinion to the Committee of Experts, which met in London in July-August, 1931, to advise on the steps necessary to give effect to President Hoover's proposal, and the Committee, in the part of its report of August 11th, 1931, dealing with this difference of opinion, stated as follows:

"We do not feel that it is within our competence to decide the difference of opinion set forth above. In this, as in other cases, where doubt has been expressed as to whether debts are inter-governmental in nature, we consider that the matter must be settled by the two Governments concerned.

"We must, however, record our emphatic view that it is desirable that a practical settlement should be reached, and we hope that the Bulgarian and Greek Governments will approach the matter in the most conciliatory spirit possible, so that this end may be achieved."

As from July 15th, 1931, Bulgaria discontinued the monthly provision with the Bank of International Settlements for the half-yearly payment of her reparation installment falling due at the end of September. Greece, for her part, omitted the payment due on July 31st, 1931, in respect of the half-yearly installment of the Greek emigration debt.

It was in these circumstances that Bulgaria submitted the matter to the Council, founding her case in particular on Article 8 of the Caphandaris-Molloff Agreement, according to which "any differences as to the interpretation of this Agreement shall be settled by the Council of the League of Nations, which shall decide by a majority vote".

*The request for an advisory opinion*

After prolonged proceedings, both written and oral, the Council decided, by a resolution dated September 9th, 1931, to ask the Court for an advisory opinion on the following points:

> "In the case at issue, is there a dispute between Greece and Bulgaria within the meaning of Article 8 of the Caphandaris-Molloff Agreement concluded at Geneva on December 9th, 1927?
>
> If so, what is the nature of the pecuniary obligations arising out of this Agreement?"

*Communications, statements and hearings*

According to the customary procedure, the request for an advisory opinion was communicated to Members of the League of Nations and to States entitled to appear before the Court. Furthermore, the Registrar, by means of a special and direct communication, informed the Bulgarian and Greek Governments, which were regarded by the Court as likely, in accordance with Article 73, paragraph 1, sub-paragraph 2, of the Rules, to be able to furnish information on the questions submitted to the Court for an advisory opinion, that the Court was prepared to receive from them written statements and, if they so desired, to hear oral arguments presented on their behalf. Within the periods fixed, and subsequently extended, by the Court, Memorials and Counter-Memorials were filed on behalf of the Bulgarian and Greek Governments. The Court sat on February 12th and 13th, 1932, to hear oral arguments offered on behalf of the two Governments.

*Composition of the Court*

For the examination of this case, the Court was composed as follows:

MM. Adatci, *President;* Guerrero, *Vice-President;* Baron Rolin-Jaequemyns, Count Rostworowski, MM. Fromageot, Altamira, Anzilotti, Urrutia, Sir Cecil Hurst, M. Schücking, Jhr. van Eysinga, M. Wang, *Judges*.

MM. Caloyanni and Papazoff, appointed as Judges *ad hoc* by the Greek and Bulgarian Governments respectively, also sat on the Court for the purposes of this case.

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*Opinion of the Court (analysis)*

The Court's opinion was delivered on March 8th, 1932.

In regard to the first question put to it, the Court's observations may be summarized as follows:

The question which Bulgaria submitted to the Council, namely, whether Greece was entitled to connect *(lier)* the Bulgarian reparation debt and the Greek emigration debt and to set off one against the other, is only another way of raising the question whether Greece is right in contending that, if she were to agree to the Hoover Plan being applied to payments on account of reparations, payments under the Greek emigration debt must also be held in suspense.

In this connection the Court points out that Greece's right to subject her acceptance of the Hoover Plan to a condition has nothing to do with the Caphandaris-Molloff Agreement. To the extent that the Greek Government contends that the debt under the Caphandaris-Molloff Agreement is of the same nature as the Bulgarian reparation debt, the Court observes that, even assuming that it is the Caphandaris-Molloff Agreement which falls to be interpreted, this interpretation would be solely for the purpose of ascertaining whether the Greek debt could come within one or other of the categories covered by the Hoover Plan. The interpretation of this Agreement could therefore come in only as a question incidental or preliminary to another question, itself depending solely on the Hoover Plan.

But the powers of the Council under Article 8 of the Caphandaris-Molloff Agreement are restricted to interpreting that Agreement, and do not extend to the Hoover Plan. The Court, therefore, concludes that, in the case at issue, there is no dispute within the meaning of the said Article.

The Court having replied in the negative to the first question, the second no longer arose.

However, in the course of the written pleadings and also during the oral arguments before the Court, the Agent and Counsel of the two Governments had stated that they desired the Court to give an opinion upon the second question, whether or not the first question was answered in the affirmative. But the Court considered that, in view of Article 14 of the Covenant, it was bound by the terms of the questions as formulated by the Council.

The second question is so worded as to be put to the Court conditionally upon an affirmative answer being given to the first question. To ignore this condition at the request of the Parties would be in effect to allow the two interested Governments to submit to the Court a question for an advisory opinion. As the wish expressed by the Agent and Counsel of the respective Governments only envisaged an extension of the advisory procedure, there was no need for the Court to consider the point whether it is possible for an understanding between the representatives of the interested Governments, reached in the course of the proceedings, to serve as a kind of "special agreement", initiating contentious proceedings before the Court.

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The advisory opinion was adopted by eight votes against six. The judges in the minority (M. Adatci, Count Rostworowski, MM. Altamira, Schücking, Jhr. van Eysinga and M. Papazoff) were content to state their dissent, without subjoining a dissenting opinion to the advisory opinion of the Court.

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*Effects of the opinion*

On May 10th, 1932, at the second meeting of its 67th Session, the Council passed a resolution taking note of the Court's opinion, and expressing its hope that the negotiations entered into with a view to a general settlement of the existing difficulties between the two Governments might lead to a satisfactory result, at an early date. The resolution was accepted by the representatives of Bulgaria and Greece. In this connection, the Bulgarian representative observed that his Government reserved its right to ask the Court, if necessary, to state its views with regard to the substance of the dispute between the two Governments

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## 46. FREE ZONES OF UPPER SAVOY AND THE DISTRICT OF GEX

### Judgment of 7 June 1932 (Series A/B, No. 46)

**Eighth Annual Report of the Permanent Court of International Justice (15 June 1931—15 June 1932), Series E, No. 8, pp. 191–206**

*Interpretation of Article 435, paragraph 2, of the Treaty of Versailles with its Annexes (Swiss note of May 5th, 1919; French note of May 18th, 1919: has this provision abrogated, or is it intended to lead to the abrogation of "the old stipulations" regarding the following free zones: the zone of the Pays de Gex; the "Sardinian" zone; the zone of Saint Gingolph and the "Lake" zone?)—(Treaties of Paris of May 30th, 1814, and November 20th, 1815; Act of the Congress of Vienna of June 9th, 1818; declarations of the Powers of March 20th and 29th and November 29th, 1815; Protocol of November 3rd, 1815; Acts of Accession of the Helvetic Diet of May 27th and August 12th, 1815; Treaty of Turin of March 16th, 1816; Manifesto, etc., of September 9th, 1829)—Settlement of the "new regime" for the free zones: New pleas submitted in the last phase of the proceedings (the* rebus sic stantibus *clause): admissibility of these pleas—Importations free of duty: power of the Court to regulate this matter—Limitations upon the Court's jurisdiction resulting from the sovereignty of the States concerned in the case—Customs cordon and control cordon*

*History of the question*

Article 435 of the Treaty of Versailles is worded as follows:

> "The High Contracting Parties, while they recognize the guarantees stipulated by the treaties of 1815, and especially by the Act of November 20th, 1815, in favour of Switzerland, the said guarantees constituting international obligations for the maintenance of peace, declare nevertheless that the provisions of these treaties, conventions, declarations and other supplementary acts concerning the neutralized zone of Savoy, as laid down in paragraph 1 of Article 92 of the Final Act of the Congress of Vienna and in paragraph 2 of Article 3 of the Treaty of Paris of November 20th, 1815, are no longer consistent with present conditions. For this reason the High Contracting Parties take note of the agreement reached between the French Government and the Swiss Government for the abrogation of the stipulations relating to this zone which are and remain abrogated.
>
> The High Contracting Parties also agree that the stipulations of the treaties of 1815 and of the other supplementary acts concerning the free zones of Upper Savoy and the Gex District are no longer consistent with present conditions, and that it is for France and Switzerland to come to an agreement together with a view to settling between themselves the status of these territories under such conditions as shall be considered suitable by both countries."

Two annexes are attached to this Article. The first contains a note by the Federal Council dated May 5th, 1919, informing the French Government that after examining the terms of Article 435, it has "happily reached the conclusion that it was possible to acquiesce in it under the following conditions and reservations" as regards the free zone of Upper Savoy and the District of Gex:

"(*a*) The Federal Council makes the most express reservations to the interpretation to be given to the statement mentioned in the last paragraph of the above article for insertion in the Treaty of Peace, which provides that 'the stipulations of the treaties of 1815 and other supplementary acts concerning the free zones of Haute-Savoie and the Gex District are no longer consistent with present conditions'. The Federal Council would not wish that its acceptance of the above wording should lead to the conclusion that it would agree to the suppression of a system intended to give neighbouring territory the benefit of a special régime which is appropriate to the geographical and economical situation and which has been well tested.

In the opinion of the Federal Council, the question is not the modification of the customs system of the zones as set up by the treaties mentioned above, but only the regulation in a manner more appropriate to the economic conditions of the present day of the terms of the exchange of goods between the regions in question. The Federal Council has been led to make the preceding observations by the perusal of the draft convention concerning the future constitution of the zones which was annexed to the note of April 26th from the French Government. While making the above reservations, the Federal Council declares its readiness to examine in the most friendly spirit any proposals which the French Government may deem it convenient to make on the subject.

(*b*) It is conceded that the stipulations of the treaties of 1815 and other supplementary acts relative to the free zones will remain in force until a new arrangement is come to between France and Switzerland to regulate matters in this territory."

The second annex contains a note by the French Government, recording the Swiss Government's accession, and adding in regard to the Swiss reservations that:

"Concerning the observations relating to the free zones of Haute-Savoie and the Gex District, the French Government have the honour to observe that the provisions of the last paragraph of Article 435 are so clear that their purport cannot be misapprehended, especially where it implies that no other Power but France and Switzerland will in future be interested in that question.

The French Government, on their part, are anxious to protect the interests of the French territories concerned, and, with that object, having their special situation in view, they bear in mind the desirability of assuring them a suitable customs régime, and determining, in a manner better suited to present conditions, the methods of exchanges between these territories and the adjacent Swiss territories, while taking into account the reciprocal interests of both regions.

It is understood that this must in no way prejudice the right of France to adjust her customs line in this region in conformity with her political frontier, as is done on the other portions of her territorial boundaries, and as was done by Switzerland long ago on her own boundaries in this region."

This exchange of notes was followed by negotiations between the two Governments, with a view to determining the future régime of the free zones; these negotiations finally resulted, on August 7th, 1921, in a convention based on the abolition of the free zones in return for compensations. This convention was approved by both Parliaments, but a referendum which was taken on it in Switzerland gave an adverse result, and the French Government was informed on March 19th, 1923, that the Federal Government was unable to ratify the convention.

However, a French law providing for the abolition of the free zones had been adopted on February 16th, 1923; its first Article laid down that:

> "Along the entire frontier, between France and Switzerland, the national customs line shall be established at the limit of the territory of the Republic.
>
> Consequently, and subject to the provisions of the articles hereafter, the so-called 'free zones' regions shall, in all respects and especially in respect of indirect taxes, henceforth be placed under the same régime as the whole of French territory."

On October 10th, 1923, the French Government informed the Federal Government that this law would come into effect on November 10th of that year. The latter Government replied, protesting against this step and proposing recourse to arbitration. Eventually, a Special Arbitration Agreement was signed at Paris on October 30th, 1924; it came into force on March 21st, 1928, and was filed with the Registry of the Court under cover of letters from the French and Swiss Ministers at The Hague dated March 29th, 1928. Articles 1, 2 and 4 of this Special Agreement provide as follows:

*The Special Agreement*

"*Article 1*.—It shall rest with the Permanent Court of International Justice to decide whether, as between Switzerland and France, Article 435, paragraph 2, of the Treaty of Versailles, with its Annexes, has abrogated or is intended to lead to the abrogation of the provisions of the Protocol of the Conference of Paris of November 3rd, 1815, of the Treaty of Paris of November 20th, 1815, of the Treaty of Turin of March 16th, 1816, and of the Manifesto of the Sardinian Court of Accounts of September 9th, 1829, regarding the customs and economic régime of the free zones of Upper Savoy and the Pays de Gex, having regard to all facts anterior to the Treaty of Versailles, such as the establishment of the Federal Customs in 1849, which are considered relevant by the Court.

The High Contracting Parties agree that the Court, as soon as it has concluded its deliberation on this question, and before pronouncing any decision, shall accord to the two Parties a reasonable time to settle between themselves the new régime to be applied in those districts, under such condition as they may consider expedient, as provided in Article 435, paragraph 2, of the said Treaty. This time may be extended at the request of the two Parties.

*Article 2*.—Failing the conclusion and ratification of a convention between the two Parties within the time specified, the Court shall, by means of a single judgment rendered in accordance with Article 58 of the Court's Statute, pronounce its decision in regard to the question formulated in Article 1 and settle for a period to be fixed by it and having regard to present conditions, all the questions involved by the execution of paragraph 2 of Article 435 of the Treaty of Versailles.

Should the judgment contemplate the import of goods free or at reduced rates through the Federal Customs barrier or through the French Customs barrier, regulations of such importation shall only be made with the consent of the two Parties.

*Article 4*.—Should the Court, in accordance with Article 2, be called upon itself to settle all the questions involved by the execution of Article 435, paragraph 2, of the Treaty of Versailles, it shall grant the Parties reasonable times for the production of all documents, proposals and observations which they may see fit to submit to the Court for the purposes of this settlement and in reply to those submitted by the other Party.

Furthermore, in order to facilitate this settlement, the Court may be requested by either Party to delegate one or three of its members for the purposes of conducting investigations on the spot and of hearing the evidence of any interested persons."

*First phase of the proceedings*

The Special Agreement was communicated on or before April 5th, 1928, to all concerned, as provided in Article 40 of the Statute and in Article 36 of the Rules of Court; similarly, it was communicated to all States, members of the League of Nations, and to all other States entitled to appear before the Court.

On the other hand, States parties to the Treaty of Versailles were not specially notified under Article 63 of the Statute, which was considered as inapplicable in this case; but their attention was drawn to the right which they no doubt possessed to inform the Court, should they wish to intervene in accordance with the said Article, in which case it would rest with the Court to decide.

The Parties duly filed their Cases, Counter-Cases and Replies within the periods laid down for this purpose, and the Court held public sittings on July 9th, 10th, 11th, 12th, 13th, 15th, 16th, 18th, 19th, 22nd and 23rd, 1929, to hear arguments, a reply and a rejoinder submitted on behalf of the respective Governments.

*The Order of August 19th, 1929*

On August 19th, 1929, in order to conform to paragraph 2 of Article 1 of the Special Agreement, the Court made an Order in which it allowed the Governments of the French Republic and the Swiss Confederation a period, expiring on May 1st, 1930, to settle between themselves the "new régime" to be applied in the territories referred to in Article 435, paragraph 2, of the Treaty of Versailles, under such conditions as they might consider expedient.

In the recitals of the said Order, the Court gave the Parties "any indications which might appear desirable as the result of the deliberation upon the question formulated in Article 1, paragraph 1", of the Special Agreement, that is, the question "whether, as between France and Switzerland, Article 435, paragraph 2, of the Treaty of Versailles, with its Annexes, has abrogated or is intended to lead to the abrogation of the provisions" of 1815, 1816, and 1829, "regarding the customs and economic régime of the free zones of Upper Savoy and the District of Gex".

*Second phase of the proceedings*

As the two Governments had not succeeded in reaching an agreement within the time laid down, the President, in pursuance of Article 4 of the Special Agreement, granted them a period "for the production by the Parties of all documents, proposals and observations which they might see fit to submit to the Court for the purposes of the settlement by it of all the questions involved by the execution of paragraph 2 of Article 435 of the Treaty of Versailles", and also a further period "to enable each Party to reply in writing to the documents, proposals and observations submitted by the other Party".

The written procedure having been concluded, the President fixed October 23rd, 1930, as the date for the opening of a new series of public hearings. At the same time he caused the Parties to be notified that, not having been able to secure the attendance at The Hague for these hearings of at least nine of the judges who had taken part in the examination of the zones' case in 1929, he had been compelled to reconstitute the Court in accordance with the principles of Article 25 of the Statute.

Accordingly, since the Parties did not avail themselves of their right, in view of the reconstitution of the Court, to demand to re-argue the whole case, the Court heard the observations presented on behalf of the French and Swiss Governments, on October 23rd, 24th, 25th, 27th, 28th, 29th and 31st, and November 1st, 3rd and 4th, 1930. Finally, on November 24th, 1930, at its own request, it heard the observations of the representatives of the Parties concerning the interpretation of Article 2, paragraph 2, of the Special Agreement.

*Order of December 6th, 1930*

On December 6th, 1930, the Court made a new Order, whereby it accorded to the two Governments a period expiring on July 31st, 1931, to settle between themselves the matter of importations free of duty or at reduced rates across the Federal Customs line and also any other point concerning the régime of the territories in question, and further declared that at the expiration of the period granted or of any prolongation thereof, it would deliver judgment at the request of either Party.

*Third phase of the proceedings*

On July 29th, 1931, the Swiss Government informed the Court that the negotiations thus contemplated had proved fruitless, and that accordingly it was for the Court to deliver its judgment. The French Government also announced that the negotiations had been broken off without any result. In these circumstances, the President fixed a period in which the Parties could submit further written observations. Subsequently, on April 19th, 20th, 21st, 22nd, 23rd, 26th, 27th, 28th and 29th, 1932, the Court heard arguments, a reply and a rejoinder by the Agents of the Parties, and their answers to certain questions put to them.

*Composition of the Court*

By decisions taken on November 2nd and December 4th, 1930, the Court, after deliberation, had recognized that the Court as then constituted must continue to deal with the case of the free zones, and had ruled that the judge who was then acting as President must continue to function for the purposes of the said case.

However, one of the judges who had sat on the Court had died; the Court was therefore composed as under:

MM. Anzilotti, *acting as President;* Loder, Altamira, Oda, Huber, Sir Cecil Hurst, MM. Kellogg, Yovanovitch, Beichmann, Negulesco, *Judges,* M. Eugène Dreyfus, *Judge ad hoc.*

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*Judgment of the Court (analysis)*

The Court's judgment was delivered on June 7th, 1932.

First, by reference to the instruments which created them, the Court gives a legal definition of the free zones to which the case relates, namely the Gex zone, the "little" Sardinian zone, the Saint-Gingolph zone, and the "Lake" zone. In addition to the Treaties of Peace of Paris of May 30th, 1814, and the Final Act of the Vienna Congress of June 9th, 1814, these instruments included certain declarations made on March 20th and 29th, 1815, and on November 3rd and 20th, 1815, by the Powers assembled at Vienna, and the "Acts of Accession" of the Swiss Diet dated May 27th and August 12th, 1815, as also the Treaty of Paris dated November 20th, 1815, and the Treaty of Turin dated March 16th, 1816.

Continuing, the Court recounts the various changes which the customs régime has undergone in the districts in question, particularly on the occasion of the consolidation of the Swiss customs in 1849—since which year the trade between the zones and the adjacent Swiss territories has been regulated by treaty—and also during the war 1914–1918; finally, it goes on to relate the origin of Article 435 of the Treaty of Versailles and of the Special Arbitration Agreement of October 30th, 1924, in virtue of which the case was submitted to it.

Proceeding next to examine the merits of the case, the Court dwells on the following considerations:

The question which the Court must first pass upon is "whether", according to Article 1, paragraph 1, of the Special Agreement, "as between Switzerland and France, Article 435, paragraph 2, of the Treaty of Versailles, with its Annexes, has abrogated or is intended to lead to the abrogation of" the provisions of 1815–1816, on which the régime of the free zones is based. The expression "as between France and Switzerland" has the effect of limiting the function of the Court to that of determining the reciprocal rights and obligations arising, in connection with the régime of the free zones, for these two countries, under Article 435, paragraph 2, of the Treaty of Versailles, with its Annexes, apart from the legal relations created as between the signatories of the said Treaty resulting from this Article.

This has not been disputed between the Parties. On the other hand, the latter are unable to agree as to the exact meaning and import of the question referred to the Court. The French Government contends that Article 1 of the Special Agreement, in asking the Court to say whether Article 435, paragraph 2, of the Treaty of Versailles, with its Annexes, "has abrogated or is intended to lead to the abrogation" of the provisions concerning the free zones, put forward two propositions, between which the Court must make its choice. The Swiss Government contests this view, and maintains that the Court's duty, under the terms of the said question, is to reply in the negative to both propositions, if it finds this result necessary for a correct interpretation of Article 435, paragraph 2, of the Treaty of Versailles, with its Annexes.

The Court finds that the expression "is intended to lead to the abrogation" means 'is intended necessarily to lead to the abrogation", since otherwise its reply would fail to remove the whole of the divergence between the two countries; accordingly, the Court accepts the Swiss argument. For, as it observes, it could not lightly be admitted that the Court, whose function it is to declare the law, should be called upon to choose between two or more constructions determined beforehand by the Parties, none of which corresponds to the opinion at which it may arrive. Unless otherwise expressly provided, it must be presumed that the Court enjoys the freedom which normally appertains to it, and that it is able, if such is its opinion, not only to accept one or other of the two propositions, but also to reject them both.

As regards the question whether Article 435, with its Annexes, has abrogated the free zones, the Court points out that the only conclusion which is drawn in the actual text of Article 435, paragraph 2, of the Treaty of Versailles, from the statement that the former provisions are not consistent with present conditions, is that France and Switzerland are to settle between themselves the status of the free zones—a conclusion which is tantamount to a declaration of disinterestedness in regard to their status on the part of the High Contracting Parties other than France. In particular, this text does not draw the conclusion that the abrogation of the old stipulations relating to the free zones is a necessary consequence of this inconsistency. Moreover, it is scarcely possible, in view of the context, to regard the expression "are no longer consistent with present conditions" as *ipso facto* involving the abrogation of the free zones.

Finally, and in any case, Article 435 of the Treaty of Versailles cannot be adduced against Switzerland, who is not a Party to that Treaty, except to the extent to which she accepted it. That extent is determined by the note of the Federal Council of May 5th, 1919, an extract from which, already quoted above, constitutes Annex 1 of Article 435. In that note the Federal Government makes explicit reservations which exclude the acquiescence of Switzerland in the abolition of the free zones. As regards the French note of May 18th, 1919, which constitutes Annex II of Article 435 of the Treaty of Versailles, that note cannot, in any circumstances, affect the conditions of the Federal Council's acquiescence in the Article in question, that acquiescence being a unilateral act on the part of Switzerland.

The Court, therefore, reaches the conclusion that Article 435, paragraph 2, of the Treaty of Versailles, with its Annexes, has not abrogated the régime of the free zones as between France and Switzerland.

Again, the Court finds that this Article was not intended to lead to the abrogation of the free zones, i.e. to create an obligation to proceed to their abrogation. Such an obligation would only be conceivable under one of two suppositions, *viz.* that by acquiescing in Article 435, Switzerland had bound herself to negotiate an agreement involving the abrogation of the zones; or else that Switzerland's consent to such abrogation was not necessary, because she had no actual right to the free zones. As regards the first of these suppositions, even assuming that Article 435, paragraph 2, were interpreted as a mandate, involving an obligation, for France and Switzerland, to proceed to abrogate provisions acknowledged to be no longer consistent with present conditions, this mandate could not be adduced against Switzerland, which has not accepted it, but has explicitly rejected the idea of "a modification of the customs system of the zones, as set up by the treaties mentioned above".

As regards the second supposition, the very terms of Article 435, paragraph 2, seem to presuppose the existence of a right on the part of Switzerland, derived from the old stipulations. It is hard to understand why the Powers which signed the Treaty of Versailles, if they considered Switzerland's consent unnecessary, did not declare the free zones abrogated, on their own authority. Furthermore, Switzerland's consent was actually asked, and various proposals were made to her in order to obtain it; finally, the High Contracting Parties inserted the Swiss note of May 5th, 1919, immediately after Article 435, and that note, in the Court's opinion, is, like the successive proposals made by France, entirely based on the existence of a Swiss right to the free zones.

The Court next examines the situation in regard to the different free zones—namely the little Sardinian zone, the Saint-Gingolph zone, and the Gex zone—and concludes that the old stipulations invest Switzerland with a right, of the character of treaty stipulations, in respect of these zones.

The Gex zone, which presents a particularly complex problem, is subjected to a detailed examination, as a result of which the Court finds that the creation of this zone forms part of a territorial arrangement in favour of Switzerland, made as the result of an agreement between that country and the Powers, including France, and that this agreement invests Switzerland with a contractual right in the said zone.

The Court, having reached this conclusion, simply from an examination of the facts, does not need to consider whether the rights in the Gex zone result, in law, from a "stipulation in favour of a third Party".

However, the Court points out, in this connection, that the question of the existence of a right acquired under an instrument drawn between other States is one to be decided in each particular case. For, though it cannot be lightly presumed that stipulations favourable to a third State have been adopted with the object of creating an actual right in its favour, yet there is nothing to prevent the will of sovereign States from having this object and this effect. It must be ascertained whether the States which have stipulated in favour of a third State meant to create for that State a right, which the latter has accepted as such. The Court holds that all the instruments relating to the free zones point to the conclusion that such was, in fact, the intention of the Powers.

After thus answering the question put to it in Article 1 of the Special Agreement—namely whether Article 435 of the Treaty of Versailles, with its Annexes, has abrogated or was intended to lead to the abrogation of the former provisions relating to the free zones—the Court passes on to examine the questions arising from its task under Article 2 of the Special Agreement: namely, to settle all the questions involved by the execution of paragraph 2 of Article 435 of the Treaty of Versailles.

In settling these questions, should the Court be bound by its findings on the first question—i.e. the question contained in Article 1 of the Special Agreement? The Parties disagree on this issue, France answering it in the affirmative, and Switzerland in the negative. In regard to this point, the Court observes that it is called on to discharge its task in "a single judgment", and that it is hardly conceivable that a single judgment should contain in the first place the interpretation of Article 435, paragraph 2, of the Treaty of Versailles with its Annexes on the point whether, as between France and Switzerland, that Article with its Annexes abrogated or was intended to lead to the abrogation of the stipulations enumerated in Article 1 of the Special Agreement, and should then go on to lay down, in connection with the settlement of the question involved or the execution of the same Article, provisions which disregard or conflict with the interpretation given by the Court.

Similarly, it seems impossible to suppose that the Parties could have desired to obtain definite indications, before the negotiations referred to in Article 1, paragraph 2, of the Special Agreement, in regard to the points indicated in the first paragraph of that Article, if, in the event of the failure of the negotiations, the Court was free to settle the régime on a basis other than that indicated to the Parties at the close of its deliberation. The whole of the procedure contemplated by Article 1 of the Special Agreement and the interpretative notes annexed thereto would, in fact, cease to have any object if the Court, in making the settlement contemplated by Article 2 of the Special Agreement, could disregard its own interpretation of Article 435 of the Treaty of Versailles.

The Court adds that, while it is certain that the Parties, being free to dispose of their rights, might have embodied, in the negotiations contemplated in Article 1, paragraph 2, of the Special Agreement, and might in any future negotiations embody in their agreement any provisions they might desire—and, accordingly, even abolish the free zones or settle matters lying outside the framework of the régime with which Article 2 of the Special Agreement is concerned—it in no way follows that the Court possesses the same freedom. Such freedom, being incompatible with the Court's proper function, could, in any case, only be enjoyed by the Court if it resulted from a clear and explicit provision; and no such provision is to be found in the Special Agreement.

The Court must, therefore, deal with the questions involved in the execution of paragraph 2 of Article 435 of the Treaty of Versailles upon the footing that it must recognize and give effect to the rights which Switzerland derived from the treaties of 1815 and the other supplementary acts relating to the free zones.

However, towards the end of the proceedings the French Government had advanced some new pleas. Thus, it had argued that, independently of the abrogatory effect of Article 435 of the Treaty of Versailles, the former stipulations establishing the zones had lapsed, owing to the change in circumstances. The Swiss Government had asked the Court to reject these arguments as inadmissible, on the ground that the time was past at which they could have been submitted. Nevertheless, considering that the decision of an international dispute of the present order should not mainly depend on a point of procedure, the Court thinks it preferable not to entertain the plea of inadmissibility, and to deal on their merits with such of the new French arguments as may fall within its jurisdiction, in so far at least as they raise questions incidental to the main issue.

The French Agent had contended that the stipulations establishing the zones had lapsed because these zones had been created in view of, and because of, the existence of a particular situation, and that this situation had now ceased to exist. In arguing thus, the point on which he chiefly relied was that in 1815 the canton of Geneva was to all intents and purposes a free trade area, that the withdrawal of the French and Sardinian customs lines at that time made the area of Geneva and that of the zones an economic unit, and that the institution of the Swiss Federal Customs in 1849 destroyed this economic unit and put an end to the conditions in consideration of which the zones had been created. In the opinion of the Court, however, this French argument fails from lack of proof that the zones were in fact

established in consideration of the existence of circumstances which ceased to exist when the Federal Customs were instituted in 1849.

As the French argument fails on the facts, it becomes unnecessary for the Court to consider any of the questions of principle which arise in connection with the theory of the lapse of treaties by reason of change of circumstances (the *rebus sic stantibus* clause), and, in particular, to consider whether that theory would apply to treaties establishing rights such as that which Switzerland derived from the treaties of 1815 and 1816.

For these reasons the Court cannot accept the French contention that the treaties of 1815 and the other supplementary acts relating to the free zones, if not abrogated by the Treaty of Versailles, have nevertheless now ceased to be in force.

The Court next considers the question whether, and to what extent, it can fulfil that part of its mission which involves settling the régime of the territories in question. Paragraph 2 of Article 2 of the Special Agreement provides that, if the judgment of the Court contemplates the import of goods free or at reduced rates through the Swiss or French customs barrier, the regulation of such importation should only be made with the consent of the two Parties. In the view of the Court, if the consent is to be subsequent to the judgment, such a condition cannot be reconciled with Articles 59 and 60 of the Statute of the Court, which provide that the judgment is binding and final; but a previous consent has only been given by one of the Parties. Again, the regulation of questions connected with tariff exemptions is outside the sphere in which a Court of Justice, concerned with the application of rules of law, can help in the solution of disputes between two States. For these reasons, the Court is of opinion that, as the Parties have failed to come to an agreement on the regulation of these matters, judgment must be limited to questions of law, i.e. to questions not covered by the above-mentioned clause of the Special Agreement.

It has been argued on behalf of the French Government that, if the Court finds itself unable for any reason to carry out the whole of the mission entrusted to it by the Special Agreement, it should declare itself incompetent as to the whole, and give no judgment whatever. The Court points out in this connection that it is the Special Agreement which represents the joint will of the Parties. If the obstacle to fulfilling part of the mission which the Parties intended to entrust to the Court results from the terms of the Special Agreement itself, it results directly from the will of the Parties and, therefore, cannot destroy the basis of the Court's competence to decide on the questions of law.

Another limitation to the Court's jurisdiction—in addition to those imposed by paragraph 2 of Article 2 of the Special Agreement—consists, in the Court's opinion, in the respect which is due to the sovereignty of France over the zones, that sovereignty being entire in so far as it is not restricted by the provisions of the treaties of 1815 and 1816 and the agreements which supplemented them.

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In view of the foregoing considerations, the Court arrives at the following conclusions regarding the settlement of the régime of the free zones:

The right of Switzerland to the maintenance of the zones is admitted; France having placed her customs line at her political frontier in 1923, without the consent of Switzerland, must withdraw that line in accordance with the former treaty provisions. On the other hand, France is free to establish a police cordon at her frontier for the control of traffic, and to collect dues and taxes, not in the nature of customs duties, at the said frontier. On this point the Court observes that it follows from the principle that the sovereignty of France is to be respected in so far as it is not limited by her international obligations—in this case, by her obligations under the treaties of 1815 together with the supplementary acts—that no restriction exceeding those which ensue from those instruments can be imposed on

France without her consent; moreover, in case of doubt, a limitation of sovereignty must be construed restrictively; and while it is certain that France cannot rely on her own legislation to limit the scope of her international obligations, it is equally certain that French fiscal legislation applies in the territory of the free zones as in any other part of French territory.

The Court makes a reservation as regards abuses of a right, for it is certain that France must not evade the obligation to maintain the zones by erecting a customs barrier under the guise of a control cordon. But an abuse cannot be presumed by the Court.

On the other hand, the Court is of opinion that if, by the maintenance in force of the old treaties, Switzerland obtains the economic advantages derived from the free zones, she ought in return to grant compensatory economic advantages to the people of the zones. She had indeed officially declared her readiness to do so, and had stated that she was willing, if France so desired, to have the terms of the exchange of goods between the zones and Switzerland settled by experts, whose decision would be binding on the two States and would not require ratification by Switzerland.

In view of the same considerations, and also because the organization of the customs line in rear of the political frontier is an operation which must necessarily take time, the Court fixes January 1st, 1934, as the date by which the French Government must have withdrawn the customs line so as to re-establish the free zones of 1815 and 1816, which were abolished in 1923.

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*Dissenting opinions*

The judgment of the Court was adopted by six votes against five. M. Altamira and Sir Cecil Hurst have subjoined a dissenting opinion on certain points regarding the interpretation of the Special Agreement; and M. Negulesco a dissenting opinion regarding the Court's jurisdiction. M. Yovanovitch confines himself to a statement of his dissent, while M. Eugène Dreyfus has appended to the judgment a dissenting opinion.

*Dissenting opinion of M. Altamira and Sir Cecil Hurst*

The dissenting judges set out that the two main questions in regard to which their opinion differs from that of the majority are the question of the interpretation of Article 435, paragraph 2, in so far as concerns the second part of the question submitted to the Court by Article 1, paragraph 1, of the Special Agreement of 1924 and the question of the interpretation of this Special Agreement, and, in particular, of Article 2, paragraph 1, thereof.

With regard to the first question, the dissenting judges consider that Article 435 was intended to lead to the abrogation of the zones in the sense that the signatory Powers considered that the inconsistency between the old provisions and present conditions pointed to such abolition, and that even though they did not wish to force Switzerland to accept such abolition—she not being a signatory of the Treaty—they considered that the contemplated agreement should lead to this result. They hold that this interpretation is not incompatible with that given in reply to the concrete question in the Special Agreement, because each interpretation corresponds to one of the two elements which together form the contents of the Article: the inconsistency between .the provisions concerning the zones and present conditions, which inconsistency is categorically stated as a fact by the Powers, and the respect for the will of Switzerland which must have free play in the endeavour to reach an agreement since that country was not a Party to the Treaty. The dissenting judges note that these two elements and their respective interpretations naturally lead to different consequences. In so far as concerns negotiations with a view to an agreement between France and Switzerland, the latter country is so situated that abrogation

cannot be forced upon her either as sole basis for negotiations or by any singlehanded action on the part of France. On the other hand, once the Parties are outside the field of negotiations, it would seem that the other aspect of the Article must predominate.

The dissenting judges then turn to the question of the role of the Court as provided for by the Special Agreement. In their view, the power conferred on the Court by Article 2, paragraph 1, of the Special Agreement includes the possibility of executing Article 435, paragraph 2, of the Treaty of Versailles, as shown both by an interpretation of this provision (notably of the phrase "all the questions involved by the execution of paragraph 2 of Article 435") and other considerations. The dissenting judges therefore consider that the Court's judgment should contain a settlement of the whole matter, that is to say, of all the questions raised by the execution of the said Article, which would have been settled by the Parties themselves had they reached an agreement. If the judgment fails to do this, the Court is omitting to carry out the express mandate of the Parties in regard to the new regulation of the zones' régime. In their view, the difference between the terms of Article 435 of the Treaty of Versailles and those of Article 2 of the Special Agreement is explained by the fact that the Treaty of Versailles, to which Switzerland was not a Party, had no power to provide for the establishment of the new régime in any other way than by an agreement between Switzerland and France, whereas the Special Agreement could request the Court to effect what the Parties could have effected. For the dissenting judges, it seems unquestionable that the Court can legitimately claim the same freedom of judgment as the Parties themselves in determining the system which would be most in harmony with the present conditions and with the ideas of Article 435 of the Treaty of Versailles.

Furthermore, for the dissenting judges, nothing in the text or in the construction of Articles 36 and 38 of the Statute that would deprive the Court of jurisdiction to establish a settlement such as is contemplated in Article 2 of the Special Agreement.

In conclusion, the dissenting judges make every reservation in regard to a theory seeking to lay down, as a principle, that rights accorded to third Parties by international conventions, to which the favoured State is not a Party, cannot be amended or abolished, even by the States which accorded them, without the consent of the third State¸ which, in their view, would be fraught with great peril for the future of conventions of this kind now in force.

*Dissenting opinion by M. Negulesco*

According to M. Negulesco, the Court should have declared that it had no jurisdiction in this last phase of the proceedings. The Court's incompetence appears from an examination of two questions: firstly, what was the intention of the Parties as expressed by the Special Agreement, and secondly, whether that intention is not inconsistent with Article 14 of the Covenant and with the Statute of the Court.

M. Negulesco holds that, in order to determine its competence, the Court must examine whether, in accordance with Article 14 of the Covenant, the dispute brought before it is of an international character, and then whether, in accordance with Articles 36 and 38 of the Statute, the question submitted to it is capable of a legal solution.

In his view, the first question submitted to the Court concerning the interpretation of Article 435, paragraph 2, of the Treaty of Versailles is certainly an international dispute of a legal character coming within the limits of its jurisdiction.

As for the second question enunciated in Article 2, paragraph 1, of the Special Agreement, it comprises several points: (a) its object is to secure the execution of Article 435, paragraph 2, of the Treaty of Versailles; (b) to this end, it confers a special power upon the Court. M. Negulesco finds that these two points in Article 2, paragraph 1, of the Special Agreement result in the Court's incompetence. Accord-

ing to M. Negulesco, the request of the Parties that the Court should regulate in their stead the customs régime between the two countries is not concerned with a dispute of a legal character. The Court is not asked to declare the law between the Parties, but to make law between them on the basis of political and economic considerations which are foreign to the attributes of a legal tribunal. M. Negulesco concludes that a study of Article 2, paragraph 1, of the Special Agreement shows clearly that the Parties intended the Court to regulate the customs exemptions. These questions, however, being of an economic and political nature and having no legal character, are not within its competence.

For M. Negulesco, however, the Court is also incompetent on account of Article 2, paragraph 2. This text clearly lays down that it is necessary to obtain the consent not only of the Party across whose customs line the importation of goods free of duty or at reduced rates is to take place, but also the consent of the other Party. M. Negulesco finds that the Court is entitled to regulate the exemptions, but its decision is only to become executory with the consent of the two countries. In his view, this is incompatible with the character of the Court's judgments. He concludes that, as the Court could not regard a case as validly submitted to it, in virtue of a Special Agreement which infringes the provisions of Articles 59 and 63, paragraph 2, of its Statute, it ought to have declared that it had no jurisdiction.

M. Negulesco considers that his interpretation of Article 2 is confirmed by the interpretation furnished by the Parties themselves. However, what the parties desired is prohibited by the Statute of the Court, and the latter should declare that it has no jurisdiction.

M. Negulesco then addresses the question whether the Court has power in virtue of paragraph 1 of Article 2 of the Special Agreement to order the withdrawal of the French customs cordon. In this regard, he states that, even if one admits that in principle the Court is competent to decide the legal questions which come under the expression "all the questions", it must be admitted that the questions thus arising are of an incidental or preliminary character. The Court has been requested by the Parties to draw up a customs régime in their place, and questions which arise in the course of regulating these matters must be regarded as incidental or preliminary; legal questions cannot therefore arise since the Court is not competent to settle the customs régime.

M. Negulesco concludes that, given that the Court is unable to answer the second question put to it by the Special Agreement, and given that, under paragraph 1 of Article 2 of the Special Agreement, the Court has to deliver "a single judgment" and that therefore all the questions asked form an indivisible whole, the Court has not jurisdiction in regard to both the questions submitted to it.

*Dissenting separate opinion by M. Eugène Dreyfus*

M. Dreyfus states that he is unable to agree either with the grounds or with the operative portion of the judgment. He considers, firstly, that the circumstances in which the final judgment was reached suggest that the Statute of the Court has not been strictly observed; secondly, the Court has not fulfilled the task entrusted to it by the Special Agreement; and lastly, instead of announcing that, as the result of the Court's inability to fulfil an important part of its task, the Court was incompetent in respect of the whole, the judgment leads, contrary to the intention of the authors of the Special Agreement, to making the position of France worse today than it was in 1919, prior to the insertion in the Treaty of Versailles of the provision of Article 435, paragraph 2, the meaning of which is in this way distorted.

M. Dreyfus observes that the Parties, through the Special Agreement, asked the Court to deliver a single judgment which would simultaneously resolve the question of interpretation of paragraph 2 of Article 435 of the Treaty of Versailles and settle, for a period to be fixed by it and having regard to present conditions, all the questions involved by the execution of that provision. He questions, in this regard, the fact that of the twelve judges who took part in the deliberations of 1929 upon the interpretation of the text, four were absent from the second phase of the proceedings, replaced by four new

judges, which would not be in accordance with the combined provisions of Articles 13, 54 and 55 of the Statute of the Court.

In M. Dreyfus's view, Article 2 of the Special Agreement entrusted the Court with a task aiming at the settlement, for a period to be determined and having regard to present conditions, of all the questions involved by the execution of Article 435, paragraph 2, of the Treaty of Versailles. He finds that this strictly limited task was not to embrace any other questions, especially questions of law which are essentially of a definitive character and do not depend upon present conditions. Consequently, he considers it difficult to understand how the Court, with its jurisdiction so closely limited by the actual intention of the Parties, decided to examine if not to settle, in the operative part of its judgment, certain questions of pure law.

With regard to the problem concerning the lapse of the old stipulations as a result of changed conditions, M. Dreyfus notes that the Court had already declared, in its Order of August 19th, 1929, that facts antecedent to the Treaty of Versailles, and particularly the establishment of the Federal Customs in 1849, were clearly relevant in the case, in that they had led the Powers signatory to the Treaty of Versailles to declare solemnly, in Article 435, paragraph 2, that the stipulations concerning the free zones were no longer consistent with present conditions. He criticizes the Court for having refused to give any practical effect whatsoever to this relevance. He observes that the reasons which led to the establishment of the free zones at the beginning of the last century have ceased to exist.

M. Dreyfus then turns to the question of the import of goods free or at reduced rates through the Federal customs barrier or through the French customs barrier, the regulation of which, says the Special Agreement, shall only be made with the consent of the two Parties. He observes that this provision has been the stumbling block which ultimately caused the Court to fail in the task upon which it embarked in order to comply with the Special Agreement. In his view, the Court, in stating that it was incapable of regulating this matter, has refused to fulfil the most important part of its task.

M. Dreyfus further considers that, in taking the view that France has no ground for complaint, since it is the Special Agreement itself which, by making the regulation of customs exemptions conditional upon the assent of the Parties, has prevented the Court from deciding on this point, the Court throws on one Party the entire responsibility for having inserted a clause, incapable of execution, in the Special Agreement. In his view, the Court should have declared that it was incompetent in respect of the whole, and dismissed both the Parties on equal terms.

M. Dreyfus finally considers what he qualifies the aspect for which the situation in which France is placed by the judgment is most peculiarly open to criticism. He notes that the Court has settled the question of law, it has further decided that the French customs line shall be withdrawn to the rear; but it has declared that, in view of the terms of the Special Agreement, it is unable to fix the matter of importations free of duty or at reduced rates across the Federal customs line, and it does not secure for France the counterpart to which it nevertheless acknowledges the latter is entitled. It follows that the Court has settled the dispute only in part, guided solely by the rules of *summum jus,* and it has left the two Governments face to face, without imposing on them, on an essential point, the settlement which it nevertheless considered necessary to the economic life of the zones.

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## SEQUEL TO THE JUDGMENT OF JUNE 7th, 1932

Following the delivery of the Court's judgment in this case on June 7th, 1932, the French and Swiss Governments agreed upon the appointment of three experts, with arbitral powers, for the purpose of regulating in a manner more appropriate to the economic conditions of the present day the terms of the exchange of goods between the regions in question, that is to say, between the free zones, on the one hand, and Swiss territory, on the other. These experts were M. Östen Undén, formerly Swedish Minister for Foreign Affairs, Sir John Baldwin, formerly delegate for Great Britain on the international river commissions, and M. J. López Oliván, Spanish Minister at Stockholm. The conditions of their appointment, their terms of reference and the circumstances which impelled them to exercise their arbitral powers are set forth in the arbitral award which they delivered on December 1st, 1933, and which runs as follows[1]:

### "ARBITRAL AWARD

The Permanent Court of International Justice, to which a dispute between France and Switzerland concerning the free zones of Upper Savoy and the district of Gex was submitted, pursuant to a special agreement for arbitration concluded between these two Powers, gave judgment on June 7th, 1932. The Court, in this judgment, decides, *inter alia*, that the French Government must withdraw its customs line in accordance with the provisions of the Protocol of the Conference of Paris of November 3rd, 1815, of the Treaty of Paris of November 20th, 1815, of the Treaty of Turin of March 16th, 1816, and of the Manifesto of the Sardinian Court of Accounts of September 9th, 1829; and that this régime must continue in force so long as it has not been modified by agreement between the Parties. The judgment also states that, 'as the free zones are maintained, some provision for the importation free of duty or at reduced rates across the line of the Federal customs, in favour of the products of the zones, must be contemplated'. Furthermore, in the grounds of the judgment, the Court expresses the opinion that since, by the maintenance in force of the treaties above mentioned, Switzerland obtains the economic advantages derived from the free zones, she ought in return to grant compensatory economic advantages to the people of the zones.

In the course of the oral arguments before the Court, the Agent for the Swiss Government made the following declaration on behalf of his Government:

> '1° By the note of May 5th, 1919 (Annex 1 to Article 435 of the Treaty of Versailles), Switzerland undertook—on the understanding that the free zones of Upper Savoy and the district of Gex were maintained—'to regulate in a manner more appropriate to the economic 'conditions of the present day the terms of the exchange 'of goods between the regions in question'.
>
> 2° Should the judgment of the Court, in conformity with the principles laid down by the Order of December 6th, 1930, compel France to establish her customs barrier on the line fixed by the provisions of the treaties of 1815 and other supplementary instruments concerning the free zones of Upper Savoy and the district of Gex, Switzerland, without making any reservation for subsequent ratification, accepts the following:

[1] *Official Journal of the French Republic*, issue of December 15th, 1933, pp. 12441 *et sqq*., and issue of December 16th, 1933, p. 12479; the *Collection of Federal Laws*, No. 46 (Berne, December 27th, 1933), pp. 1028 *et sqq*.

(*a*) The Franco-Swiss negotiations designed to secure the execution of the undertaking stated in No. 1° above shall take place, should France so request, within twelve months from the date of the Court's judgment, with the assistance and subject to the mediation of three experts.

(*b*) Failing an agreement between the Parties and upon the request of either Party, the said experts shall be appointed from amongst the nationals of countries other than France and Switzerland, by the judge at present acting as President of the Permanent Court of International Justice for the purposes of the case of the free zones, or, should he be unable to do so, by the President of the Permanent Court of International Justice, provided these persons consent to undertake this duty.

(*c*) It shall rest with the experts to fix—with binding effect for the Parties—in so far as may be necessary by reason of the absence of agreement between them, the terms of the settlement to be enacted in virtue of the undertaking given by Switzerland (No. 1° above). The principles of law laid down by the judgment of the Court shall be binding on the experts, save in so far as the Parties may by mutual consent authorize them to depart therefrom.'

The Permanent Court of International Justice having, in its Judgment of June 7th, 1932, placed this declaration on record, the Federal Government drew the French Government's attention to the declaration and asked whether that Government intended to accept the procedure thus proposed to the Court by the Federal Government. In reply, the French Embassy at Berne, in a note dated May 27th, 1933, informed the Federal Government that the French Government agreed to the procedure in question.

Subsequently, the French and Swiss Governments agreed to request the undersigned to undertake the functions of expert as defined in the above declaration. The Franco-Swiss negotiations, with a view to the fulfilment of the undertaking given in paragraph 1 of this declaration, were begun at Montreux-Territet on October 9th, 1933. They were carried on from October 9th to 12th and from November 6th to 25th, 1933, with the assistance and mediation of three experts. The French and Swiss delegations were respectively presided over by M. Coulondre, Minister Plenipotentiary, Deputy-Director of political and commercial questions at the French Ministry for Foreign Affairs, and M. Comte, Inspector-General of the Swiss Federal Customs.

II.—It proved impossible in these negotiations to arrive at an agreement between the Parties in regard to all the questions considered, namely the various facilities which Switzerland should afford to the products of the free zones, following the withdrawal of the French customs line. The expert-arbitrators were thus compelled to record, at the meeting on November 25th, 1933, that their efforts to reconcile the views of the two Parties had failed and that, accordingly, it now rested with them to fix, with binding effect for the Parties, the terms of the settlement to be enacted in fulfilment of the undertaking given by Switzerland 'to regulate in a manner more appropriate to the economic conditions of the present day the terms of the exchange of goods between the regions in question'.

It should however be observed that, in regard to three minor points, exchanges of views had taken place and agreement between France and Switzerland had been reached, outside the official negotiations before the expert-arbitrators. In its Judgment of June 7th, 1932, the Court had stated that 'the withdrawal of the customs line does not affect the right of the French Government to collect at the political frontier fiscal duties not possessing the character of customs duties'. The French delegation announced at the outset of the negotiations that its Government meant to maintain the fiscal cordon at the political frontier and that the question of fiscal charges must remain outside the scope of the negotiations. With regard however to arrangements for the supervision of passenger and goods traffic across the fiscal cordon, conversations had been entered into between the delegations, as a result of which the head of the French delegation, at the meeting on November 9th, 1933, made the following declaration:

'As regards the establishment and operation of the fiscal cordon, the competent French authorities intend to be guided by the principles laid down by the International Convention for the simplification of customs formalities concluded at Geneva on November 3rd, 1923.

In particular, they propose as far as possible and in accordance with existing practice

(*a*) so to place the French fiscal posts substituted for the old customs offices and so to allot their duties that they may correspond to the Swiss customs offices and that their office hours may coincide;

(*b*) to carry out the fiscal examination in such a way that traffic and trade shall not be impeded; in particular at a point where a tramway or any public conveyance crosses the frontier, the French fiscal officers will, whenever circumstances permit, carry out their examination inside the carriages, without obliging passengers to alight, save for the payment of charges or where fraud is presumed.

Similarly, in accordance with present practice, tourists and excursionists crossing the political frontier between Switzerland and the free zones shall be exempted from any tax in respect of provisions for their journey, articles of equipment and sporting accessories in use which are their personal property and which they carry with them for the purposes of their excursions, such as ice-axes, ropes, field glasses, cameras, skis, toboggans, skates, thermos flasks, kettles, camping, field cooking or picnic equipment, etc., in so far as such tourists or excursionists do not intend the said articles for sale.

Furthermore, speaking generally, it is not the intention of the competent authorities to modify the local facilities at present granted.

The French delegation believes that the same administrative practice is at present followed by the Swiss authorities; it would be glad to receive an assurance that this practice will be maintained.'

The head of the Swiss delegation, having taken note of this declaration, made in his turn the following declaration at the same meeting:

'The Swiss delegation thanks the French delegation for the declaration which it has been good enough to make on behalf of the French Government regarding the operation of the French fiscal posts at the political frontier between Switzerland and the free zones of 1815–1816.

It takes due note of this declaration.

The Swiss delegation in its term hastens to declare that the Federal Council likewise intends to make no change in the liberal practices and in the facilities customary in the application of its customs régime at the political frontier between Switzerland and the free zones of 1815–1816.

Accordingly, and like the French Government, the Federal Council undertakes to apply, as regards the crossing of its customs line, the same principles and the same methods as those enunciated in the declaration of the French delegation respecting the crossing of the French fiscal line.'

Another point in regard to which agreement was reached between the Parties outside the negotiations before the expert-arbitrators, concerns the position of the French customs cordon as from January 1st, 1934 (i.e. the inner boundary of the free zones). Whilst pointing out that this question remained outside the scope of the negotiations, the French delegation informed the expert-arbitrators and the Swiss delegation of the line for the customs cordon contemplated by the French Government. Unofficial conversations were entered into between the delegations, as a result of which an agreement between the two Governments regarding the boundaries of the zones was recorded by means of an exchange of notes dated at Paris on November 15th/16th, 1933.

Finally, the Parties signified their agreement with regard to the measures of control, by means of a joint declaration, made at the meeting on November 23rd, and which runs as follows:

'§ 1.—As a general rule, the admission of produce enjoying freedom from duty without restriction as to quantity will be made dependent upon the previous deposit by each farmer, with the French customs service responsible for the supervision of the free zones, of a basic declaration indicating the nature of the concern, of what it consists, the detail of its crops, the methods of production, the number of animals, of hives, etc., and, in general, all information enabling an estimate to be made of the approximate quantities of produce which the concern is capable of producing.

This declaration will be checked and endorsed by the French customs service and transmitted by it to the Swiss customs administration.

Produce imported into Switzerland must be accompanied by certificates issued by the French customs service to the effect that such produce has its origin in the zones.

The French Government will make the necessary arrangements to ensure that consignments of the produce referred to in the present paragraph imported into France shall be deducted from the quantities which may be imported free of duty into Switzerland. The French Government may with this object apply to such goods the 'open account' system or any other similar system.

§ 2.—Quotas instituted or provided for by the new settlement shall be divided up amongst the interested parties by the competent French authorities.

Produce admitted into Switzerland under daily or annual quotas, apart from market supplies, must be accompanied by quota certificates prepared by the French customs service. These certificates will indicate that the produce in question has its origin in the zones and that it is within the limits of the total quotas for importation into Switzerland.

§ 3.—With regard to market supplies, the French customs administration will transmit annually to the Swiss customs administration a return showing in respect of each farmer details of his farm in so far as concerns market produce. Imports will be accompanied by certificates prepared by the mayors to the effect that the produce has its origin in the zones and indicating the names and addresses of the producers.

§ 4.—The French Government will as soon as possible notify the Swiss Government of the measures taken with a view to the application of the above provisions. It will transmit examples of the certificates designed to secure the importation into Switzerland, free of duty or at reduced rates, of produce of the zones and specimen seals and signatures of the agents competent to prepare such certificates.

§ 5.—The French Government will take the necessary steps to impose penalties for acts performed or attempted with a view to securing the admission into Switzerland, under the terms of the Convention, of products not entitled to such admission, and in particular the presentation of incorrect declarations, or the fraudulent use or attempted use of origin or quota certificates or of false certificates. The question of penalties resulting from the application of Swiss legislation is reserved.

§ 6.—No special formality of control will be required in the case of goods exempt from duty under the Swiss customs tariff. Such goods will continue to be allowed to enter subject only to the production of evidence of origin if the Swiss Government considers such evidence necessary. The same will apply in principle as regards products which are liable only to a small tax.

§ 7.—Products allowed the benefit of customs facilities on entry into Switzerland may be imported through all customs offices and collection posts established at the frontier of the zones.

Nevertheless, in the case of market produce, importation may be limited to one or more offices designated by the importer.

§ 8.—The foregoing provisions shall be without prejudice to such measures of verification and control as the Swiss Government may see fit to take under its laws.

§ 9.—Whenever the need arises, the competent administrations of the two countries will consider modifications to be made by mutual agreement in the foregoing provisions.

Furthermore, all questions concerning control formalities may be referred to the Franco-Swiss Conciliation and Control Commission as soon as that body has been constituted.'

It should be mentioned here that the Parties have declared that the two Governments will come to an understanding with a view to granting mutual facilities for the repairing and finishing trade between Swiss territory and the free zones.

The attempts to reconcile the views of the two Parties having proved unsuccessful, the expert-arbitrators were obliged to proceed to arbitration pursuant to paragraph 2 (*c*) of the declaration made before the Court by the Agent for the Swiss Government.

III.—As already observed, the arbitrators' task consists in regulating the terms of the exchange of goods between the zones and Switzerland 'in a manner more appropriate to the economic conditions of the present day'. The new régime, according to the declaration of the Federal Government repeatedly made before the Permanent Court of International Justice and reaffirmed before the expert-arbitrators by the Swiss delegation, must be 'a more liberal régime and one of greater legal stability than formerly'. (See, for instance, *Publications of the Court*, Series C, No. 17—1, Vol. II, p. 886.)

Accordingly, it rests with the arbitrators to effect a settlement as regards the import of produce of the zones into Switzerland characterized by greater liberality and stability than formerly. The first thing to be done therefore is to consider the conditions under which such importation is at present carried on and the scope of the proposals made by the Swiss delegation in order to ascertain whether these proposals correspond to the undertaking given by the Federal Government.

The régime hitherto applied as regards the importation of produce of the zones into Switzerland gives considerable facilities. This régime, which is somewhat different for the two zones, comprises:

(1) the system of exemption from duty with no limit as to quantities, subject to the production of evidence of origin, in respect of a large number of products, e.g., tan, peat, timber, building stone, tiles, bricks and lime;

(2) the so-called market system, enabling products of the zones destined for the market, such as fresh vegetables and garden produce, fresh fruit, potatoes, poultry, fresh eggs, to be imported free of duty into Switzerland, as a general rule to an amount of 5 quintals for each importation;

(3) the system of admitting certain products duty free within the limits of quotas fixed beforehand (wine, cheese and milk, for which a daily quota of 25,300 litres has recently been fixed);

(4) the system of quotas, admitted at fixed or reduced rates of duty (cattle, hides, tanned skins).

As regards the stability of the present régime, it should be observed that the régime consists in fixing certain advantages or certain quotas in each case, for given products, by agreement or by a unilateral decision of the Swiss Federal Council.

IV.—In the opinion of the French delegation, the new régime, in order to be more liberal than the old, should in principle permit the entry into Switzerland free of duty of all the produce of the zones; and further, in order to endow it with greater stability, the provisions respecting this freedom from

duty should be made permanent in character. The Swiss delegation raised no objection to the proposal that the new settlement should be given a permanent character.

As regards the question in what these facilities should consist, the Swiss Government expressed its opinion before the Permanent Court of International Justice by submitting (in 1930) a detailed proposal for a settlement. In the course of the negotiations before the expert-arbitrators, the Swiss delegation stated that they still regarded this proposal as the solution corresponding best to the common interests of the Swiss and French populations concerned. This proposal includes the admission into Switzerland free of duty of the whole of that portion of the agricultural and industrial production of the zones not exported elsewhere and not consumed locally, or—to quote the actual words used by the Federal Government's Agent before the Permanent Court—freedom from customs duty for 'the whole of that portion of the production of the zones exportable to Switzerland'. The Swiss Agent also expressed himself as follows before the Court:

> 'On the basis of this plan, but on this basis only—that is to say on condition that the French customs cordon is withdrawn to the inner boundaries of the free zones—Switzerland can give satisfaction to this essential interest of the farmers of the zones. She will shoulder the burden and accept the serious competition with her own agricultural interests involved by the obligation in principle to allow the whole of the agricultural produce of the zones to enter free of duty. Under these conditions, Switzerland can do this, and it is right that she should, because, as I have already indicated, she continues herself to profit by the existence of the free zones around Geneva and, in particular from the economic standpoint, by the free outlet which this régime secures above all for Genevese trade.'

V.—The Swiss proposal of 1930 contains however a clause to the effect that imports from Switzerland to the free zones are to be exempt from all customs duties or *taxes* of any kind. The Swiss Government, in the proceedings before the Court, had disputed France's right to levy at her political frontier any duties or taxes, even those which are not upon the import or export of goods, but fall upon the same articles produced or manufactured in France. It had also maintained that the tax levied on importation was a customs duty in disguise. In regard to this point, however, the Court, in its Judgment of June 7th, 1932, stated—as already mentioned—that 'the withdrawal of the customs line does not affect the right of the French Government to collect at the political frontier fiscal duties not possessing the character of customs duties'. The Court also made the following statement in the grounds of the judgment:

> 'However that may be, the Court neither desires nor is able to consider whether the collection at the political frontier of any particular French tax is or is not contrary to France's obligations. It feels it must confine itself to stating that, in principle, a tax levied solely by reason of importation or exportation across the frontier must be regarded as a tax in the nature of a customs duty and consequently as subject to the regulations relating thereto.'

In the course of the negotiations before the expert-arbitrators, the French delegation—as mentioned above—emphasized that France would, in the zones, have an entirely free hand as regards fiscal taxes and that the delegation was not empowered to extend the scope of the negotiations to include fiscal questions. The French delegation also stated that the French Government maintained its opinion that the tax levied on importation was not in the nature of a customs duty.

The Swiss delegation admitted that under the terms of the Court's judgment, the French Government had a free hand as regards fiscal taxes in the zones, provided that such taxes were not in the nature of disguised customs duties; nevertheless, in the view of the Swiss delegation, the tax levied on importation would in reality be a customs duty. Furthermore, it contended that if the fiscal cordon were maintained at the political frontier, the advantages accruing to Switzerland as a result of the with-

drawal of the customs cordon would thereby be much diminished. As a result of this fiscal cordon, the zones would not have the same value as an outlet for Genevese trade. It would follow that Switzerland could not reasonably be expected to grant the same customs facilities to the inhabitants of the zones as those proposed on the supposition that the fiscal cordon at the political frontier would be abolished.

With regard to the question whether the existence of the fiscal cordon at the political frontier should in any way affect the determination of the customs facilities which Switzerland is bound to afford to the produce of the zones, the arbitrators have arrived at the conclusion that there is a preponderance of reasons in favour of the view that there should be no such interdependence between the fiscal system of the zones and the customs facilities granted by Switzerland.

It should be observed in the first place that the arbitrators are not empowered to approve or reject the various views with regard to the nature of the tax levied on importation.

Switzerland, if her contention is sound, may claim the abolition of this tax in the zones, independently of the settlement of the question of the customs facilities to be granted by her. There is no need to make this settlement, which is to be permanent in character, dependent upon the final solution of the question of the nature of the tax at present levied on importation by France.

In regard to this point, it should be added that, if France is at liberty to impose indirect taxation not in the nature of customs duties, but calculated under certain conditions to impede exports from Switzerland to the zones, Switzerland may exert a similar right in respect of exports from the zones to Switzerland.

Finally, it should be observed that Switzerland's undertaking to establish a more liberal régime for imports from the zones into Switzerland has been given subject only to the condition that the zones should be maintained in accordance with the old treaties. The Court having declared that the terms of these treaties involve no obligations as regards the fiscal régime applied in the zones, the conclusion is that the undertaking given by Switzerland exists independently of this régime—a fact which has moreover been admitted by Switzerland. It is possible that Switzerland, in giving this undertaking, overestimated the value of the zones as an outlet for her trade as a result of the too wide construction which she sought to place upon the terms of the old treaties. But this reason is not sufficient to justify the arbitrators in declaring the question of the fiscal taxes at present levied in France and that of the customs facilities to be granted by Switzerland to be interdependent.

The arbitrators therefore hold that, as regards the regulation of imports from the zones to Switzerland, the above-mentioned principles enunciated by the Federal Government's Agent before the Court should be maintained, regardless of the indirect taxes which France, in the exercise of her sovereign rights, may see fit to levy in the zones.

VI.—In its 1930 proposal, the Swiss Government laid down certain other restrictions in connection with the exemption from customs duty to be granted to the produce of the zones. Under Article 7 of the plan, Switzerland would not grant unlimited exemption from customs duty, but would fix for the purposes of free importation 'import credits'—to use the terminology employed by Switzerland—on the basis of the total production of the zones, taking into account, however, on the one hand, local consumption in the zones, and, on the other hand, exports from the zones elsewhere than to Switzerland.

In support of the 'import credits' system (instead of unlimited importation free of duty), it was argued before the Permanent Court of International Justice that this system would make it possible to increase the degree of control and to prevent fraud. In this connection, the Swiss Agent made the following statement before the Court:

'The import credits only come into operation afterwards, to serve as a sort of upper limit, in order to avoid recourse to the method of certificates of origin as a means of control—a method recognized by the French Government itself to be dangerous—and effectively to prevent fraud.

But of course the credits will be generously assessed; they will moreover—as is expressly stated in the Swiss proposal—be subject to periodical revision. In order to take into account fluctuations which—as stated in the written proceedings by the French Government—may occur in 'exports elsewhere than to Switzerland', the credits might, for instance, be fixed by taking the average of the largest imports from the zones to Switzerland over a certain number of normal years, leaving open the possibility of increasing this average by a certain percentage, or of taking into account some legitimate but unforeseen need.

It is not therefore the case, as the French Government contends, that under the system proposed in our plan 'the zones' farmers would be unable to dispose [in Switzerland] of the surplus of their crops in plentiful years'.

Moreover, the import credits will be subject to revision. And, contrary to what the other side has contended, this revision will not be in the least arbitrary, since our plan gives France the safeguard of a clause providing for arbitration.'

In the course of the negotiations before the expert-arbitrators, the Swiss delegation insisted upon the system of 'import credits'. They also raised several objections to unlimited importation free of duty. If maximum limits for the quantities to be allowed to enter free of duty were not fixed in respect of the various products, it was to be feared—according to the Swiss delegation—that the production of certain particular agricultural products would be intensified—even assuming the characteristics of an industry—in order to enable the zones' farmers to profit by the higher prices paid on the Swiss market. This situation however would be unfair and might have serious consequences for Swiss farmers who will have to face the competition of the zones' producers. Another consideration has been put forward in justification of some limitation of exports, going further than the general rules already mentioned as guiding principles for the fixing of the import credits. It has been emphasized that, during the present crisis, which falls so hardly upon agriculture, the Swiss authorities have applied certain measures designed to maintain the prices of agricultural products at a level higher than would ensue from the free play of economic laws. The result of these measures has been, amongst other things, that the price of milk in Switzerland is considerably higher than it is in adjoining countries, especially in France. In the opinion of the Swiss delegation, it would be unfair that the inhabitants of the zones, who do not, or only to a small extent, participate in the sacrifices which enable prices to be maintained, shall profit by the high prices and thus be led greatly to increase their exportations to Switzerland of the products in question.

In view of these special conditions, the Swiss delegation proposed that the quotas for certain products, namely cattle and the products of cattlefarming (milk and cheese), hides and wine, should not be fixed on the basis of the total exportable production of the zones, but at a lower figure, having regard to the conditions prevailing on the Swiss market and the exceptional measures taken in Switzerland to maintain the price level.

The Swiss delegation also proposed certain changes in the present so-called market system. These changes would chiefly involve restrictions. Thus it was proposed that, in addition to the quota for each importation which forms part of the present market system, there should be an import credit or annual quota for the free importation of the goods in question, a total quantity which must not be exceeded. The Swiss delegation also proposed a considerable restriction of the quantities of certain important products admitted duty-free under the market system, namely eggs, poultry, honey (in the case of the Gex zone), fish and cut flowers. Of the goods at present benefiting by the market system, some would be omitted, including milk which—as already stated—has for some time already censed to be included

in the list of products allowed to benefit by the market system and which has been made subject to an annual quota. Goods kept in this category would be allowed to enter duty-free, as in the past, exclusively under the market system.

With regard to the products of industry and of arts and crafts having their origin in the zones, the Swiss delegation proposed that a distinction should be drawn between industrial concerns operating in the free zones on November 10th, 1923—the date on which the French customs cordon was moved to the political frontier—and those established since that date. Goods produced by the old concerns would be granted freedom from duty up to the limit of import credits to be fixed on the basis of the imports of these concerns to Switzerland before the establishment of the French customs cordon at the frontier; whereas other concerns would not enjoy this advantage.

The French delegation strongly criticized a system of import credits which would involve a restriction of customs exemption inconsistent with Switzerland's undertaking to establish a more liberal system than in the past and which would be likely to present considerable objections. For, in that delegation's opinion, there would be a danger that, owing to the fixing of these credits beforehand for a somewhat extended period, the Swiss market, in the event of a temporary increase in the production of the zones due to an exceptional harvest, would be closed to the free importation of the surplus, and likewise that insufficient account would be taken of the normal economic development of the zones. Furthermore, with regard to the principles governing the fixing of import credits, the French delegation objected to the previous deduction of local consumption and of exports elsewhere than to Switzerland. As regards the deduction of local consumption, the delegation contended that the inhabitants of the zones should be free, if they found it economically advantageous, to sell a given product in Switzerland and buy elsewhere goods of the same kind for their own consumption. They also observed that certain articles, such as vegetables, could not be kept very long without deteriorating, and that it was therefore necessary to sell the greater part at once, and if necessary to import vegetables for local consumption at other times of the year. Concerning the deduction of exports elsewhere than to Switzerland, the French delegation pointed out the objections to the fixing beforehand of the amount of this deduction, as this would not leave the inhabitants of the zones sufficient latitude to export their products to Switzerland or to France at their discretion, in accordance with the relative ability of the two markets to absorb them. The French delegation submitted a plan designed to achieve the following:

> 'To secure to the zones a régime of exemptions from duty enabling them to dispose of their normal production, but of their normal production only, in either of the markets between which they are confined, as may best suit their interests.
>
> The operation of this régime could be ensured by a system of open accounts, kept and supervised by the French customs in respect of each zones' producer.
>
> The latter would have all his exports entered in his open account as they took place, whether such exports were to Switzerland, France or some other country, and his rights to exemption from duty would cease when this account was exhausted.'

The French delegation likewise sought, by a systematic comparison between the Swiss proposals and the *de facto* régime now in force, to show that these proposals did not constitute a more liberal régime. In this connection, the delegation referred to the present market system, drawing attention to the various restrictions proposed by Switzerland to this system and to the fact that a quantitative limitation of free imports, affecting all products of the zones, would constitute a diminution rather than an increase of freedom as regards the export régime of the zones.

The expert-arbitrators, with a view to reconciling the opinions of the Parties, submitted to them the main lines of an agreement upon the problem as a whole. The Parties, after consideration were able to modify the positions they had previously taken up in certain respects. Thus, the Swiss delegation,

though in other respects maintaining its previous attitude, agreed to exemption from customs duty, without limitation as to quantities, for a group of articles of secondary importance and abandoned 'import credits' in respect of another group of products which would obtain the benefit of the market system. For its part, the French delegation which, generally speaking, accepted the conciliation proposal, modified its attitude by agreeing to the idea of a 'safe-guarding clause' allowing temporary restrictions upon the free importation of zones' products, in exceptional circumstances. Further, the French delegation accepted the idea of an immediate application of this exceptional régime, by the fixing of quotas for certain products for an initial period.

VII.—Before considering the various proposals and arguments put forward on either side, it will not be irrelevant to mention that the population of the zones is about 30,000 and that they cover an area of 540 square kilometers. The Gex zone is slightly more thickly populated than the zone of Upper Savoy. Both zones are essentially agricultural districts. There is but little industry; in the zone of Upper Savoy, less than 400 persons are engaged in industrial employments.

According to a calculation made by the Genevese Chamber of Commerce, the value of the zones to Genevese trade (wholesale and retail, manufacture, contract work and finishing trades) represented in 1913 approximately 9¼ million francs. The value of zones' exports to Switzerland represented in 1913 about 5 million francs (according to French data based on the Swiss customs statistics).

For the rest, the free importation into Switzerland of the produce of the zones is a relatively unimportant factor in the economic life of Switzerland, having regard to the economic character of the zones, their small population and inconsiderable extent.

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An examination of the general structure of the system which, in fact and in law, at present governs the importation of produce of the zones into Switzerland, shows that Switzerland is applying, and has in the past applied, to this importation a régime which may fairly be described as liberal. It is in particular to be observed that the special marketing trade renders possible the free importation to a practically unlimited extent of several of the most important products of the zones. The difference between the free importation of the whole production of the zones and the present system is so slight that the only conceivable way of establishing a more liberal régime would be to grant exemption from duty for the whole production of the zones, subject however to a reservation in respect of certain products and certain exceptional circumstances.

The arbitrators consider that the proposal of the Swiss delegation that the quota system should be generally applied, either in the form of 'import credits' or of quotas in the true sense, is particularly unsuited to the object in view, namely, the establishment of a more liberal régime. The quota system, even in the form of import credits, involves for a large number of products, as compared with the present system, increased restrictions, especially if regard be had to the fact that the Swiss delegation has also proposed a reduction of the quotas of certain products hitherto imported under the market system. The general application of the quota principle to imports from the zones to Switzerland would, in the opinion of the arbitrators, constitute a retrograde step; whereas the idea is to work out a new régime more liberal than that prevailing hitherto. It would seem moreover that the unlimited or practically unlimited exemption from duty hitherto granted to a large number of products has not had any serious consequences as regards Swiss producers. The market system has evidently been most advantageous to Genevese consumers as well as to the inhabitants of the zones. Nor must the fact be lost sight of that it is also important to Switzerland that the inhabitants of the zones should be satisfied with the régime established and that they should regard the maintenance of the zones, not only as a right possessed by Switzerland under treaties concluded more than a century ago, but also as constituting

an arrangement beneficial to the zones themselves. It is also probable that after the withdrawal of the French customs cordon and as the inhabitants of the zones are by degrees enabled to dispose of their products in Switzerland free of duty, they will also make their purchases there to a greater extent than they would otherwise.

For the reasons set out above, the arbitrators consider that the new régime must be more liberal than that proposed by the Swiss delegation and that, accordingly, the quota system should be avoided as far as possible, even in the form of 'import credits'.

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On the basis of the foregoing considerations, the arbitrators who, in the absence of agreement between the Parties, are called upon themselves to determine the system applicable as from January 1st, 1934, to imports from the zones to Switzerland, have established a permanent Settlement, the essential features of which are:

(*a*) unlimited exemption from duty for all agricultural and allied products and for raw mineral products;

(*b*) the free importation of manufactured or worked products up to the limit of import credits;

(*c*) a provision allowing temporary restrictions to be placed upon the system of unlimited exemption from duty in exceptional circumstances;

(*d*) the setting up of a body for conciliation and supervision;

(*e*) a procedure by arbitration.

1.—With regard to agricultural and allied products, the fundamental principle of the new régime should be unlimited free importation of zones' products into Switzerland. It would not in itself be unreasonable to deduct local consumption and, in one form or another, products already exported or which, according to reliable estimates, would be exported elsewhere than to Switzerland. But it seems superfluous and unpractical to introduce a permanent system of 'import credits' solely with the object of legislating for exceptions to the principle. As regards most goods, a large part of the production is consumed in the zones themselves, and experience confirms this very normal situation. Again, a part of the production will quite naturally continue to be exported to France. Moreover, if this system of import credits were applied, it would be necessary, as the Federal Government's Agent stated before the Permanent Court of International Justice, to 'fix the credits by taking the average of the largest imports from the zones to Switzerland over a certain number of normal years' and 'to increase this average by a certain percentage', and finally 'to take into account some legitimate but unforeseen need'. From an economic standpoint, it is natural that there should be fluctuations corresponding to the tendencies of trade, and this fact can hardly entail any great drawbacks from the Swiss point of view.

2.—It must however be acknowledged that during a time of crisis, unlimited exemption from duty might, in the case of some of the most important agricultural products of the zones, lead to disturbances on the Swiss market which should in all fairness be taken into account. The arguments put forward in this connection by the Swiss delegation, with regard to milk products, wine and cattle, undoubtedly merit consideration, having regard to the present agricultural depression. Nevertheless, it would be neither necessary nor fair to meet Switzerland's legitimate interests by recourse to a general and permanent quota system. In the view of the arbitrators, the inclusion in the Settlement of a clause enabling temporary restrictions to be placed upon the import of certain products, in exceptional circumstances, would afford protection against the dangers resulting from unforeseen economic disturbance and at the same time impart to the Settlement the elasticity required by its permanent character.

3.—With regard to products manufactured or worked by industrial concerns situated in the zones, the arbitrators have seen fit to fix a limit for exemption from customs duty, taking into account, on the one hand, the present output capacity of these concerns and normal economic development, and, on the other hand, consumption in the zones and exports elsewhere than to Switzerland.

Though it is true that the French delegation sought to obtain exemption from customs duty for the whole output of the zones, both agricultural and industrial, both delegations agreed in not attributing under present conditions any very great importance to the question of industrial exports. Everyone knows that industry is but little developed in the zones, which, in all probability, will remain essentially agricultural districts. Moreover, the exports of zones' industries are largely directed towards the interior of France. Accordingly, there is reason to believe that trade between Geneva and the zones will essentially consist, in the future as in the past, in an exchange of the industrial products and various services offered by an urban area for the agricultural products offered by the country districts surrounding it.

Notwithstanding the small importance of the industrial concerns situated in the zones, it is possible that, profiting by a special régime, new industries might be established there with the sole object of disposing of the whole of their output upon the Swiss market. It is mainly to guard against this contingency that the arbitrators have considered it necessary to fix import credits. Nevertheless, these credits should be calculated sufficiently generously not to hamper the normal economic development of the zones.

Should industrialized agricultural undertakings be established in the zones, the importation of their products into Switzerland will be subjected to the regulations laid down for the products of industry.

The Swiss delegation was unwilling to extend exemption from customs duty to the products of industrial concerns established in the zones since 1923, i.e. after the establishment of the French customs cordon at the political frontier, because such concerns had been established under an economic régime fundamentally different from that which would be applied to the zones as from January 1st, 1934.

Nevertheless, that delegation, in the course of negotiations with the French delegation, agreed to admit the products of such concerns under the system of import credits. The arbitrators, in fixing these credits in the absence of an agreement between the Parties, have taken into account the circumstances in which the industries were established in the zones.

4.—The Parties were unanimous regarding the institution of a mixed commission and regarding provision for recourse to arbitration, and agreed in this connection to accept the text embodied in Articles 7 and 8 of the Settlement.

Having regard to present circumstances, the arbitrators consider that, directly the Settlement comes into force and pursuant to Article 4 (*a*) thereof, restrictions should be placed upon the free importation of important products.

With regard to the fixing of quota figures, the arbitrators have sought, in so far as the Parties have been unable to agree, to strike a fair mean, taking into consideration the conditions at present prevailing upon the Swiss market, the quotas now fixed for certain products and *desiderata* put forward on either side.

Actuated by considerations of the same kind and with the idea of assisting the interests at stake as far as possible during the transition period from the old to the new régime, the arbitrators have thought it right to maintain the market system for a limited number of products. In decreeing this temporary restriction upon unlimited free importation, the arbitrators have acted on the principle that the advantages at present granted in respect of the same products under the market system should not be diminished. Accordingly, they have been unable to have regard to the considerable restrictions upon

this system which the Swiss delegation had proposed. On the other hand, the details of the system have been adapted to the new conditions.

It should be observed here that the Parties have agreed as to the definition of animals to be regarded as of zones' origin; this definition is given in a note to Article 2 of the Settlement.

With regard to the fixing of the industrial quotas included in the Annex, the arbitrators have been able to take as their basis an agreement between the Parties in regard to nomenclature and, in the case of some products, also in regard to the figures. The figures in regard to which no agreement was reached between the Parties have been fixed according to a method similar to that used for the fixing of quotas of agricultural products.

Having particular regard to the fact that, according to the very terms of the undertaking given by Switzerland, stability must constitute a characteristic of the new régime, it appeared desirable to prevent the introduction of changes within the first few years. Accordingly, it has been provided in the Annex that the restrictions placed by it upon customs exemptions are to remain applicable for ten years and that no others may be imposed during the same period, which is incidentally the period for which the Annex remains in force. On the other hand, the arbitrators have not seen fit to prejudge the question whether, to what extent and for how long freedom from customs duty should be restricted at the expiration of this period. These points can be subsequently decided on the basis of the principles established by the Settlement and in the light of the conditions then prevailing.

For these reasons, the arbitrators have drawn up the terms of the Settlement and Annex as appended hereto concerning the importation into Switzerland of the products of the free zones.

Done and signed this first of December 1933, in three copies, two of which shall be transmitted to the French and Swiss Governments respectively.

(*Signed*) Östen Undén John Baldwin J. López Oliván Staffan Söderblom

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## SETTLEMENT REGARDING THE IMPORTATIONS INTO SWITZERLAND OF THE PRODUCTS OF THE FREE ZONES

*Article* 1.—Importations from the free zones of the district of Gex and Upper Savoy into Switzerland shall be effected under the conditions laid down by the present Settlement.

*Article* 2.—Products other than those mentioned in Article 3, originating in and coming from the free zones, shall enter Switzerland free of all customs duties and in unlimited quantities, that is to say:

agricultural and allied products;
raw mineral products;
game taken and fish caught in the zones.

Ad *Article* 2.—Cattle and pigs shall be regarded as covered by the term products originating in the zones if they fulfil the following conditions:

*Bulls and steers* must have been born and reared in the zones or brought there more than two years previously;

*cows* must have been born and reared in the zones or brought there before the age of two years;

*calves* must have been born and reared in the zones, and

*pigs* must have been born and reared in the zones or brought there more than three months previously.

*Article* 3.—Manufactured or worked products originating in and coming from industrial concerns situated in the free zones, shall enter Switzerland free of all customs duties, up to the limit of import credits to be fixed periodically, having regard, on the one hand, to the productive capacity of the zones at the time of the entry into force of the present Settlement and their normal industrial development, and, on the other hand, to markets other than Switzerland, either in the zones or in territory under French rule or in other countries.

As regards new industries, their products shall be admitted to the benefit of a quota if and in so far as the establishment of such industries can be regarded as a feature of the normal economic development of the zones.

*Article* 4.—By way of exception to the provisions of Article 2, quotas or other restrictions may however be temporarily imposed as regards the importation into Switzerland of certain specially named products, should their importation

(*a*) owing to unforeseen and exceptional circumstances, seriously disturb the market of the adjoining Swiss cantons;

(*b*) have increased abnormally as the result of intensive or industrialized production.

*Article* 5.—The two Governments shall come to an agreement with a view mutually to facilitating reparation and finishing trades between Swiss territory and the free zones.

*Article* 6.—The two Governments shall institute measures of supervision and penalties calculated to prevent fraud. The system of supervision must operate in such a way as not to interfere with the efficient working of the régime provided for in this Settlement.

*Article* 7.—A permanent Franco-Swiss commission shall be constituted upon the coming into force of this Settlement. It will consist of three French members and three Swiss members. The chairman, who will be alternately selected from amongst the French and Swiss members, will be appointed by the commission itself. He will have no casting vote.

The duties of this commission will be:

(1) to settle difficulties which may result from the operation of the régime provided for in this Settlement;

(2) to propose measures of supervision calculated to prevent fraud in connection with free importation into Switzerland;

(3) in conjunction with the customs authorities of the two countries, to ensure that the measures of supervision are carried out;

(4) to propose modifications to be made, under Article 3, in the industrial import credits;

(5) to formulate an opinion in advance with regard to any contemplated application of Article 4.

Should the commission be unable to agree, the question will be referred without delay to the two Governments for settlement through diplomatic channels, or, if need be, by means of the procedure provided for in Article 8.

*Article* 8.—Any dispute which may arise between the two Governments regarding the interpretation or application of the present Settlement or of its Annex and which cannot be settled within a reasonable time, either by the mixed commission or through diplomatic channels, shall be referred, at the request of either Party, to a single arbitrator appointed by mutual agreement between the two Governments and, failing such agreement, in accordance with the rules laid down hereinafter for the appointment of members of the arbitral tribunal.

Either Party however may require that the dispute shall be referred to an arbitral tribunal consisting of five members, of whom one shall be appointed by France, one by Switzerland, and the remaining three by mutual agreement between the Parties. Should the Parties fail to agree in regard to these appointments, or should one of the Parties fail to appoint its arbitrator within the three months following the request to this effect addressed by one Party to the other, the necessary appointment or appointments shall be made, at the request of one Party only, by the President of the Permanent Court of International Justice, or, should he be a national of France or Switzerland, by the Vice-President, or, if need be, by the senior member of the Court.

In the event of the death, resignation or inability to sit of one of the arbitrators, he shall be replaced in the manner laid down for the original appointment.

The tribunal shall itself make rules for its procedure, which shall consist in hearing arguments by both Parties. In the event of a dispute as to its jurisdiction, the decision will rest with the tribunal. Recourse shall be had to it by unilateral application.

The tribunal shall decide *ex æquo et bono* disputed points which are not of a legal nature.

The decision of the arbitral tribunal shall be final.

*Article* 9.—The present Settlement, which shall come into force on January 1st, 1934, imports the abrogation of all previously existing provisions inconsistent therewith.

It may only be modified by agreement between the Parties.

In immediate application of Article 4, restrictions upon importations free of duty are laid down in the Annex to this Settlement.

(*Initialled*) Ö. U. J. B. L. O.

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Annex

1.—Importations from the zones into Switzerland of the products enumerated below shall, so long as the present Annex remains in force, be subject to the following restrictions:

A.

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|---|---|
| Milk | 25,300 litres *per diem* free of duty |
| Cheeses | 2,500 quintals *per annum* free of duty |
| Butter | 650 quintals *per annum* free of duty |
| Wine | 8,000 Hl. *per annum* free of duty |
| Bulls, Steers, Cows | 1,000 Head *per annum* subject to a duty of 15 Swiss frs. per head; |
| Calves | 3,000 Head *per annum* subject to a duty of 7 Swiss frs. per head; |
| Pigs | 1,000 Head *per annum* subject to a duty of 5 Swiss frs. per head. |

*Note*. Imports of cream shall be included in the milk quota, one litre of cream being reckoned as 10 kg.

B.

Bread, poultry, fresh eggs and honey shall only be allowed to enter free of duty in so far as they take the form of market supplies. Accordingly, they must be brought or accompanied into Switzerland by the sellers themselves; consignments accompanied by way-bills are not permitted to enter Switzerland duty-free.

The weight of each importation of the above products shall not exceed 500 kilogrammes.

II.—The import credits for manufactured or worked goods are fixed, at the quantities indicated in the annexed table, in the first place for a period of five years.

*Note.* The following are excluded from the system of import credits: skins and raw hides, salted or dried; rough timber, even if stripped of bark or roughly squared; road-making material, hewn, sawn, crushed or pulverized stone. These products will be admitted free of duty under Article 2 of the Settlement.

III.—This Annex shall come into force on January 1st, 1934, and shall remain applicable until December 31st, 1943.

During this period, Article 4 of the Settlement may only be invoked with a view to imposing restrictions upon the importation from the zones into Switzerland of products other than those mentioned under No. 1 above.

(*Initialled*) Ö. U. J. B. L. O".

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On December 27th, 1933, the President of the French Republic promulgated a law determining the customs and fiscal organization of the French territories to which the Court's judgment related[2]. Furthermore, pursuant to Article 16 of this law, a decree was issued on December 29th, 1933, laying down regulations governing consignments of goods exported from or imported into these territories[3].

The Swiss Federal Council, for its part, issued a federal decree, on December 22nd, 1933, providing that the Regulations regarding importations into Switzerland of the products of the free zones prescribed by the arbitrators, together with their annexes, should come into force on January 1st, 1934[4].

The French members of the Franco-Swiss Permanent Commission set up under Article 7 of the Regulations appended to the award of the expert-arbitrators, were appointed by a decree dated December 30th, 1933[5]. The Swiss members were appointed by the Federal Council on January 12th, 1934[6].

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## 47. INTERPRETATION OF THE STATUTE OF THE MEMEL TERRITORY (PRELIMINARY OBJECTION)

### Judgment of 24 June 1932 (Series A/B, No. 47)

**Eighth Annual Report of the Permanent Court of International Justice (15 June 1931—15 June 1932), Series E, No. 8, pp. 207–211**

*Convention of May 8th, 1924, concerning Memel, Article 17: jurisdiction of the Council of the League of Nations and of the Court; is the jurisdiction of the Court conditional on prior consideration of the dispute by the Council?*

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[2] Official Journal of the French Republic, issue of December 29th, 1933, pp. 13016 and 13017. The records of the debates in the Senate on the draft law concerning the zones are given in the *Journal officiel* for December 24th. 1933, pp. 2113 *et sqq*.

[3] Official Journal of the French Republic, issue of December 30th, 1933, pp. 13106 *et sqq*.

[4] Collection of Federal Laws, No. 46 (Berne, December 27th, 1933), p. 1027.

[5] Official Journal of the French Republic, issue of December 31st. 1933, p. 13174.

[6] Federal Gazette, No. 3 (Berne, January 17th, 1934). p. 53.

*History of the question*

On April 11th, 1932, the Governments of Great Britain, France, Italy and Japan filed an application with the Registrar of the Court, instituting proceedings against the Government of the Lithuanian Republic in respect of differences of opinion as to whether certain acts of the latter Government were in conformity with the Statute of the Memel Territory annexed to the Convention of May 8th, 1924, concerning Memel. The events which had given rise to the said difference of opinion were the dismissal of M. Böttcher, President of the Directorate of Memel, in consequence of a journey that he had made to Berlin, and also certain steps taken subsequently to his dismissal, in particular the formation of a Directorate not enjoying the confidence of the Diet, and the dissolution of that body.

In their application, the Applicant Powers ask the Court to decide:

"(1) whether the Governor of the Memel Territory has the right to dismiss the President of the Directorate;

(2) in the case of an affirmative decision, whether this right only exists under certain conditions or in certain circumstances, and what those conditions or circumstances are:

(3) if the right to dismiss the President of the Directorate is admitted, whether such dismissal involves the termination of the appointments of the other members of the Directorate;

(4) if the right to dismiss the President of the Directorate only exists under certain conditions or in certain circumstances, whether the dismissal of M. Böttcher, carried out on February 6th, 1932, is in order in the circumstances in which it took place;

(5) whether, in the circumstances in which it took place, the appointment of the Directorate presided over by M. Simaitis is in order;

(6) whether the dissolution of the Diet, carried out by the Governor of the Memel Territory on March 22nd, 1932, when the Directorate presided over by M. Simaitis had not received the confidence of the Diet, is in order".

*Preliminary objection*

On May 31st, 1932, in a document filed at the same time as its Counter-Case on points 1 to 4 of the application, the Lithuanian Government raised a preliminary objection against the Court's jurisdiction in respect of points 5 and 6 of the application.

*Statements and hearings*

Within the period laid down, the Applicant Powers submitted a written statement containing their observations and conclusions on the objection made by the Lithuanian Government. In this statement it was submitted that the objection should be disallowed. At public hearings held on June 14th and 15th, 1932, the Court heard oral observations submitted on behalf of the Parties to the case upon the Lithuanian Government's objection.

*Composition of the Court*

For the examination of this question, the Court was composed as follows:

M. Guerrero, *Vice-President of the Court, acting as President*[1]*;* Mr. Kellogg, Baron Rolin-Jaequemyns, Count Rostworowski, MM. Fromageot, de Bustamante, Altamira, Anzilotti, Urrutia, Adatci, Sir Cecil Hurst, MM. Schücking, Negulesco, Jhr. van Eysinga, M. Wang, *Judges*.

M. Römer'is, appointed as judge *ad hoc* by the Lithuanian Government, also sat on the Court, for the purposes of the case.

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*Judgment of the Court (analysis)*

The Court's judgment was delivered on June 24th, 1932.

The Lithuanian Government founds its preliminary objection upon Article 17 of the Convention of May 8th, 1924, concerning Memel. This Article is worded as follows:

> "The High Contracting Parties declare that any Member of the Council of the League of Nations shall be entitled to draw the attention of the Council to any infraction of the provisions of the present Convention.
>
> In the event of any difference of opinion in regard to questions of law or of fact concerning these provisions between the Lithuanian Government and any of the Principal Allied Powers members of the Council of the League of Nations, such difference shall be regarded as a dispute of an international character under the terms of Article 14 of the Covenant of the League of Nations. The Lithuanian Government agrees that all disputes of this kind shall, if the other Party so requests, be referred to the Permanent Court of International Justice. There shall be no appeal from the Permanent Court's decision, which shall have the force and value of a decision rendered in virtue of Article 13 of the Covenant."

The Lithuanian Government contends that the two paragraphs of Article 17 relate to two distinct phases of one and the same procedure, and that, accordingly, all disputes, before being referred to the Court, must be submitted to the Council for examination. This condition had not been observed by the Applicant Powers in regard to questions 5 and 6 of their application.

On the other hand, the Applicant Powers consider that a matter may properly be submitted to the Court under paragraph 2 of Article 17, even though it has not been previously brought before the Council of the League, as is the case with the present questions 5 and 6.

The Court points out, in the first place, that the proceedings before the Council, contemplated by paragraph 1 of Article 17, are quite different from the judicial proceedings before the Court to which the second paragraph of Article 17 relates. If proceedings before the Council are to be a condition precedent to proceedings before the Court, the intention of the contracting Parties to stipulate such a condition must be clearly established. But there is nothing in the text of Article 17 to show that such was the intention of the Parties.

The actual text of Article 17 shows that the two procedures relate to different objects, the object of the procedure before the Council being the examination of any "infraction of the provisions of the Convention", whereas the procedure before the Court is concerned with "any difference of opinion in regard to questions of law or fact". Furthermore, there is a distinction between the two procedures with regard to those who may initiate them. While any Member of the Council of the League may bring a

[1] For this case, as the President was a national of one of the Parties, he handed over the presidency to the Vice-President, in accordance with Article 13 of the Rules, which was thus applied for the first time.

matter before the Council, proceedings before the Court may only be initiated by any one of the Principal Allied Powers, member of the Council.

If the principle of the unity of the procedure were to be adopted, it would follow, in the opinion of the Court, that a case could not be proceeded with before the Court, under paragraph 2 of Article 17, if it had been brought before the Council, under paragraph 1, by a Member of the Council other than one of the Principal Allied Powers which signed the Convention.

After setting aside an argument which the Lithuanian Government had based on the actual wording of Article 17, the Court examines certain arguments which the said Government seeks to derive from the history of the text of that Article. In this connection, the Court points out that, as it has constantly held, the preparatory work cannot be adduced to interpret a text which is, in itself, sufficiently clear. The Court is, moreover, of opinion that the history of Article 17 of the Convention affords nothing which conflicts with the interpretation of the terms of the Article, standing by themselves.

Finally, the Court has been unable to find any support for the Lithuanian contention in the report of the Committee of Jurists appointed by the Council of the League of Nations on September 3rd, 1926, an extract from which report is cited by the Lithuanian Government in support of its plea.

For these reasons, the Court reserves points 5 and 6 of the application of April 11th, 1932, for judgment on the merits.

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*Dissenting opinions*

The Court's judgment was adopted by thirteen votes to three. Baron Rolin-Jaequemyns appended a dissenting opinion to the judgment; Count Rostworowski and M. Römer'is declared that they were in favour of upholding the Lithuanian objection for the two cases in point (questions 5 and 6 of the application), in so far as these concern infractions of the provisions of the Convention of Paris of May 8th, 1924, and are covered by Article 17, paragraph 1, of that Convention.

*Dissenting separate opinion by Baron Rolin-Jaequemyns*

Baron Rolin-Jaequemyns expresses his dissent with the Court's decision overruling the preliminary objection raised by the Lithuanian Government in regard to the last two questions (5 and 6) of the application instituting proceedings of the four Applicant Powers. He states that, under Article 17, paragraph 2, of the Convention of May 8th, 1924, the Court cannot be called upon to decide questions of this kind unless such questions have first been referred to the Council of the League of Nations under the first paragraph of the same Article 17. In support of his interpretation, Baron Rolin-Jaequemyns cites a report by a Committee of Jurists constituted in the course of the year 1926 by the Council of the League of Nations, which made a pronouncement on the scope and working of the Convention and which clearly indicates, in its interpretation of Article 17, that in the event of an infraction of the Convention, the matter must first be brought before the Council, and that "only in the case of a difference of opinion *(s'il subsiste une différence d'opinions)* between the Lithuanian Government and one of the Principal Allied Powers, members of the Council, can such a dispute be brought before the Court . . .". He observes that these conditions have not been fulfilled in the two cases dealt with by the Court's judgment.

# 48. LEGAL STATUS OF THE SOUTH-EASTERN TERRITORY OF GREENLAND (PROVISIONAL MEASURES)

## Orders of 2 and 3 August 1932 (Series A/B, No. 48)

**Ninth Annual Report of the Permanent Court of International Justice (15 June 1932—15 June 1933), Series E, No. 9, pp. 119–121**

*Joinder of the two Applications—Dismissal of a request for indication of interim measures of protection; Article 41 of the Statute: indication of interim measures of protection at the request of the Parties or* proprio motu*; possible future indication of interim measures of protection reserved*

*Institution of proceedings*

By a Royal Decree of July 12th, 1932, the Norwegian Government declared that it had proceeded to occupy the territory on the south-east of Greenland between latitudes 63° 40' and 60° 30' North. By an Application, accompanied by a request for interim measures of protection, dated July 18th, 1932, the Norwegian Government instituted proceedings against the Danish Government and asked for judgment to the effect that the placing of the above-mentioned territory under the sovereignty of Norway was legally valid. On the other hand, by means of an Application also dated July 18th, 1932, the Danish Government instituted proceedings against the Norwegian Government concerning the legal status of the same territory, and asked the Court for judgment to the effect that the promulgation of the Norwegian Decree of occupation of July 12th, 1932, and any steps taken in this respect by the Norwegian Government constituted a violation of the existing legal situation and were accordingly illegal and invalid.

*Joinder of suits (Order of August 2nd, 1932)*

In its Order of August 2nd, 1932, the Court joined the two suits filed on July 18th, 1932, by the Norwegian and Danish Governments respectively. In the recitals of the Order, the Court observes that the two Applications are directed to the same object, namely the situation created by the Royal Norwegian Decree of July 12th, 1932. The situation with which the Court has to deal closely approximates, so far as concerns the procedure, to that which would arise if a special agreement had been submitted to it by the two Governments, parties to the dispute, indicating the subject of the dispute and the differing claims of the Parties; accordingly, the two Applications should be joined and the two applicant Governments held to be simultaneously in the position of Applicant and Respondent.

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*Request for interim measures of protection*

The Norwegian Government in its Application also asked for the Court to decide forthwith and order the Danish Government, as an interim measure of protection, to abstain in the said territory from any coercive measure directed against Norwegian nationals. In support of this request, it was alleged that there was serious reason to fear that the Danish Government might proceed to acts of violence against Norwegian nationals residing and exercising their calling in the territory in question. The Danish Government besought the Court to dismiss the Norwegian request for interim measures of protection as being purposeless and groundless.

Seeing that, under Article 57 of the Rules, the Court shall "only indicate measures of protection after giving the Parties an opportunity of presenting their observations on the subject", the Court decided to hold a public hearing when an opportunity would be afforded to the Parties to submit their

observations orally. It also decided to admit judges *ad hoc*, since in this case their presence was not inconsistent with the urgent nature of interim measures of protection. At the hearing which was held on July 28th, 1932, the Court heard the statements, reply and rejoinder presented on behalf of the two Governments.

*Composition of the Court*

The Court on this occasion was composed as follows:

MM. Adatci, *President;* Guerrero, *Vice-President;* Baron Rolin-Jaequemyns, Count Rostworowski, MM. Fromageot, Altamira, Anzilotti, Urrutia, Sir Cecil Hurst, MM. Schücking, Negulesco, Jhr. van Eysinga, M. Wang, *Judges*.

MM. Vogt and Zahle, appointed as judges *ad hoc* by the Norwegian and Danish Governments respectively, also sat on the Court for the purposes of the case.

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*Order of August 3rd, 1932 (analysis)*

In its Order of August 3rd, 1932, the Court first states that, under Article 41 of the Statute, it may proceed to indicate interim measures of protection both at the request of the Parties (or of one of them) and *proprio motu*. Considering in the first place the Norwegian request for interim measures, the Court observes that it has already ruled that the object of the measures of interim protection contemplated by the Statute is to preserve the respective rights of the Parties pending the decision of the Court, in so far, that is, as the damage threatening these rights would be irreparable in fact or in law. Adopting this standpoint, the Court observes that the Norwegian request is not based on the plea that the action which the Norwegian Government asks the Court to prevent would prejudice some recognized or alleged Norwegian right. Moreover, the incidents which the Application of the Norwegian Government aims at preventing cannot in any event, or to any degree, affect the existence or value of the sovereign rights claimed by Norway over the territory in question, were these rights to be duly recognized by the Court in its future judgment on the merits of the dispute; and these are the only rights which could possibly enter into account.

Again, it had been argued that, under Article 41 of the Statute, the Court could indicate interim measures of protection for the sole purpose of preventing regrettable events and unfortunate incidents. Without taking a final stand upon this point, the Court observes that, even adopting this broader interpretation of Article 41 of the Statute, there would seem to be no occasion to fear that the incidents contemplated by the Norwegian request will actually occur. In support of this view, the Court quotes the Parties' declarations which, taken together, are indicative of the existence in responsible circles in both countries of a state of mind and of intentions which are eminently reassuring. Moreover, these intentions having been officially proclaimed before the Court, the latter must not and cannot presume that the two Governments concerned might act otherwise than in conformity with the intentions thus expressed. In any event, no act on the part of these Governments in the territory in question can have any effect whatever as regards the legal situation which the Court is called upon to define; accordingly, the Parties can have no interest in causing acts to be performed likely to give rise to incidents.

Considering next whether there was ground for proceeding *proprio motu* to indicate interim measures of protection, the Court observes that the rights which it might be necessary to protect are solely such sovereign rights as the Court might, in giving judgment on the merits, recognize as appertaining to one or other of the Parties. Having regard to the character of these rights, considered in relation to the natural characteristics of the territory in issue, even "measures calculated to change the legal status of the

territory" could not, according to the information at the Court's disposal at the time, affect the value of such alleged rights, once the Court in its judgment on the merits had recognized them as appertaining to one or other of the Parties; in any case, the consequences of such measures would not, in point of fact, be irreparable. Finally, the Court points out that both Parties are bound by Article 33 of the General Act for conciliation, judicial settlement and arbitration adopted at Geneva on September 26th, 1928: consequently, in the event of any infringement of the alleged rights, a legal remedy would be available.

For these reasons, the Court arrives at the conclusion that there is no necessity for the indication of interim measures of protection, either at the request of the Parties or *proprio motu*; and it dismisses the request of the Norwegian Government. It reserves, however, its right subsequently to consider whether circumstances should have arisen requiring the indication of provisional measures.

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## 49. INTERPRETATION OF THE STATUTE OF THE MEMEL TERRITORY

### Judgment of 11 August 1932 (Series A/B, No. 49)

**Ninth Annual Report of the Permanent Court of International Justice (15 June 1932—15 June 1933), Series E, No. 9, pp. 121–130**

*Convention of May 8th, 1924, concerning Memel; Statute of the Memel Territory annexed to the aforesaid Convention—Interpretation, in particular, of Articles 1, 2 and 17 of the convention, and of Articles 2, 6, 7, 10, 12, 16 and 17 of the Statute—Powers of the Governor of the Territory in respect of: (a) the dismissal of the President and members of the Directorate of the Memel Territory; (b) the constitution of the Directorate; (c) the dissolution of the Chamber of Representatives of the Territory—Conditions governing the exercise of these powers*

*History of the case*

Under the Convention concerning Memel concluded at Paris on May 8th, 1924, between the British Empire, France, Italy and Japan, of the one part, and Lithuania, of the other part, the Memel Territory constitutes, under the sovereignty of Lithuania, a unit enjoying legislative, judicial, administrative and financial autonomy, within the limits prescribed by the Statute which is annexed to the Convention and which, under Article 16 of the Convention, is to be considered as constituting for all purposes part thereof. It was the intention of all Parties to the Convention that the autonomy to be conferred on Memel was to be real and effective, that is to say that it was to give the people of Memel the right and the power to manage their own local affairs in their own way.

On December 17th, 1931, M. Böttcher, who at that time was President of the Memel Directorate, the body which, under the Memel Statute, exercises the executive power in the Territory, made a journey to Berlin. The Lithuanian Government was unaware of the journey; the facts only became known to them at a later date. The expenses of the journey were defrayed out of the public funds of the Territory. While at Berlin, M. Böttcher had interviews with public officials at the German Food Ministry and also at the Ministry for Foreign Affairs.

When the Governor of Memel became aware of the facts, he informed M. Böttcher, on December 27th, 1931, that he (M. Böttcher) no longer possessed his (the Governor's) confidence and advised him to resign. On January 25th, 1932, M. Böttcher not having resigned, the Governor reported the facts to the Memel Chamber of Representatives in a letter which was read to the Chamber that day, and M.

Böttcher, on his side, also made a statement. Thereupon, the Chamber expressed its continued confidence in M. Böttcher by a vote of fifteen to four with six abstentions. On February 6th, the Governor dismissed M. Böttcher from the Presidency. On the same day the Governor invited M. Žygaudas, who was already a member of the Directorate, to take over the duties of M. Böttcher. M. Žygaudas declined, and the Governor then instructed M. Tolišius, an official of the Directorate, to act as President *ad interim*. The two members of the Directorate, other than the President, were also relieved of their offices.

The German Government submitted the matter to the Council of the League of Nations in pursuance of Article 17, paragraph 1, of the Memel Convention, and on February 20th, 1932, the Council adopted a report which, in view of the complexity of the matter, did not attempt to solve the questions of law involved—in particular the question whether M. Böttcher's dismissal was lawful—but pointed to the fact that the situation called for urgent steps to prevent its aggravation and that the establishment of a Directorate enjoying the confidence of the Chamber of Representatives was an absolute necessity.

On February 23rd, M. Böttcher forwarded to the Governor his resignation from the post of President of the Directorate. The majority parties not having suggested nominees for the post of President of the Directorate, the Governor appointed a certain M. Simaitis. When the Directorate formed by M. Simaitis presented itself to the Chamber, the latter refused its confidence, whereupon the Chamber was dissolved by decree of the Governor on March 22nd.

From the time of the proceedings at Geneva before the Council, the four Powers who were Parties with Lithuania to the Convention of Memel had been interesting themselves in affairs at Memel and had informed the Lithuanian Government that they would regard the dissolution of the Chamber as contrary to the recommendations of the Council of the League of Nations and would be obliged to consider whether it did not constitute a new infraction of the Memel Convention.

After the dissolution of the Chamber, the four Powers submitted the case to the Court by means of a unilateral Application filed with the Registry of the Court on April 11th, 1932.

*Application*

In the Application, which relies on the jurisdictional clause in Article 17 of the Memel Convention, the applicant Powers state the subject of the dispute in the following terms:

> "To decide. . . .
>
> (1) whether the Governor of the Memel Territory has the right to dismiss the President of the Directorate;
>
> (2) in the case of an affirmative decision, whether this right only exists under certain conditions or in certain circumstances and what those conditions or circumstances are;
>
> (3) if the right to dismiss the President of the Directorate is admitted, whether such dismissal involves the termination of the appointments of the other members of the Directorate;
>
> (4) if the right to dismiss the President of the Directorate only exists under certain conditions or in certain circumstances, whether the dismissal of M. Böttcher, carried out on February 6th, 1932, is in order in the circumstances in which it took place;
>
> (5) whether, in the circumstances in which it took place, the appointment of the Directorate presided over by M. Simaitis is in order;
>
> (6) whether the dissolution of the Diet, carried out by the Governor of the Memel Territory on March 22nd, 1932, when the Directorate presided over by M. Simaitis had not received the confidence of the Diet, is in order."

*Procedure*

The applicant Powers having renounced their right to present a written Reply, time-limits were fixed only for the presentation of a Case and of a Counter-Case. By a document filed at the same time as its Counter-Case, the Lithuanian Government objected that the Court had no jurisdiction to deal with points 5 and 6 of the Application above mentioned.

In these circumstances, the Lithuanian Government, in its Counter-Case, only presented observations on questions 1 to 4 of the Application of the applicant Powers.

By a judgment given on June 24th, 1932, the Court overruled the Lithuanian preliminary objection and retained points 5 and 6 of the Application for judgment on the merits. A Counter-Case on these points was filed by the Lithuanian Government within the time-limit fixed for the purpose.

In the Case of the applicant Powers it is submitted:

"(*a*) that the Governor of the Memel Territory has no right to dismiss the President of the Directorate;

(*b*) that the termination of the appointment of the President of the Directorate does not *ipso facto* entail the termination of the appointments of the other members of the Directorate;

(*c*) that the appointment of the Directorate presided over by M. Simaitis was not in order, in the circumstances in which it took place;

(*d*) that the dissolution of the Memel Diet, carried out by the Governor of the Territory on March 22nd, 1932, when the Directorate presided over by M. Simaitis had not received the confidence of the Diet, was not in order".

The first Lithuanian Counter-Case contains the following "general submissions":

"(1) that the Governor of the Memel Territory is entitled to dismiss the President of the Directorate;

(2) that, in any event, the Governor of the Memel Territory is entitled to dismiss the President of the Directorate in the following cases:

(*a*) when the President has committed acts which compromise the sovereignty or unity of the Lithuanian State;

(*b*) when the President has encroached upon the powers of the central authority;

(*c*) when the President has exercised his powers in disregard of the principles of the Lithuanian Constitution;

(*d*) when the President opposes the adoption by the local authorities of the measures necessary to apply in Memel international treaties concluded by Lithuania dealing with matters which are within the competence of the local authorities;

(*e*) when the President opposes the adoption by the local authorities of the measures necessary to execute the provisions of the Statute and of those laws of the Republic which are applicable to the Territory;

(3) that the dismissal of the President of the Directorate by the Governor entails the termination of the duties of the other members, who may only conduct current affairs of their departments if specially commissioned thereto by the Governor;

(4) that the dismissal of M. Böttcher by the Governor of Memel on February 6th, 1932, was, in the circumstances in which it was effected, quite regular."

In the second Counter-Case it is submitted:

"That since points 5 and 6 of the Application of April 11th, 1932, by the Governments of France, Great Britain, Italy and Japan do not relate to differences of opinion between the said Governments and Lithuania upon questions of law or fact concerning the provisions of the Convention of Paris of May 8th, 1924, but only to a difference of views between the five Governments as to the political expediency of certain acts of the Lithuanian authority at Memel which do not come under Article 17, paragraph 2, these points cannot be entertained by the Court.

Alternatively, in the event of the Court not deciding that points 5 and 6 of the Application of the four Governments are inadmissible, that:

(1) the appointment of the Directorate presided over by M. Simaitis is in order in the circumstances in which it took place;

(2) the dissolution of the Diet carried out by the Governor of the Memel Territory on March 22nd, 1932, is in order."

In the course of public sittings held on June 8th, 13th, 14th, 16th and 18th (points 1–4) and July 11th, 12th and 13th, 1932 (points 5 and 6), the Court heard the statements, observations, replies and rejoinder presented on behalf of the Parties.

*Composition of the Court*

For the examination of this case, the Court was composed as follows:

MM. Guerrero, *Vice-President, acting as President*[1]*;* Baron Rolin-Jaequemyns, Count Rostworowski, MM. Fromageot, de Bustamante, Altamira, Anzilotti, Urrutia, Adatci, Sir Cecil Hurst, MM. Schücking, Negulesco, Jhr. van Eysinga, M. Wang, *Judges*.

M. Römer'is, who was appointed as judge *ad hoc* by the Lithuanian Government, also sat on the Court for the purposes of the case.

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*Judgment (analysis)*

The Court gave judgment on August 11th, 1932.

Before proceeding with its consideration of the case, the Court draws attention to the inconvenience resulting from the fact that the first three questions in the Application are formulated purely *in abstracto* and in terms which go beyond the facts out of which the dispute has arisen and, so far as the Court is able to judge from the documents laid before it, go beyond the question of law or fact on which the Parties to the dispute had differed in opinion before the initiation of the proceedings on April 11th, 1932; these terms might therefore raise doubts as to the jurisdiction of the Court which, in this case, depends on Article 17, paragraph 2, of the Memel Convention.

Proceeding then to consider point 1 of the Application, the Court observes, in connection with the question whether the right of dismissal is implied in the Statute (though not expressly provided for), that the Convention of Paris of 1924 and the Statute annexed to it must be considered as a whole in order to understand the régime which the four Powers and Lithuania intended to establish for the Memel Territory. In regard to this, the Court arrives at the following conclusions:

[1] The President, being a national of one of the Parties concerned in the case, handed over the functions of President to the Vice-President, in accordance with Article 13 of the Rules of Court.

Whilst Lithuania was to enjoy full sovereignty over the ceded territory, subject to the limitations imposed on its exercise, the autonomy of Memel was only to operate within the limits so fixed and expressly specified. In view more especially of article 7 of the Statute of Memel (according to which affairs which are not within the jurisdiction of the local authorities of the Memel Territory shall be within the exclusive jurisdiction of the competent organizations of the Lithuanian Republic), the Court holds that it is impossible to deny to Lithuania the exercise of certain rights simply because they are not expressly provided for in the Statute.

As regards the autonomous legislative power, this only exists within the prescribed limits of the autonomy, as is shown by the express provisions of the Statute; the Governor exercises a right of veto in order to ensure the observance of these provisions. There is no express corresponding rule as regards the executive power. Article 17 of the Statute simply says: "The Directorate shall exercise the executive power in the Memel Territory." Nevertheless, the Court finds it impossible to believe that it was the intention of the Convention to leave Lithuania, the sovereign of the Memel Territory, with no remedy whatever if the executive authorities at Memel violated the Statute by acting in a manner beyond their powers. The Court holds that this conclusion is not shaken by the provisions in Article 17 to the effect that the President shall hold office so long as he possesses the confidence of the Chamber. This provision cannot, in the opinion of the Court, be isolated from the rest of the Article in which it appears. To place upon these words the meaning that the right to continue to hold office conferred upon the President of the Directorate is absolute and persists in all cases so long as the Chamber supports him, would result in a President being able to violate the Statute and to flout the authorities of the Lithuanian Government so long as he carried the Chamber with him. Such an interrelation would destroy the general scheme of the Convention of Paris and the Statute annexed to it. The Court therefore is led to the conclusion that, under the proper interpretation of the Statute, the Governor must be regarded as entitled to watch the acts of the executive power in Memel, in order to see that such acts do not exceed the limits of the competence of the local authorities, as laid down by the Statute, nor run counter to the stipulations of Article 6 of the Statute (according to which the local authorities of the Memel Territory, in exercising the powers conferred upon them, shall conform to the principles of the Lithuanian Constitution) or to the international obligations of Lithuania. In the view of the Court, the means of making this right effective are to be found in the right of the Governor to dismiss the President of the Directorate. But such dismissal would constitute a legitimate and appropriate measure of protection of the interests of the State only in cases in which the acts complained of were serious acts calculated to prejudice the sovereign rights of Lithuania and violating the provisions of the Memel Statute, and when no other means are available.

With regard to the second point in the Application, the Court observes that the broad principle laid down by it as governing the exercise of the right of dismissal is sufficient to indicate the conditions and circumstances in which such a right would exist. Whether or not such conditions or circumstances were present would always depend on the facts of the particular case.

As regards point 3 of the Application, the Court observes that the autonomy conferred on the Memel Territory covers so broad a field that that Territory cannot without inconvenience be left without a government. Again, the dismissal of the President by the Governor, which would in general take the form of the revocation of the decree of appointment, is an act personal to the President of the Directorate and therefore limited, so far as the Governor is concerned, to the President. The Court accordingly holds that the dismissal of the President of the Directorate by the Governor does not by itself involve the termination of the appointments of the other members of the Directorate. They will hold their posts until they are replaced.

In answering point 4 of the Application, the Court has to decide whether M. Böttcher's actions, when viewed in the light of the principles stated above, justify the Governor in dismissing him.

The reason for M. Böttcher's dismissal was the visit to Berlin which he made without the knowledge of the Lithuanian Government. The statements made on either side differ, especially as regards the object of the journey. The Court considers however that it may be safely assumed that M. Böttcher tried to secure from the German Government, for the admission into Germany of Memel agricultural produce, terms more favourable than those enjoyed by Lithuania generally. Such an attempt falls within the sphere of foreign relations which, under Article 7 of the Statute, are within the exclusive jurisdiction of the Lithuanian Republic; consequently, M. Böttcher's action exceeded the competence of the Memel authorities and thereby violated the Statute. The Court then states that the gravity of the incident must be judged by reference to the repercussions which such an arrangement as M. Böttcher hoped for might have; and in its view, the possible repercussions of M. Böttcher's act were such as to make it one which Lithuania was justified in regarding as of a serious nature and calculated to prejudice her sovereign rights. Accordingly, the Court decides that the dismissal of M. Böttcher on February 6th, 1932, was in order in the circumstances in which it took place.

In point 5 of the Application, the applicant Powers ask the Court to say whether the appointment of the Directorate presided over by M. Simaitis was in order. Seeing that, under Article 17 of the Statute, the Governor appoints the President of the Directorate and the latter appoints the other members, the Court holds that the question must be taken to refer to the appointment by the Governor of M. Simaitis to the post of President of the Directorate, that being the only act in the constitution of the Directorate for which Lithuania was responsible, or in respect of which the Court can give a decision.

In the opinion of the Court, the only qualification in law for membership of the Directorate is that laid down in Article 17: citizenship of the Territory. The duty of the Governor to limit his choice to persons to whom it may reasonably be expected that the Chamber will accord its confidence, is not a legal obligation. The confidence of the Chamber is a matter which the Chamber will express for itself by its vote in due course when the Directorate presents itself to the Chamber. Under the Statute, the Governor makes the appointment on his own responsibility, and the Chamber gives or refuses its confidence at a later stage. For the rest, the Governor might reasonably have expected that the Chamber would accord its confidence to M. Simaitis. For these reasons the Court decides that the action of the Governor in appointing M. Simaitis to be President of the Directorate involved no action which was contrary to the Statute and that, in the circumstances in which it took place, the appointment of the Directorate presided over by M. Simaitis was therefore in order.

Lastly, in the sixth point of the Application, the Court is asked to say whether the dissolution of the Diet, carried out on March 22nd, 1932, was in order. Under Article 12, paragraph 5, of the Statute, the Governor is not entitled to dissolve the Chamber on his own authority. His decision requires the concurrence of the Directorate. The Court considers that the reason why a dissolution must not take place without the consent of the Directorate is in order to ensure that the local elements will have some voice in the decision whether or not the Chamber is to be dissolved.

A Directorate which has never obtained the confidence of the Chamber may represent no more than the individual will and views of the Governor and of his nominee for the post of President of the Directorate. There is no guarantee that their views represent in any way whatever the views of the local elements at Memel. That is why, in the Court's view, some distinction must be drawn, as regards agreeing to a dissolution, between the powers of a Directorate which has in the past secured the confidence of the Chamber and loses it on the occasion of some subsequent vote, and those of a Directorate which has never received the confidence of the Chamber. To give effect to what the Court considers to have been the intention of the Statute, this distinction, which is not excluded by the text of the Statute, must be made. The conclusion at which the Court arrives is that, on a proper construction of the Statute, the Governor cannot dissolve the Chamber except with the consent of a Directorate which has functioned as a Directorate with the consent of the Chamber, and which may therefore be regarded

as a body representing local aspirations and views. In the present case, the Directorate presided over by M. Simaitis had never functioned as a Directorate with the consent of the Chamber. Consequently, when the Governor proceeded to the dissolution on March 22nd, he issued the decree with the consent of a body which was not capable of giving the consent which paragraph 5 of Article 12 of the Statute requires in such cases.

The Court adds that its function in the present case is limited to that of interpreting the Memel Statute in its treaty aspect, and that it does not intend to say that the action of the Governor in dissolving the Chamber, even though it was contrary to the treaty, was of no effect in the sphere of municipal law. The Court takes the view that the intention of the applicant Powers was only to obtain an interpretation of the Statute which would serve as a guide for the future.

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*Dissenting opinions*

The Court's judgment was adopted by ten votes to five. MM. de Bustamante, Altamira, Schücking and van Eysinga, being unable to concur in the judgment of the Court on points 1 to 5 of the Application, appended to the judgment a dissenting opinion on point 1, whilst M. Anzilotti appended a separate opinion to the effect that the Court should have rejected the Application of the four Powers as inadmissible; M. Urrutia confined himself to expressing his disagreement in regard to Nos. 1 and 3 of the operative clauses of the judgment (points 1, 2 and 4 of the Application).

*Dissenting opinion by MM. de Bustamante, Altamira, Schücking and Jonkheer van Eysinga*

The dissenting judges state that they are unable to concur in the judgment of the Court in regard to points 1 to 5 of the application instituting proceedings, but confine themselves to attaching to the judgment this dissenting opinion in regard to the first point.

The dissenting judges state that the apparent intention of Article 17, paragraph 2, of the Statute of the autonomous unit of Memel is to make the continuance in office of the President of the Directorate appointed by the Governor dependent solely on the confidence of the representatives of the citizens of the autonomous unit of Memel. Accordingly, no authority other than the Chamber of Representatives can remove the President and the provision does not imply a right on the part of the Governor to dismiss the President of the Directorate. It follows that Article 17 of the Statute by itself affords sufficient ground for a negative answer to the first question.

The dissenting judges consider that the history of Article 17 of the Statute only tends to confirm this view. From a detailed analysis of the preparatory works of this provision, they conclude that this history confirms that the Governor is not entitled to dismiss the President of the Directorate.

The dissenting judges then observe that the right of the Governor to dismiss the President of the Directorate has been claimed in virtue of the sovereignty acquired by Lithuania over the Memel Territory under Article 2 of the Convention of Paris of May 8th, 1924. It is argued that this sovereignty includes a right of "control" over acts of the Directorate which might be contrary, *inter alia*, to the Statute of Memel, and that this "control" in turn includes the right of the Governor to dismiss the President of the Directorate. In this connection, the dissenting judges note that the sovereignty of Lithuania over the autonomous unit of Memel is simply the residue left to the exclusive jurisdiction of Lithuania by the Convention of Paris. And as the Statute annexed to the Convention reserves to the Memel Chamber of Representatives, and not to the Governor, the right to dismiss the President of the Directorate, Lithuania's sovereignty over the autonomous uinit of Memel does not include the right to dismiss the President of the Directorate. According to the dissenting judges, the Statute gives Lithuania, in certain very

definite cases, a right to "control" acts which exceed the competence of the authorities of the Territory or which are incompatible with the provisions of Article 6 or with Lithuania's international obligations, but this does not include a right of "control" over the executive authorities, which remains in the hands of the Chamber of Representatives.

*Dissenting opinion by M. Anzilotti*

M. Anzilotti considers the Court should have declared that the application was inadmissible, since it does not embody the essential features of a claim for legal redress and tends to force the Court to deviate from the fundamental rules governing the activities of a judicial body.

M. Anzilotti finds that the application, instead of stating what the Applicants believed themselves entitled to claim from the Court, puts a series of questions to which the Court is asked to reply, as though what was required was an advisory opinion. He states that the Court cannot answer questions; it must pass upon claims. In such a claim, the specification of the subject of the dispute can only be a statement of that which the Applicant wishes to obtain from the Court and of the reasons of law or of fact on the basis of which he feels entitled to obtain it *(petitum et causa petendi).* A properly constituted action at law is only possible if a claim is presented in this form, for an action is hardly conceivable unless there is a person who makes against some other person a claim upon which it is for the judge to pass according to law. He therefore concludes that the Court could not answer the questions put in the application, because by so doing, it would be giving an advisory opinion for which the applicant Powers were not entitled to ask and which the Court was not entitled to give.

With regard to the question whether the Court could not base itself on the claims which the applicant Powers subsequently presented in the form of submissions in their Memorial, in order to supplement or amend the application, M. Anzilotti observes that the submissions of the Memorial do not correspond with the questions in the application and that grave doubts remain as to what the applicant Powers ask of the Court and as to the position of the Respondent in regard to at least one of the most important questions in the case. M. Anzilotti proceeds to examine the differences between the application, the submissions of the Memorial and the statements made at the public hearings by the Agents on each of the points at issue.

M. Anzilotti notes that while he is unable to concur with the judgment in respect of question No. 1, he nevertheless agrees with the Court that there are certain exceptional cases in which the Governor of the Memel Territory is entitled to dismiss the President of the Directorate, either with a view to ensuring the regular operation of the Memel constitutional system or as a necessary means of defence against the consequences of a given act. He states that the question whether the right of dismissal has been exercised in a regular manner by the Governor in M. Böttcher's case depends therefore, to a great extent, on certain circumstances of fact. In this regard, he considers that the seriousness of the initial irregularity of the application has become increasingly manifest during the subsequent proceedings. In his view, all that the Court could do was to take note of this irregularity and declare that it would not entertain the dispute.

M. Anzilotti holds that the foregoing observations apply strictly speaking to points *2* and 4 of the application. As regards points 1, 5 and 6, he holds that the Court could have given judgment upon submissions (a), (c) and (d) of the Memorial, which exactly correspond to the above-named points, while, at the same time, defining in more precise terms the claim of the applicant Powers. In regard to point 3 of the application and submission (b) of the Memorial, he finds that that the Court could have given judgment on this submission, confining it, however, to the case of dismissal. However, he points out that in actual fact, as well as in the intention of the Applicants, the various questions in the application are closely bound up with one another and form an indivisible whole with its basis or starting point

in the dismissal of M. Böttcher. He concludes that the Court should therefore have declared that the application in its entirety was inadmissible.

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## 50. INTERPRETATION OF THE CONVENTION OF 1919 CONCERNING EMPLOYMENT OF WOMEN DURING THE NIGHT

### Advisory Opinion of 15 November 1932 (Series A/B, No. 50)

**Ninth Annual Report of the Permanent Court of International Justice (15 June 1932—15 June 1933), Series E, No. 9, pp. 131–135**

*Convention of Washington (1919) concerning "the employment of women during the night": applicability to certain categories of women, other than those employed in manual work—Principles of interpretation—Influence of the fact that this is a Labour Convention (Part XIII of Treaty of Versailles)—Influence of the origin and antecedents of the Convention (Convention of Berne of 1906)—Preparatory work and provisions of conventions adopted at the same time as the Convention concerning the employment of women during the night (the "eight-hour day" Convention)*

*History of the case*

At its 1st Session, held at Washington, the International Labour Conference, on November 28th, 1919, adopted a draft convention concerning employment of women during the night. The Convention, which came into force on June 13th, 1921, contains the following clause:

> "*Article* 3.—Women without distinction of age shall not be employed during the night in any public or private industrial undertaking, or in any branch thereof, other than an undertaking in which only members of the same family are employed."

The Government of the United Kingdom, which had ratified the Convention in July 1921, pointed out that the application of the Convention in Great Britain gave rise to difficulty: in the view of that Government, the above-quoted clause must have the effect of debarring women altogether from entering upon certain employments in which continuous working is necessary. For this reason, it proposed that the possibility of revising the Convention on the point in question should be considered.

The consultation by the International Labour Office of the governments, to whose special attention the question, raised by the British Government, of the "distinction to be made between working women and women employed in a supervisory capacity" had been drawn, revealed the existence of a great divergence of views, both as to the interpretation to be placed on Article 3 of the Convention concerning employment of women during the night and as to the desirability of undertaking the revision of this Article. Nevertheless, the Labour Conference, on assembling in May 1931, prepared a new text of the Convention concerning employment of women during the night, revised on this point *inter alia*, the original wording of Article 3 being replaced by the following: "This Convention does not apply to persons holding a responsible position of management, who do not ordinarily perform manual work." The revised text of the Convention was not adopted, as it failed to obtain a two-thirds majority (Art. 405 of the Treaty of Versailles); the proposa1 for the revision of Article 3 of the Convention was therefore rejected.

In view of this situation, and pursuant to a proposal made by the Government of Great Britain, the Governing Body of the International Labour Office decided, on April 6th, 1932, to ask the Council of the League of Nations to submit to the Court a request for an advisory opinion on the interpretation of Article 3 of the Convention of 1919.

*Request*

The Council, complying with this request, adopted on May 9th, 1932, a Resolution asking the Court for an advisory opinion on the following question:

> "Does the Convention concerning employment of women during the night, adopted in 1919 by the International Labour Conference, apply, in the industrial undertakings covered by the said Convention, to women who hold positions of supervision or management and are not ordinarily engaged in manual work?"

*Notifications, written statements and hearings*

In accordance with the customary procedure, notice of the Request was given to members of the League of Nations and to other States entitled to appear before the Court. Furthermore, the Registrar, by means of a special and direct communication, drew the attention of the governments of States which had ratified the Convention of 1919 concerning employment of women during the night, to the terms of Article 73, paragraph 1, sub-paragraph 3, of the Rules. As a result of this communication, the Government of the United Kingdom of Great Britain and Northern Ireland informed the Registrar that it desired to be represented before the Court in this case. The Court decided to grant this request.

The Registrar also sent to four international organizations considered by the President—the Court not being in session—as likely to be able to furnish information on the question referred to the Court for advisory opinion, the special and direct communication mentioned in Article 73, paragraph 1, sub-paragraph 2, of the Rules; of these organizations—namely, the International Labour Organization, the International Federation of Trades Unions, the International Confederation of Christian Trades Unions and the International Organization of Industrial Employers—the first three stated that they desired to submit written and oral statements to the Court.

Lastly, pursuant to a decision of the Court to the effect that States and organizations which had been notified of the Request but which had not entered an appearance might nevertheless be permitted to submit a statement within the time-limit fixed for the filing of second written statements, the President granted a request to this effect on the part of the German Government.

Statements were filed on behalf of the Government of the United Kingdom and of the German Government, as well as by the International Labour Organization, the International Federation of Trades Unions and the International Confederation of Christian Trades Unions. The Court held a public sitting on October 14th, 1932, in order to hear the oral arguments submitted on behalf of the above-mentioned Governments and organizations.

*Composition of the Court*

The Court was composed as follows for this case:

MM. Adatci, *President;* Guerrero, *Vice-President;* Baron Rolin-Jaequemyns, Count Rostworowski, MM. Fromageot, Anzilotti, Urrutia, Sir Cecil Hurst, M. Schücking, Negulesco, Jhr. van Eysinga, *Judges*.

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*Opinion (analysis)*

The Court's Opinion was delivered on November 15th, 1932.

The Court holds that the wording of Article 3 of the Convention of 1919 concerning employment of women during the night, considered by itself, gives rise to no difficulty; it is general in its terms and free from ambiguity or obscurity. It prohibits the employment during the night in individual establishments of women without distinction of age; taken by itself, it necessarily applies to the categories of women contemplated by the question submitted to the Court. The terms of Article 3 of the Washington Convention, which are in themselves clear and free from ambiguity, are in no respect inconsistent either with the title, or with the Preamble, or with any other provisions of the Convention. If, therefore, Article 3 of the Washington Convention is to be interpreted in such a way as not to apply to women holding posts of supervision and management and not ordinarily engaged in manual work, it is necessary to find some valid ground for interpreting the provision otherwise than in accordance with the natural sense of the words.

The first point considered by the Court, in deciding whether there exist good grounds for restricting the operation of Article 3 to women engaged in manual work, is whether any such restriction results from the fact that the Convention is a Labour convention, i.e. one prepared within the framework of Part XIII of the Treaty of Versailles and in accordance with the procedure provided for therein. In this connection the Court considers whether it could be maintained that, in view of the fact that the improvement of the lot of the manual worker was the aim of Part XIII, a provision in a Labour convention couched in general terms must be assumed to be intended to apply only to manual workers unless the opposite intention is made manifest by the terms of the convention. The Court holds that it would not be sound to argue thus: it is not disposed to regard the sphere of activity of the International Labour Organization as circumscribed so closely, in respect of the persons with which it was to concern itself, as to raise any presumption that a Labour convention must be interpreted as being restricted in its operation to manual workers, unless a contrary intention appears. The limits of this sphere are not fixed with precision or rigidity in Part XIII, and a study of the text of Part XIII provides ample material supporting the conclusion reached by the Court. Indeed, the words used in the Preamble and in the operative articles of Part XIII—both in the French and English texts—to describe the individuals who are the subjects of the International Labour Organization's activities are not words which are confined to manual workers.

The Court next considers the view that the circumstances in which the Convention was adopted at Washington afford sufficient reason for confining the operation of Article 3 to female workers doing manual work, *inter alia*, because the business before the Washington Conference was (as regards the employment of women at night) described in item 5 of the agenda of the Conference as "the extension and application of the international conventions adopted at Berne in 1906 on the prohibition of night work for women employed in industry". The Court is unable to share this view. It observes in this connection that the text of the Convention makes no reference to the Berne Convention, and that the Preamble of the Convention connects it, not with the fifth item in the agenda of the Conference, but with the third, which concerns "Women's employment. . . . (*b*) during the night".

With regard to the argument that the Convention was not intended to apply to women holding posts of supervision, because in 1919 the point, being of no practical importance, had not been considered, the Court observes that the mere fact that, at the time when the Convention concerning employment of women at night was concluded, certain facts or situations, which the terms of the Convention in their ordinary meaning are wide enough to cover, were not thought of, does not justify interpreting those of its provisions which are general in scope otherwise than in accordance with their terms.

In view of the fact that, in the course of the discussions at the International Labour Conference in 1930 and 1931, several delegates, with expert knowledge of the subject, had confidently expressed the opinion that the Convention applied only to working women, the Court was led to examine the preparatory work of the Convention. In the view of the Court, the impression derived from a study of the preparatory work is that, though at first the intention was that the Conference should not deviate from the stipulations of the Berne Convention, this intention had receded into the background by the time that the Draft Convention was adopted on November 28th, 1919. The uniformity of the terms of this Draft Convention with those of the other draft conventions which were being adopted and which had their origin in the programme set forth in Part XIII of the Treaty of Versailles, had become the important element. The preparatory work thus confirms the conclusion reached in a study of the text of the Convention that there is no good reason for interpreting Article 3 otherwise than in accordance with the natural meaning of the words.

The Court holds that this conclusion is corroborated by a comparison between the Convention concerning employment of women during the night and the Convention generally known as the Eight Hour Day Convention, which was also drawn up at Washington in 1919: the latter contains a specific exception to the effect that the provisions of the Convention shall not apply to persons holding positions of supervision or management or to persons employed in a confidential capacity.

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*Dissenting opinions*

The Court's opinion was adopted by six votes to five.

M. Anzilotti appended his dissenting opinion to the Opinion of the Court. The other judges who did not concur in the Opinion (Baron Rolin-Jaequemyns, Count Rostworowski, MM. Fromageot and Schücking) confined themselves to recording their dissent.

*Dissenting opinion by M. Anzilotti*

M. Anzilotti states that he does not see how it is possible to say that an article of a convention is clear until the subject and aim of the convention have been ascertained, for the article only assumes its true import in this convention and in relation thereto. Only when it is known what the Contracting Parties intended to do and the aim they had in view is it possible to say either that the natural meaning of terms used in a particular article corresponds with the real intention of the Parties, or that the natural meaning of the terms used falls short of or goes further than such intention.

In M. Anzilotti's view, Part XIII of the Treaty of Versailles has for its object the regulation of the employment of manual workers (*ouvriers*). While it is open to the International Labour Organization also to concern itself with certain other categories of workers (*travailleurs*), this task is a secondary and in a sense an incidental one. He observes that this follows, in the first place, from the historical connection between this Part of the Treaty of Versailles and the scientific and practical movement which had prepared and already in part brought into being what was called "international labour legislation". M. Anzilotti considers that the subject and aim of the convention is further confirmed by the Preamble to Part XIII of the Treaty, Chapter I of this Part, setting the basis of the organization, and Article 427, enunciating methods and principles for regulating labour conditions.

M. Anzilotti considers that, if the task allotted by Part XIII of the Treaty of Versailles to the Organization which it establishes is the regulation of conditions of manual labour, it is only natural to infer that any convention concluded under this Part is to be regarded as relating to manual labour and

not to labour in general. Another and more general intention is conceivable but cannot be presumed: it must be proved.

As for Article 3 of the Washington Convention, M. Anzilotti states that it should be construed in relation to the Convention of which it forms part and which, by its nature, concerns the employment of women manual workers. In his view, the terms used in this provision do not afford proof that the intention of the High Contracting Parties was to prohibit in general the employment at night of women in the industry. In this regard, he notes that the expression "women", found in this Article, is used in documents relating to labour legislation to designate women industrial workers.

M. Anzilotti concludes that a correct interpretation of Article 3 leads to the conclusion that the Washington Convention applies exclusively to women manual workers. He notes that, if however any doubt were possible, it would be necessary to refer to the preparatory work, which, in such case, would be adduced not to extend or limit the scope of a text clear in itself, but to verify the existence of an intention not necessarily emerging from the text but likewise not necessarily excluded by that text. M. Anzilotti finds that the preparatory work would, if need be, confirm the interpretation which, in his view, naturally flows from the text of the Convention.

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*Effects*

At the 1st meeting of its 70th Session (January 24th, 1933), the Council instructed the Secretary-General to transmit the Opinion drawn up by the Court to the Director of the International Labour Office in order to be communicated to the Governing Body.

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**Tenth Annual Report of the Permanent Court of International Justice (15 June 1933—15 June 1934), Series E, No. 10, pp. 128–129**

SEQUEL TO THE OPINION OF NOVEMBER 15th, 1932

At its 61st Session (Geneva, February, 1933), the Governing Body of the International Labour Office considered the Court's opinion, which had been transmitted to it by the Council of the League of Nations.

In this connection, the Director of the International Labour Office reminded the Governing Body that, as a result of this opinion, the German Government had withdrawn the request submitted to that Body in April 1932 to the effect that an opinion should be obtained from the Court on the question whether the Convention applied to women who, in industrial undertakings, were entirely or principally engaged in commercial work, office work or other similar work. The Director went on to say that the Governing Body must nevertheless consider what further action was required in view of the opinion given by the Court, for several States which had ratified the Convention did not appear to be strictly carrying it out, since the laws giving effect to it did not apply to women occupying positions of supervision or management. There appeared to be two possible ways of remedying the situation: either the existing laws could be amended, if necessary, to adapt them to the interpretation of the Court, or the Convention could be revised so as to provide an exception for women occupying positions of management or supervision.

The question was taken up again by the Governing Body at its 64th Session (October, 1933). By twenty votes to two, it was decided to place on the Agenda for the 1934 Session of the Conference the question of the possible revision of the Convention, the scope of such revision being limited to the following points:

(1) insertion in the Convention of a clause specifying that the Convention does not apply to persons holding responsible positions of management and not ordinarily engaged in manual work (British Government proposal);

(2) insertion in the Convention of a provision to the effect that the competent authorities may, in view of exceptional circumstances affecting the workers of a particular industry or area and after consultation of the employers' and workers' organizations concerned, decide that for those workers the interval between 11 o'clock in the evening and 6 o'clock in the morning shall be substituted for the interval between 10 o'clock in the evening and 5 o'clock in the morning—during which all work is forbidden to women (Belgian Government proposal);

(3) possible amendment of the formal clauses of the Convention.

During its 18th Session, which was held in June 1934, the International Labour Conference, by one hundred and twenty votes to one, adopted the (revised) Convention concerning employment of women during the night. The new text modifies the Convention adopted in 1919 in respect of this point, and has regard, in particular, to the Court's advisory opinion.

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## 51. DELIMITATION OF THE TERRITORIAL WATERS BETWEEN THE ISLAND OF CASTELLORIZO AND THE COASTS OF ANATOLIA

### Order of 26 January 1933 (Series A/B, No. 51)

**Ninth Annual Report of the Permanent Court of International Justice (15 June 1932—15 June 1933), Series E, No. 9, pp. 136–137**

*Withdrawal of the suit—Termination of the proceedings*

By a Special Agreement signed at Ankara on May 30th, 1929, which came into force on August 3rd, 1931, the Turkish and Italian Governments agreed to request the Court to give its decision upon certain questions which had arisen in connection with the delimitation of the territorial waters between the island of Castellorizo and the coasts of Anatolia. The Special Agreement was notified to the Registry of the Court on November 18th, 1931. Together with the text of the Special Agreement, Turkey, which was not at that time a Member of the League of Nations, transmitted to the Registry a declaration made in conformity with Article 35, paragraph 2, of the Rules of Court.

The Court fixed time-limits for the presentation of Cases, Counter-Cases and Replies; subsequently, at the request of the two Parties, these time-limits were twice extended.

By a letter dated January 3rd, 1933—the day on which the time-limit ultimately fixed for the filing of Cases by each Party expired—the Turkish *Chargé d'affaires* at The Hague, by order of his Government, informed the Registrar, with reference to the provisions of Article 61 of the Rules of Court, that his Government, acting in agreement with the Royal Italian Government, was discontinuing the proceedings instituted on November 18th, 1931, and requested him to note this communication in order

that the suit might be removed from the Court's list. The same day the Registrar received a similar communication from the Italian Government.

According to these communications, the dispute which had arisen between Italy and Turkey regarding the ownership of the islands, islets and rocks adjacent to the island of Castellorizo had been settled by the signature of an agreement concluded at Ankara on January 4th, 1932. It was also stated in the said communications that this agreement had been ratified by the Italian Government and that the Turkish Government's ratification was expected in a few days time.

The two Parties being thus agreed in their intention to break off proceedings, the Court made an Order in which, after recording this fact and declaring that the proceedings begun in regard to the case concerning the delimitation of the territorial waters between the island of Castellorizo and the coasts of Anatolia were accordingly terminated, it decided that the case should be removed from its list.

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## 52. ADMINISTRATION OF THE PRINCE VON PLESS (PRELIMINARY OBJECTION)

### Order of 4 February 1933 (Series A/B, No. 52)

**Ninth Annual Report of the Permanent Court of International Justice (15 June 1932—15 June 1933), Series E, No. 9, pp. 138–140**

*(Joinder of the preliminary exception to the merits of the case and fixing of new time-limits.)*

On May 18th, 1932, the German Government brought before the Court a suit against the Polish Government founded on an alleged violation by the latter Government of certain obligations incumbent upon it under the Geneva Convention of May 15th, 1922, concerning Upper Silesia, in regard to the Administration of the Prince von Pless, a Polish national belonging to the German minority in Polish Upper Silesia.

*Application*

In its Application, the German Government indicated the subject of the dispute and asked for judgment to the following effect:

> "(1) that the attitude of the Polish Government and authorities towards the Pless Administration in the matter of income taxes for the fiscal years 1925–1930—especially as regards the application of the procedure by default, the accumulation of the amounts due over several fiscal years, the interpretation and application of the provisions concerning depreciation and the non-taxation of charges relating to the acquisition, maintenance and security of revenue, together with the revaluation of items in the balance sheets—is in conflict with Articles 67 and 68 of the Geneva Convention;
>
> (2) that acts of the fiscal authorities in conflict with the aforementioned provisions are, according to Article 65 of the Geneva Convention, null and void;
>
> (3) that the Polish Government is bound to indemnify the Prince von Pless for the damage resulting from the attitude referred to in (2) above, and that the applicant Government shall subsequently be given an opportunity of stating the figure claimed for this indemnity;

(4) that the Pless Administration enjoys full liberty to appoint its employees and workmen, regardless of race and language, without being exposed in this connection to any pressure whatever from the Polish Government and authorities".

*Statements and hearings*

By a document filed with the Registry on October 8th, 1932, the Polish Government raised, under Article 38 of the Rules, a preliminary objection to the German Government's Application, submitting that the Court should "declare the German Government's Application inadmissible".

By the date fixed by the Court, the German Government filed a statement setting out its observations and submissions in regard to the Polish Government's preliminary objection.

This statement besought the Court to overrule the objection. At public sittings held on November 7th, 9th, 10th and 11th, 1932, the Court heard the oral arguments upon the Polish objection presented on behalf of the two Parties.

*Composition of the Court*

For the examination of this case, the Court was composed as follows:

MM. Adatci, *President;* Guerrero, *Vice-President;* Baron Rolin-Jaequemyns, Count Rostworowski, MM. Fromageot, Anzilotti, Urrutia, Sir Cecil Hurst, MM. Schücking, Negulesco, Jhr. van Eysinga, M. Wang, *Judges*.

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*Order (analysis)*

The Court, on February 4th, 1933, made an Order upon the Polish preliminary objection. In this Order it first of all observes that the suit brought by the German Government is founded on Article 72, paragraph 3, of the Geneva Convention of May 15th, 1922, concerning Upper Silesia, according to which any difference of opinion between the Parties as to questions of law or of fact arising out of the preceding articles may be referred to the Court; but that Poland maintains that there is no difference of opinion between the two Parties. In order to determine whether such a difference does or does not exist, it is necessary to determine what is the subject of the dispute, and this, under Article 40 of the Statute, must be set out in the Application. In this connection the Court observes that whilst, on the one hand, in submission No. 1 of the Application the German Government enumerates certain acts which, it alleges, constitute a violation of the Geneva Convention on the part of the Polish Government, on the other hand, in submission No. 4, no specific act is indicated as constituting a violation of that Convention, and this raises the question whether submission No. 4 is intended to refer to the same acts as those envisaged in No. 1. In the Court's opinion, this point may be of considerable importance in determining the existence and scope of a difference of opinion between the Parties. The Polish Government maintains that the acts mentioned in submission No. 1 of the Application relate only to a dispute between the Polish Treasury and the Prince von Pless as a tax-payer; as regards the principle enunciated in submission No. 4, it says that it is in agreement with the German Government but denies that that principle has been violated or disregarded by Poland. The German Government on the other hand appears to regard the acts mentioned in submission No. 1 as means used by the Polish Government of bringing unlawful pressure to bear upon the Prince von Pless. This being so, the question whether there is a difference of opinion, within the meaning of Article 72, paragraph 3, of the Geneva Convention, appears to be inextricably bound up with the facts adduced by the Applicant and can only be decided

on the basis of a full knowledge of these facts, such as can only be obtained from the proceedings on the merits.

Next, the Court raises, *proprio motu*, a question regarding its jurisdiction, a question which concerns the merits and is connected with another, namely, whether on the basis of Article 72, paragraph 3, of the Geneva Convention a State, in its capacity as a Member of the Council, may claim that an indemnity be awarded to a national of the respondent State, a claim made by the German Government in submission No. 3 of its Application.

In the second place, the Polish Government maintains that the German Application is inadmissible so long as the Prince von Pless has not exhausted the means of redress open to him under Polish Law. And the Prince von Pless has appealed to the Supreme Polish Administrative Tribunal from several decisions given by the fiscal authorities and cited in the suit. The Court does not consider it necessary, in its Order, to pass upon the question of the applicability of the principle as to the exhaustion of interna1 means of redress, since, in any event, it will certainly be an advantage to the Court, as regards the points which have to be established in the case, to be acquainted with the final decisions of the Supreme Polish Administrative Tribunal upon the appeals brought by the Prince von Pless and pending before that Tribunal.

For these reasons, the Court joins the preliminary objection to the merits of the suit, in order to pass upon the objection and, if the latter is overruled, upon the merits, by means of a single judgment. At the same time, it arranges its procedure so as to ensure that it may be acquainted in sufficient time with the decisions of the Supreme Polish Administrative Tribunal. It reserves however to the German Government the right to plead that there has been an unjustifiable delay in the delivery of these decisions by the Supreme Polish Administrative Tribunal and will give its decision upon that point after hearing the arguments of both Parties.

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## 53. LEGAL STATUS OF EASTERN GREENLAND

### Judgment of 5 April 1933 (Series A/B, No. 53)

**Ninth Annual Report of the Permanent Court of International Justice (15 June 1932—15 June 1933), Series E, No. 9, pp. 141–151**

*Norwegian declaration of occupation of July 10th, 1931; its legality and validity—Danish title to sovereignty over Greenland resulting from a continuous and peaceful exercise of the authority of the State—Facts establishing the will and intention to act as sovereign and the display or effective exercise of such authority (before 1915; after 1921)—Influence on this title of the steps taken by Denmark between 1915 and 1921 to obtain from the Powers recognition of her sovereignty over all Greenland—Engagements on the part of Norway involving recognition of Danish sovereignty over Greenland, or an obligation not to dispute the sovereignty or not to occupy territory in Greenland: express renunciation; conclusion of international agreements implying recognition of Danish sovereignty: the "Ihlen declaration" (July 1919)—Meaning of the term "Greenland": colonized area or Greenland as a whole. Burden of proof—Treaty of Kiel of January 14th, 1814—Convention of Stockholm of September 1st, 1819—Convention of Copenhagen of July 9th, 1924, and notes signed the same day by the Parties to the Convention*

*History of the case*

On June 28th, 1931, some Norwegian hunters hoisted the flag of Norway in Mackenzie Bay in Eastern Greenland, and announced that they had occupied the territory lying between Carlsberg Fjord, to the South, and Bessel Fjord, to the North, in the name of the King of Norway.

In reply to an enquiry on the part of Denmark, who regarded the territory covered by this announcement as under her sovereignty, the Norwegian Government, on July 1st, stated that the occupation in question was "an entirely private act, which will not influence our policy". Nevertheless, on July 10th, 1931, it stated that it had felt obliged to proceed, in virtue of a Royal Resolution of the same date, to the occupation of the territories in Eastern Greenland situated between latitude 71° 30' and 75° 40' N. The territory covered by this Resolution was denominated by Norway "Eirik Raudes Land". The following day the Danish Government submitted the question to the Court.

*Application*

The Application instituting proceedings was filed with the Registry on July 12th, 1931. It was based on the optional clause of Article 36, paragraph 2, of the Court's Statute and pointed out that the territories covered by the Norwegian Government's proclamation of July 10th, 1931, announcing their occupation were, in the contention of the Danish Government, subject to the sovereignty of the Crown of Denmark. The Application, after thus indicating the subject of the dispute, formulated the claim by asking the Court for judgment to the effect that "the promulgation of the above-mentioned declaration of occupation and any steps taken in this respect by the Norwegian Government constitute a violation of the existing legal situation and are accordingly unlawful and invalid".

*Written proceedings and hearings*

The various documents of the written proceedings were duly filed within the time-limits originally fixed, or as extended, by the Court. In the Counter-Case, the Norwegian Government asked for judgment to the effect that Denmark had no sovereignty over Eirik Raudes Land and that Norway had acquired the sovereignty over that territory. In the course of public sittings held between November 21st, 1932, and February 7th, 1933, the Court heard the statements, replies, rejoinders and observations presented on behalf of the two Governments.

*Composition of the Court*

For the examination of this case, the Court was composed as follows:

MM. Adatci, *President*; Guerrero, *Vice-President*; Baron Rolin-Jaequemyns, Count Rostworowski, MM. Fromageot, Anzilotti, Urrutia, Sir Cecil Hurst, MM. Schücking, Negulesco, Jhr. van Eysinga, M. Wang, *Judges*.

MM. Vogt and Zahle, who were appointed as judges *ad hoc* by the Norwegian and Danish Governments respectively, also sat on the Court for the purposes of this case.

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*Judgment (analysis)*

The Court's judgment was delivered on April 5th, 1933.

The Court begins by giving a summary of the facts, of which the following is an extract:

*The facts*

Greenland, the climate and character of which are those of an Arctic country, was—according to the information supplied to the Court—discovered about the year 900 A. D. The country was colonized about a century later. The settlements founded at this period towards the southern end of the west coast appear to have existed as an independent State for some time, but became tributary to the Kingdom of Norway in the XIIIth century. Before 1500 they had disappeared.

In 1380, the kingdoms of Norway and Denmark were united under the same Crown; the constitutional character of this union, which lasted until 1814, changed to some extent in the course of time. Nevertheless, there is nothing to show that during this period Greenland, in so far as it constituted a dependency of the Crown, should not be regarded as a Norwegian possession.

The disappearance of the Nordic colonies did not put an end to the King's pretensions to the sovereignty over Greenland, and some foreign countries appear to have acquiesced in these pretensions in the XVIIth century.

Though at this time no colonies or settlements existed in Greenland, contact with it was not entirely lost, and, at the beginning of the XVIIIth century, closer relations were once more established between Greenland and the countries whence the former European settlements on its coasts had originated. Beginning in 1721, settlements were founded on the west coast by the pastor Hans Egede, of Bergen, in Norway. Concessions were granted to various individuals or companies comprising a prohibition applicable to all other persons of trading and navigation in Greenland contrary to their terms.

According to an Ordinance of April 22nd, 1758, this prohibition applied in respect of "colonies and factories already established or subsequently to be established", and likewise "other ports and localities in general without differentiation or exception".

In 1774, the State having itself once more taken over the Greenland trade, which it administered by means of an autonomous "Board", the King, on March 18th, 1776, issued an Ordinance, which is still in force, and which repeats the provisions of the previous instruments in very similar terms. The concessions previously granted to private persons were bestowed upon a privileged Trading Administration. Since then, the Greenland trade has been a monopoly of the State of Denmark. According to the Ordinance of March 18th, 1776, the "colonies and factories" then existing on the west coast extended from latitude 60° to 73° N.

On January 14th, 1814, the King of Denmark was compelled to sign the Peace Treaty of Kiel, the fourth article of which provided for the cession to the King of Sweden of the Kingdom of Norway, excluding however Greenland, the Faroe Islands and Iceland. At the end of 1814 the necessary steps were taken with a view to the complete liquidation of all matters arising out of the Union between Denmark and Norway. After protracted negotiations, this liquidation was effected by the Convention signed at Stockholm on September 1st, 1819, between Denmark of the one part and the United Kingdoms of Sweden and Norway of the other part.

In the course of the XIXth century and the early years of the XXth, the coasts of Greenland were entirely explored. In 1822, the Scottish whaler Scoresby made the first landing by a European in the territory in dispute. About 1900, the insular character of Greenland was established. The whole of the east coast was explored by Danish expeditions, and there were in addition many non-Danish expeditions.

In 1894, at Angmagssalik (lat. 65° 36' K.), the first Danish settlement on the east coast was established. As regards the limits of the colonized territory on the west coast of Greenland, which in 1814 were from latitude 60° to latitude 73° N., an extension took place in 1905 to latitude 74° 30' N. In 1925, another Danish trading and mission station was established on the east coast at Scoresby Sound, in about latitude 70° 30' N. In the last place, on May 10th, 1921, a Danish decree was issued to the effect

that trading, mission and hunting stations having been established by Denmark on the east and west coasts of Greenland, the whole of that country was henceforth linked up with the Danish colonies and stations, under the authority of the Danish Administration.

Ever since 1814 and up to the present time, the practice of the Danish Government, when concluding bilateral commercial conventions or when participating in multilateral conventions relating to economic questions, has been to secure the insertion of a stipulation excepting "Greenland" or the "territory of Greenland"—without further qualification—from the operation of the convention.

On August 4th, 1916, the United States, at the request of Denmark, signed a declaration to the effect that they would not object to the Danish Government extending their political and economic interests to the whole of Greenland.

On July 12th, 1919, the Danish Minister for Foreign Affairs instructed the Danish Minister at Christiania that a Committee had just been constituted at the Peace Conference "for the purpose of considering the claims that may be put forward by different countries to Spitzbergen", and that the Danish Government would be prepared to renew before this Committee the unofficial assurance already given to the Norwegian Government, according to which Denmark, having no special interests at stake in Spitzbergen, would raise no objection to Norway's claims upon that archipelago. In making this statement to the Norwegian Minister for Foreign Affairs, the Danish Minister was to point out "that the Danish Government had been anxious for some years past to obtain the recognition by all the interested Powers of Denmark's sovereignty over the whole of Greenland, and that it intended to place that question before the above-mentioned Committee", and, further, that the Danish Government felt confident that the extension of its political and economic interests to the whole of Greenland "would not encounter any difficulties on the part of the Norwegian Government".

The Danish Minister having accomplished his mission on July 14th, 1919, the Norwegian Minister for Foreign Affairs, M. Ihlen, replied to him, on July 22nd following, "that the Norwegian Government would not make any difficulties in the settlement of this question" (i.e. the question raised on July 14th by the Danish Government). This is the "Ihlen Declaration" which is considered below.

In 1920 and 1921, the Danish Government approached the Governments in London, Paris, Rome, Tokyo and Stockholm with a view to obtaining assurances from them on the subject of the recognition of Denmark's sovereignty over the whole of Greenland. Each of these Governments replied in terms which satisfied the Danish Government. On January 18th, 1921, the Danish Government addressed a communication to the same effect to the Norwegian Government. The latter however was not prepared to adopt the same attitude unless it received an undertaking from the Danish Government that the liberty of hunting and fishing on the east coast, which Norwegians had hitherto enjoyed, should not be interfered with. This undertaking the Danish Government was unwilling to give, and as soon as it became clear that the Norwegian Government was not prepared to give the desired assurances, the Danish Government stated, in May 1921, that it would rest content with the verbal undertaking given by M. Ihlen in 1919. The decree of May 10th, 1921, already mentioned above, was then issued.

Nevertheless, on the Danish side there was evinced willingness to make every effort to satisfy the desire of the Norwegian Government that Norwegians should be able to continue to fish and to hunt on the east coast of Greenland, but a determination not to give way on the claim to sovereignty. Negotiations—entered into at the instance of the Norwegian Government—followed between delegations specially appointed for the purpose. These negotiations, which were at first intended to cover the Greenland question generally, but which were subsequently confined to the questions of hunting and fishing, resulted in the signature, on July 9th, 1924, of a Convention on these questions applicable to the eastern coast of Greenland.

Simultaneously with the Convention, notes were signed by each Government to the effect that in signing the Convention it reserved its opinion on questions concerning Greenland not dealt with in the Convention. The chief points that these notes had in view were: the Danish contention that Denmark possessed full and entire sovereignty over the whole of Greenland and that Norway had recognized that sovereignty, and the Norwegian contention that all the parts of Greenland which had not been occupied in such a manner as to bring them effectively under the administration of the Danish Government, were in the condition of *terrae nullius* and that if they ceased to be *terrae nullius*, they must pass under Norwegian sovereignty.

In the summer of 1930, the Norwegian Government conferred police powers on certain Norwegian nationals "for the inspection of the Norwegian hunting stations in Eastern Greenland". This evoked protest on the part of Denmark, seeing that, in the Danish view, these territories were subject to Danish sovereignty.

The year 1930 also witnessed the inauguration by Denmark of a "three years' plan" for scientific research in the central part of Eastern Greenland. In 1931, the Danish Government stated that it thought it necessary, in connection with this expedition, to provide for police supervision, with powers extending to all persons in the territory in question in Eastern Greenland. The Norwegian Government urged that the Danish "three years' plan" should not be carried out in such a way as to conflict with the provisions of the Convention concerning Eastern Greenland or with the legitimate interests of the Norwegian hunters in that country. A prolonged diplomatic discussion ensued but led to no result. In these circumstances, the Danish Government preferred to seek a solution for the existing differences in conciliation or in judicial settlement by the Permanent Court of International Justice; but the negotiations conducted with a view to the drawing up of a special agreement proved fruitless.

Meanwhile, on June 28th, 1931, certain Norwegian hunters had carried out the unofficial occupation already mentioned which, on July 10th, was followed by the Norwegian Government's official proclamation of occupation. This led the Danish Government to file its unilateral Application submitting the question to the Court.

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*The law*

In its exposition of the law, the Court first of all observes that the Danish claim is founded on the contention that the area occupied was, at the time of the occupation, subject to Danish sovereignty, since that area is part of Greenland and at the time of the occupation Danish sovereignty existed over all Greenland. In support of this contention, the Danish Government advances two propositions. The first is that the sovereignty which Denmark now enjoys over Greenland has existed for a long time, has been continuously and peacefully exercised and, until the present dispute, has not been contested by any Power. The second proposition is that Norway has by treaty or otherwise herself recognized Danish sovereignty over Greenland as a whole and therefore cannot now dispute it. The Danish Government also relies on the Ihlen Declaration which, it maintains, debars Norway from proceeding to any occupation of territory in Greenland, and likewise on certain other undertakings entered into by Norway.

The Norwegian Government, on the other hand, submits that the area occupied was, at the time of the occupation, *terra nullius*; its contention being, indeed, that the area in question lay outside the limits of the Danish colonies in Greenland and that Danish sovereignty extended no further than the limits of those colonies. Norway also maintains that the attitude which Denmark adopted between 1915 and 1921, when she addressed herself to various Powers in order to obtain a recognition of her position in Greenland, was inconsistent with a claim to be already in possession of the sovereignty

over all Greenland, and that in the circumstances she is now estopped from alleging a long-established sovereignty over the whole country.

Proceeding to consider the first Danish argument, the Court observes that Denmark's claim is not founded upon any particular act of occupation, but alleges a title founded on the peaceful and continuous display of State authority. The Court goes on to say that such a claim to sovereignty based upon continued display of authority involves two elements, each of which must be shown to exist: the intention and will to act as sovereign, and some actual exercise or display of such authority. Having laid down this principle, the Court undertakes a detailed analysis of the historical data respecting Greenland from the earliest times, and particularly of the legislative instruments of the XVIIIth century. In this connection it observes that legislation is one of the most obvious forms of the exercise of sovereign power.

Norway argues that in the legislative and administrative acts of this period, the word "Greenland" was not used in the geographical sense but meant only the colonies or the colonized area on the west coast. In the view of the Court, that is a point as to which the burden of proof lies on Norway; but that country, it holds, has not succeeded in establishing her contention: in the eyes of the Court, it is clear that the operation of these legislative measures was not confined to the colonies. The conclusion to which the Court is led is that, bearing in mind the absence of any claim to sovereignty by another Power, and the arctic and inaccessible character of the uncolonized parts of the country, the King of Denmark and Norway, during the period from the founding of the colonies by Hans Egede in 1721 up to 1814, displayed his authority to an extent sufficient to give his country a valid claim to sovereignty and that his rights over Greenland were not limited to the colonized area.

With regard to the period following the Treaty of Kiel—the result of which was that what had been a Norwegian possession remained with the King of Denmark and became for the future a Danish possession—Denmark relies *inter alia* on the long series of conventions—mostly commercial in character—which have been concluded by her and in which, with the concurrence of the other contracting Party, a stipulation has been inserted to the effect that the convention shall not apply to Greenland. Norway has argued that in these conventions also the word "Greenland" only means the colonized area; but the Court holds that she has not succeeded in proving this contention and that, to the extent that these treaties constitute evidence of recognition of her sovereignty over Greenland in general, Denmark is entitled to rely upon them. These treaties may also be regarded as demonstrating sufficiently Denmark's will and intention to exercise sovereignty over Greenland.

With regard to the exercise of sovereignty over the uncolonized area, the Court examines certain concessions granted by Denmark in respect of this region. It arrives at the conclusion that Denmark must be regarded as having displayed during the period 1814–1915 her authority over the uncolonized part of the country to a degree sufficient to confer a valid title to the sovereignty.

The Court next considers the applications which the Danish Government addressed to foreign governments between 1915 and 1921, seeking the recognition of Denmark's position in Greenland. The point at issue between the Parties is whether Denmark was seeking a recognition of an existing sovereignty extending over all Greenland, as urged by her Counsel, or, as maintained by Counsel for Norway, whether she was trying to persuade the Powers to agree to an extension of her sovereignty to territory which did not as yet belong to her. The terms used in the correspondence between the Danish Government and the foreign governments concerned relating to these applications are not always clear. Nevertheless, the Court holds that in judging the effect of these notes too much importance must not be attached to particular expressions here and there; the correspondence must be judged as a whole. Considered thus, it can be reconciled with the view upheld by the Danish Government in the present case, namely, that what that Government was seeking in these applications was recognition of existing sovereignty and not consent to the acquisition of new sovereignty. In this connection, the Court notes

in particular that as soon as one of the Powers to whom application had been made indicated a desire to obtain some return for the grant of what had been asked, the Danish Government replied with a note setting out the legal basis of its claim to sovereignty in Greenland on lines similar to those which it has followed in the present case. If that was the view which the Danish Government held before, during and at the close of these applications to the Powers, its action in approaching them in the way it did must certainly have been intended to ensure that those Powers should accept the point of view maintained by the Danish Government, namely, that sovereignty already existed over all Greenland; and not to persuade them to agree that a part of Greenland not previously under Danish sovereignty should now be brought thereunder. Their object was to ensure that those Powers would not themselves attempt to take possession of any non-colonized part of Greenland, and the method of achieving this object was to get the Powers to recognize an existing state of fact.

In these circumstances, there can, in the Court's opinion, be no ground for holding that, by the attitude which the Danish Government adopted, it admitted that it possessed no sovereignty over the uncolonized part of Greenland, nor for holding that it is estopped from claiming that Denmark possesses an old established sovereignty over all Greenland.

Turning next to the period 1921–1931, the Court observes that subsequent to the date when the Danish Government issued the Decree of May 10th, 1921, referred to above, there was a considerable increase in that Government's activity on the eastern coast of Greenland. The Court holds that the legislative and administrative measures taken by Denmark at this time show that she was exercising governmental functions in connection with the territory in dispute. They show to a sufficient extent the two elements necessary to establish a valid title to sovereignty, namely: the intention and will to exercise such sovereignty and the manifestation of State activity. Earlier in the judgment the Court had already remarked that, as the critical date was July 10th, 1931, it was not necessary that Danish sovereignty over Greenland should have existed throughout the period during which the Danish Government maintained that it had possessed it: it was sufficient to establish the existence of a valid title in the period immediately preceding the occupation.

It follows from the above that the Court is satisfied that Denmark has succeeded in establishing her contention that at the critical date, namely July 10th, 1931, she possessed a valid title to the sovereignty over all Greenland.

In considering the second Danish proposition that Norway had given certain undertakings which recognized Danish sovereignty over all Greenland, the Court arrives at the conclusion that in three cases undertakings were given.

In the first place, the Court holds that, at the time of the termination of the Union between Denmark and Norway (1814–1819), Norway undertook not to dispute Danish sovereignty over Greenland. In the course of the negotiations following upon the dissolution of the Union between Denmark and Norway, the restitution of Greenland to Norway was claimed, but the claim was withdrawn and the King of Sweden and Norway renounced in the name of the latter country all claims in respect of the Faroe Islands, Iceland and Greenland. Furthermore, in the view of the Court, Article 9 of the Convention of September 1st, 1819, finally disposed not only of the financial questions dealt with in Article 6 of the Treaty of Kiel, but of all questions mentioned in the Treaty, and therefore also of the territorial questions in Article 4, which leaves Greenland to Denmark. Since, in the view of the Court, "Greenland" in Article 4 of the Treaty of Kiel means the whole of Greenland, the Court holds that in consequence of the various undertakings resulting from the separation of Norway and Denmark and culminating in Article 9 of the Convention of September 1st, 1819, Norway has recognized Danish sovereignty over all Greenland.

In the Court's opinion, a second series of undertakings by Norway, recognizing Danish sovereignty over Greenland, is afforded by various bilateral agreements concluded by Norway with Denmark, and by various multilateral agreements to which both Denmark and Norway were contracting Parties. In these agreements, concluded since 1826, Greenland is described as a Danish colony or as forming part of Denmark, or Denmark is allowed to exclude Greenland from the operation of the agreement. In accepting these bilateral and multilateral agreements as binding upon herself, Norway reaffirmed that she recognized the whole of Greenland as Danish.

Thirdly and lastly, the Court considers the Ihlen Declaration. In this connection, it does not accept the Danish view that this amounted to a recognition of an existing Danish sovereignty in Greenland. But it holds that the declaration, even if not constituting a definitive recognition of Danish sovereignty, is an engagement obliging Norway to refrain from occupying any part of Greenland.

The Court considers it beyond all dispute that a reply, given by the Minister for Foreign Affairs of a particular country on behalf of his Government, in response to a request by the diplomatic representative of a foreign Power, in regard to a question falling within his province, is binding upon that country. On the other hand, the Court does not admit the Norwegian objection that the Minister's declaration, though unconditional and definitive in form, cannot be relied upon against Norway because, if the Norwegian Minister had been warned of the Danish Government's intention to extend the régime of exclusion to the whole of Greenland, his answer would—it is argued—have been different. The Court finds it difficult to believe that Norway could not have foreseen the extension of the monopoly. Accordingly, the Court does not agree that the Decree of May 10th, 1921, introducing the régime of exclusion for all Greenland, justified Norway in changing her attitude. In regard to this particular point, it recalls that as early as December 1921, Denmark announced her willingness to do everything in her power to make arrangements to safeguard Norwegian subjects against any loss they might incur as a result of the issue of the Decree, and that the Convention of July 9th, 1924, was a confirmation of Denmark's friendly disposition in respect of these Norwegian hunting and fishing interests. Lastly, the Court is unable to read into the words of the Ihlen declaration "in the settlement of this question" a condition which would render the promise to refrain from making any difficulties inoperative should a settlement not be reached. The promise was unconditional and definitive.

It follows that, as a result of the undertaking involved in the Ihlen Declaration of July 22nd, 1919, Norway is under an obligation to refrain from contesting Danish sovereignty over Greenland as a whole, and a fortiori to refrain from occupying a part of Greenland.

Denmark also maintains that the Convention of July 9th, 1924, excluded any right on the part of Norway to occupy a part of Greenland. But the question of the sovereignty and that of the terra nullius—to mention that point alone—were left entirely outside the Convention, as is made clear by the notes exchanged on July 9th, 1924, and the Court accordingly finds that neither Denmark nor Norway can derive support from the Convention for their respective fundamental standpoints.

Finally, Denmark maintains that, under certain provisions of the Covenant of the League of Nations, of the General Act of Conciliation, Judicial Settlement and Arbitration of 1928, and of the conventions between Denmark and Norway for the pacific settlement of disputes, Norway was likewise bound to abstain from occupying any part of Greenland; she also maintains that the same result ensued from two agreements said to have been arrived at by the two Parties at the beginning of July 1931, in the course of the exchange of views which preceded the occupation of July 10th.

In view of the conclusion reached by the Court, there is no need for these questions to be considered.

Each Party prayed the Court to order the other Party to pay the costs in this case. The Court, however, holds that there is no need to deviate from the general rule laid down in Article 64 of the Statute, namely, that each Party will bear its own costs.

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*Dissenting opinions*

The judgment of the Court was adopted by twelve votes to two.

MM. Anzilotti and Vogt appended to the judgment statements of their dissenting opinions. MM. Schücking and Wang, though concurring in the judgment, appended thereto some brief observations.

*Dissenting opinion of M. Anzilotti*

In the first place, M. Anzilotti dissents with regard to the manner in which the question referred to the Court has been approached. He states that the first thing to be done was to decide whether the request addressed by the Danish Government to the Norwegian Government in July 1919, and of a declaration on the part of the latter Government accepted by the Danish Government, constituted a valid agreement between the two Governments; if so, the rule to be applied for the solution of the dispute should first and foremost have been sought in this agreement.

M. Anzilotti observes that it is scarcely possible rightly to appreciate the request with which the Court is concerned unless the Court considers it in conjunction with the whole series of overtures of which it formed part. The dissenting opinion sets out the text and circumstances surrounding these overtures by Denmark to other States concerning the issue at hand. He points out that the notes to the Governments of the United States of America, Italy, France, Japan and Sweden all reproduce the same essential ideas, that is to say that, ever since the beginning of the XVIIIth century, Denmark has been founding colonies in Greenland, but that formal possession has not been taken of the whole of Greenland in the name of the Crown of Denmark; that it is desirable that Denmark should be enabled to extend her sovereignty and, thereby, her care to the whole of Greenland; finally, that the recognition of Danish sovereignty might take the form of a declaration similar to that made by the United States of America, the terms of which are given in each case. However, he notes that on two occasions the Danish Government deviated from this standpoint and contended that the recognition sought was in respect of a situation already existing and long since established: these were notes to the British and Norwegian Governments.

This examination leads M. Anzilotti to conclude that, at that moment, the Danish Government was perfectly aware of the possibility of adopting either attitude: *viz*. that of affirming an already existing sovereignty, and requesting its recognition, or that of urging reasons in support of an extension of its sovereignty, and requesting the recognition of this extension. It elected to adopt the latter attitude and only resorted to the former in the course of a discussion and to avoid conditions or limitations which it felt unable to accept.

He finds that the majority of replies from the interested States show that what they agreed to recognize was the extension of Danish sovereignty over the whole of Greenland. He therefore expresses the opinion that, if one reads the documents as they stand, giving the words the sense which they naturally bear in the context, one is inevitably led to the conclusion that the Danish Government was making a distinction between the colonized districts of Greenland and the other parts of the country, and that what it was requesting from the States whom it approached was, not the recognition of an already existing sovereignty, but the recognition of the right to extend its sovereignty to the whole of Greenland.

M. Anzilotti then examines whether this conclusion is inexplicable or inconsistent, having regard to the position of Denmark in Greenland at the moment when the overtures were made. In this regard, he points out two facts meriting particular attention. First, the existence of an ancient claim to sover-

eignty over the country known as Greenland, a claim unconnected either with the extent of the colonization of the country, or even with a more or less accurate geographical demarcation thereof. Second, the disproportion between the claim to sovereignty over all Greenland and the effective exercise of that sovereignty. He admits that, with these elements as a backdrop, Danish-Norwegian or Danish sovereignty was manifested in a manner satisfying to requirements of international law, in the sense that sovereignty over all Greenland was neither compromised nor lost. It is however obvious that this position is only tenable if one postulates the existence of a title to sovereignty antecedent to the so-called second colonization and if the validity of that title is established. M. Anzilotti notes however that the situation evolved in an entirely contrary direction. Historic claims to dominion over whole regions—claims which had, formerly, played an important part in the allocation of territorial sovereignty—ost weight and were gradually abandoned even by the States which had relied upon them. International law established an ever closer connection between the existence of sovereignty and the effective exercise thereof, and States successfully disputed any claim not accompanied by such exercise.

M. Anzilotti concludes that either the so-called second colonization is the manifestation of a pre-existing sovereignty and the title to this sovereignty must be established and shown to be valid; or else Greenland, in 1721, was a *terra nullius* and there is an occupation which must be appraised in accordance with the rules governing occupation.

M. Anzilotti notes that the fact that the Danish Government had doubts as to the soundness of its claim to sovereignty over certain parts of Greenland is proved by the very overtures which it made. Accordingly, when, in 1915, the Danish Government considered that the time had come to settle the question, it definitely took up the attitude suggested to it by the present state of international law. Historical claims were abandoned. A definite distinction is made between the parts of Greenland of which effective possession has been taken—in regard to which no question arises—and the other parts of which possession has not been formally taken but over which it would nevertheless be just and desirable that Denmark should be enabled to extend her sovereignty. And it was in order to obtain recognition of this extension that the Danish Government approached the governments of the States which it regarded as especially interested.

M. Anzilotti examines thereafter the principal documents relating to the Danish Government's request to the Norwegian Government, and to the latter's reply. He states that one cannot go so far as to say that there was a regular reciprocal *do ut des* contract, in which the declaration that Denmark was prepared to make and which it actually made before the Committee of the Peace Conference on the issue of the Spitzbergen question was to constitute the counter-part of the undertaking which it was asking Norway to give.

M. Anzilotti states that it would be going beyond the intention of the Parties—or, at any rate, of one of them—if the agreement resulting from the Ihlen declaration were to be regarded as a complete and final settlement of the Greenland question between Denmark and Norway. In this respect, the Norwegian declaration differs unmistakably from those which the Danish Government obtained from other Powers, and which are complete in themselves. He adds that the point on which the Danish Government's request and the Norwegian Government's reply are in accord is that the latter Government shall not make any difficulties in a settlement of the question which would enable the Danish Government to extend its political and economic interests, that is to say, its sovereignty, to the whole of Greenland.

M. Anzilotti turns to the question of the validity of the agreement concluded between the Danish Minister at Christiania, on behalf of the Danish Government, and the Norwegian Minister for Foreign Affairs, on behalf of the Norwegian Government, by means of purely verbal declarations, having regard, in the first place, to its verbal form, and to the competence of the Minister for Foreign Affairs.

On the first point, M. Anzilotti holds that there does not seem to be any rule of international law requiring that agreements of this kind must necessarily be in writing, in order to be valid. On the second point, he notes that no arbitral or judicial decision relating to the international competence of a Minister for Foreign Affairs has been brought to the knowledge of the Court; nor has this question been exhaustively treated by legal authorities. M. Anzilotti states that it must be recognized that the constant and general practice of States has been to invest the Minister for Foreign Affairs—the direct agent of the chief of the State—with authority to make statements on current affairs to foreign diplomatic representatives, and in particular to inform them as to the attitude which the government, in whose name he speaks, will adopt in a given question. Declarations of this kind are binding upon the State. As regards the question whether Norwegian constitutional law authorized the Minister for Foreign Affairs to make the declaration, M. Anzilotti states that this is a point which does not concern the Danish Government: it was M. Ihlen's duty to refrain from giving his reply until he had obtained any assent that might be requisite under the Norwegian laws.

M. Anzilotti then considers the question of whether the declaration of the Norwegian Minister for Foreign Affairs was vitiated, owing to a mistake on a material point, i.e. because it was made in ignorance of the fact that the extension of Danish sovereignty would involve a corresponding extension of the monopoly and of the régime of exclusion. M. Anzilotti finds that there was no mistake at all. But even accepting, for a moment, the supposition that M. Ihlen was mistaken as to the results which might ensue from an extension of Danish sovereignty, he declares that it must be admitted that this mistake was not such as to entail the nullity of the agreement. If a mistake is pleaded it must be of an excusable character; and one can scarcely believe that a government could be ignorant of the legitimate consequences following upon an extension of sovereignty.

Finally, M. Anzilotti dismisses the concerns, given all the circumstances set out in the judgment of the Court, relating to whether the breaking off of the negotiations by the Danish Government in 1921 entitled the Norwegian Government to consider itself released from its undertaking. He therefore finds that the agreement, which was validly concluded in 1919, has retained its force.

M. Anzilotti concludes that as the Norwegian occupation was effected in violation of an undertaking validly assumed, it constitutes a violation of the existing legal situation, and it is therefore unlawful: within those limits the Court should, therefore, have acceded to the Danish Government's submission. However, he additionally posits that the Court could not have declared the occupation invalid, if the term "invalid" signifies "null and void". A legal act is only non-existent if it lacks certain elements which are essential to its existence. Such would be the occupation of territory belonging to another State, because the status of a *terra nullius* is an essential factor to enable the occupation to serve as a means of acquiring territorial sovereignty. But this does not hold good in the case of the occupation of a *terra nullius* by a sovereign State in conformity with international law, merely because the occupying State had undertaken not to occupy it. Accordingly, it would have been for the Norwegian Government to revoke the occupation unlawfully carried out, without prejudice to the Danish Government's right to apply to the Court, as reparation for the unlawful act, to place this obligation on record.

*Observations by MM. Schücking and Wang*

MM. Schücking and Wang fully concur in the Court's conclusions that the Norwegian occupation is unlawful and invalid, but nevertheless find it necessary to make some reservations regarding some of the reasons which are given in support of them.

They state that, even if all the circumstances, taken together, conferred a presumptive title upon Denmark, the history of the diplomatic overtures undertaken by Denmark between 1915 and 1921 in order to obtain recognition of her sovereignty over the whole of Greenland, proves that, at that

time, Denmark herself did not maintain towards the other interested Powers the theory of an already existing Danish sovereignty over the whole country. They therefore feel compelled to place a different construction upon the Danish overtures to the Powers, namely, that Denmark was desirous of extending her sovereignty to the whole of Greenland, with the assent of the States chiefly interested.

*Dissenting opinion by M. Vogt*

After having recalled some historical facts concerning Greenland, M. Vogt starts his consideration with the legal consequences of the overtures made by the Danish Government to various Powers between 1915 and 1921. In his view, all these expressions convey the same idea, namely, that Denmark had not hitherto possessed sovereignty over all Greenland. The parts of Greenland which have not been brought under the Danish Greenland Administration and of which possession has not been effectively or even formally taken, cannot be regarded as under Danish sovereignty.

M. Vogt notes that, on various occasions, in the XIXth century, the Danish Government had expressed its conviction, in Denmark, that the sovereignty over the whole of Greenland belonged to Denmark. On the other hand, during the same century, there had been no small number of official acts and declarations which revealed an opposite conviction. He states that such contradictions cannot be regarded as evidence of a definite attitude, or of a firm conviction.

M. Vogt then addresses the question whether Denmark acquired sovereignty over the territory in dispute, subsequently to 1921. M. Vogt observes that Denmark had the *animas possidendi* during that period; but after examining relevant factors, he finds that Denmark has not proved the *corpus possessionis* in respect of the territory in question, nor has she proved an "inchoate title".

In order to determine the extent of Danish sovereignty over Greenland, M. Vogt analyses the origin of Danish sovereignty over this territory and finds that the sovereignty which Denmark now possesses in Greenland is based upon the Norwegian colonization at the beginning of the XVIIIth century. He states that, according to the custom then prevalent in matters of colonization, the sovereignty was in reality restricted, after the second colonization, to certain areas surrounding the factories or stations successively established. M. Vogt states that the system which it was sought to apply in Greenland consisted, from 1721 onwards, in successively extending the colonized territory, with a consequent extension of the territory under governmental administration, thus again, in turn, extending the sovereignty of Denmark. M. Vogt further states that if Denmark believed that she possessed a sovereignty, valid in international law, over the whole of Greenland, she ought to have prohibited trading with Greenland to all other nations; she ought to have taken steps to combat the foreign trade which she said was prohibited. But the history of the colonization shows that Denmark did not believe herself entitled to proceed in this way.

The dissenting opinion sets out the history of Danish actions in Greenland; M. Vogt posits that the system of gradual extension of sovereignty by means of the extension of colonization and administration was consistently followed, and, in 1921, it again found expression in the Decree of May 10th. He concludes that the Greenland which up to 1814 was a possession of Norway, and which in 1814 became a Danish possession was not the whole of Greenland in the geographical sense of the present day. It could only be, and it was only, the Greenland over which the Monarch of the two united kingdoms had exercised—and over which he consequently possessed—effective sovereignty, in other words, the colonized districts subject to the administration of the Sovereign.

M. Vogt states that the numerous treaties in which the Danish government inserted an exception in regard to Greenland cannot be adduced as evidence that the respective contracting States recognized Danish sovereignty over the whole of Greenland, given that one could not therefore account for the fact

that the Danish Government itself, in the years 1915–1921, approached a certain number of these very same States with an express request for their recognition.

The dissenting opinion addresses the conversations which took place on July 14th and 22nd, 1919, between M. Krag, the Danish Minister at Oslo, and M. Ihlen, the Norwegian Minister for Foreign Affairs. M. Vogt details differences between these conversations and the overtures made by Denmark to various other powers. On the Sptizbergen question, M. Vogt states that it has not been proved that the Krag-Ihlen conversations linked together the Greenland and Spitzbergen questions in a manner possessing any real legal significance. M. Vogt observes that it appears from the information supplied during the proceedings that the conversation of July 14th, 1919, was the first notice that the Norwegian Government had of Denmark's aspirations. Thus, M. Ihlen was unprepared for the question; he mentioned the matter verbally and unofficially to his colleagues, but no decision was taken by the Government. M. Vogt continues that, while it might be said that M. Ihlen was guilty of negligence on this occasion, this criticism applies more strongly to the Danish Government in the same connection. The outcome of the Danish demarche was a verbal answer given by the Norwegian Minister for Foreign Affairs, without any discussion between the two Governments upon the substance of the question and without the question having been examined in Norway. The responsibility for this fatal omission rests first and foremost upon Denmark.

M. Vogt points out that M. Ihlen, when making his declaration of July 22nd, was speaking on behalf of the Norwegian Government and promised that Norway would raise no difficulty in the future settlement of this matter. Such a promise made by the Minister for Foreign Affairs is, in principle, valid and binding. But in the present case there are special circumstances. M. Ihlen, when making his declaration, was labouring under a fundamental and excusable misapprehension. M. Vogt states that a promise given under such conditions has not the same value as a promise which is not tainted by an error or defect.

M. Vogt declares that M. Ihlen's declaration clearly related to a future settlement of the matter between the two Governments. Norway was honouring M. Ihlen's promise when Denmark suddenly broke off the negotiations for a mutual settlement.

According to M. Vogt, the Danish Government, in its overtures to foreign Powers, had linked the question of sovereignty and that of the monopoly so closely together that it is impossible to treat them as separate in this connection. The Danish Government had spoken of an extension of sovereignty, while—according to its own statement—it had in mind, from beginning to end, the extension of the monopoly system. He finds that M. Ihlen gave his reply without realizing this inseparable inter-connection, and indeed without being able to suspect its existence. However, when this connection became clear to M. Ræstad, the latter stated that Norway could not accept such a request for recognition by Denmark. M. Ræstad's letter of July 20th, 1921, contains, for that reason, a refusal to recognize this sovereignty over the whole of Greenland, the recognition of which Denmark had endeavoured by her overtures to obtain.

On account of these factors, M. Vogt states that it would be contrary to all justice that, after the rupture of the negotiations by Denmark in 1921, Norway should still be regarded as bound by M. Ihlen's promise, and obliged to refrain from making difficulties in a future settlement between the two countries. He concludes that the Krag-Ihlen arrangement had lost its binding force in 1921.

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## 54. ADMINISTRATION OF THE PRINCE VON PLESS

### Order of 11 May 1933 (Series A/B, No. 54)

**Ninth Annual Report of the Permanent Court of International Justice (15 June 1932—15 June 1933), Series E, No. 9, pp. 152–154**

*Application for the indication of interim measures of protection—Note taken of the declarations of the Parties concerning this Application—The application ceases to have any object*

In the Prince von Pless case, which has been pending before the Court since May 18th, 1932, the German Government's Agent, in a document dated May 2nd, 1933, requested the Court "to indicate to the Polish Government, as an interim measure of protection, pending the delivery of judgment upon the Application of May 18th, 1932, that it should abstain from any measure of constraint in respect of the property of the Prince von Pless, on account of income-tax". In support of this Application, the German Agent alleged:

> "that the Taxation Office at Pszczyna, on April 20th, 1933, served on the Prince von Pless two summonses for the payment within fifteen days of the sum of . . . 5,246,539.89 zlotys . . . on account of income-tax for the fiscal years 1927, 1928 and 1929, and a sum of . . . 1,851,489.84 zlotys . . . on account of income-tax for the fiscal year 1930;
>
> that these summonses to pay are accompanied by a threat that in the event of the whole sum not being paid within the above-mentioned time, measures of constraint will be applied;
>
> that the Taxation Office at Pszczyna on April 20th, 1933, decreed the attachment of the claim of the Prince von Pless against the administration of the State Railways in respect of deliveries of coal up to an amount of 1,841,759.84 zlotys;
>
> that the carrying into effect of the above-mentioned measures of constraint would irremediably prejudice the rights and interests forming the subject of the dispute".

This document was received in the Registry on May 3rd, and the President immediately convened an extraordinary session of the Court for May 10th, 1933, pursuant to Article 57 of the Rules[1].

On May 8th, 1933, the Polish Government sent the Court a declaration to the effect that the summonses for payment (warrant for execution) in respect of the payment of the income-tax of the Prince von Pless for the years 1927–1930 had been sent to the Prince by oversight, the newly-appointed head of the department dealing with measures of constraint (of the Taxation Office) having been unacquainted with the documents relating to the matter; that, the higher authorities having learnt that measures of constraint had been taken in respect of the Prince von Pless, the Government of the Republic of Poland had annulled the warrant above mentioned; that the said Government maintained its declaration to the effect that it would suspend measures of constraint in respect of the income-tax of the Prince von Pless for the years 1925–1930, and would not collect these taxes, until the Court has finally decided the dispute now pending before it. On being notified of this declaration, the German Government's Agent informed the Court that the German Government was in agreement with the course adopted by the Polish Government for the settlement of this question, that it notified the Court of this agreement and that it requested the Court, applying by analogy Article 61, paragraph 1, of the Rules, to take note of the agreement reached.

[1] At the same time, the President, on May 5th, 1933, sent a telegram to the Polish Minister for Foreign Affairs, suggesting to him the desirability of considering the possibility of suspending any contemplated measures of constraint directed against the Prince von Pless pending the meeting of the Court and its decision.

In its Order of May 11th, 1933, the Court observes that, in consequence of the annulment, on the ground that an administrative error had occurred, of the measures of constraint (warrant for execution of April 20th, 1933) taken against the Prince von Pless in respect of his income-tax for the years 1927 to 1930, the grounds for the German Government's Application for the indication of interim measures of protection have ceased to exist. It also observes that, in so far as concerns the income-tax of the Prince von Pless for the years 1925–1930, there is no difference between that which the German Government seeks to obtain according to the submission set forth in the document of May 2nd, 1933, and the intentions of the Polish Government as expressed in the declaration of that Government's Agent, dated May 8th, 1933; finally, it observes that it likewise appears from this declaration and from the declaration of the same date made by the Agent of the German Government that the Parties are agreed in regard to the settlement of the question forming the subject of the latter Government's Application of May 2nd, 1933.

In these circumstances, the Court notes the fact that the Polish Government has annulled the measures of constraint taken against the Prince von Pless and takes note of that Government's declaration that it will suspend any measures of constraint against the Prince von Pless in respect of his income-tax for the years 1925 to 1930 and the collection of the taxes due by him for these years, until the Court has finally decided the dispute. It also notes the German Government's declaration to the effect that it is in agreement in regard to the settlement of the question. Accordingly, it declares that the request for the indication of interim measures of protection has ceased to have any object.

In the recitals of the Order, the Court states that, since the Application for the indication of interim measures has ceased to have any object, it is unnecessary for it to consider whether it would have been competent to adjudicate upon it and whether that Application was admissible; furthermore, that the Order must in no way prejudge either the question of the Court's jurisdiction to adjudicate upon the Application submitting the case of the Prince von Pless, or that of the admissibility of that Application.

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## 55. LEGAL STATUS OF THE SOUTH-EASTERN TERRITORY OF GREENLAND (TERMINATION OF PROCEEDINGS)

### Order of 11 May 1933 (Series A/B, No. 55)

**Ninth Annual Report of the Permanent Court of International Justice (15 June 1932—15 June 1933), Series E, No. 9, p. 155**

*Withdrawal of the suit—Termination of the proceedings*

On July 18th, 1932, the Norwegian Government filed an Application instituting proceedings against the Danish Government in regard to the legal status of certain parts of the south-eastern territory of Greenland. This Application indicated the subject of the dispute as follows: "By a Royal Decree of July 12th, 1932, the Royal Norwegian Government has placed the south-eastern territory of Greenland situated between latitudes 63° 40' and 60° 30' North under the sovereignty of Norway." On the same day, the Danish Government, for its part, filed an Application respecting the legal status of the same territory and indicating as the subject of the dispute the fact that the Norwegian Government had declared that it had proceeded to occupy the territory above mentioned, which, in the contention of the Danish Government, was subject to the sovereignty of the Crown of Denmark. By an Order of August 2nd, 1932, the Court joined the two suits.

In a letter of April 18th, 1933, the Norwegian Government's Agent informed the Court that, by a Royal Decree of April 7th, 1933, his Government had revoked the Royal Proclamation of July 12th, 1932, and that, in these circumstances, it withdrew the Application of July 18th, 1932, instituting proceedings in regard to the legal status of the territories in question. The same day, the Danish Government's Agent, for his part, informed the Court that, the Norwegian Government having notified the Danish Government of the withdrawal of its declaration of occupation, the Danish Government, pursuant to Article 61 of the Rules of Court, withdrew its Application of July 18th, 1932.

In these circumstances, the Court, by an Order of May 11th, 1933, noting these declarations of withdrawal, declared the proceedings in this case closed and decided that it should be removed from the list.

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## 56. APPEALS FROM CERTAIN JUDGMENTS OF THE HUNGARO-CZECHOSLOVAK MIXED ARBITRAL TRIBUNAL

### Order of 12 May 1933 (Series A/B, No. 56)

**Ninth Annual Report of the Permanent Court of International Justice (15 June 1932—15 June 1933), Series E, No. 9, pp. 156–157**

*Withdrawal of the suit—Termination of the proceedings*

On July 11th, 1932, the Czechoslovak Government filed an Application, dated July 7th, "appealing from the judgments of December 21st, 1931, of the Hungaro-Czechoslovak Mixed Arbitral Tribunal concerning questions of jurisdiction in the case of Alexander Semsey and others *v.* the State of Czechoslovakia (No. 321) and in the case of Wilhelm Fodor *v.* the State of Czechoslovakia (No. 752)". On July 25th, 1932, the same Government filed an Application, dated July 20th, "appealing from the judgment of April 13th, 1932, of the Hungaro-Czechoslovak Mixed Arbitral Tribunal upon merits in the case of the *Ungarische Hanf- und Flachsindustrie v.* (1) the State of Czechoslovakia, and (2) the Flax Spinners' Association (No. 127)".

By the date fixed for the presentation of Counter-Cases in the two suits, the Hungarian Government lodged preliminary objections in respect of each of the two Applications filed by the Czechoslovak Government. The Court, by an Order dated October 26th, 1932[1], joined these objections and fixed a time-limit for the submission of a written statement by the Czechoslovak Government. The suits, therefore, were, in so far as concerned the preliminary objections, ready for hearing as from January 16th, 1933; the opening of the oral proceedings was fixed for May 9th, 1933.

In a letter dated April 8th, 1933, however, the Czechoslovak Government's Agent informed the Court that his Government withdrew the "appeals" in question. On being informed of the contents of this letter, the Hungarian Government's Agent, in a letter of April 18th, 1933, declared that the Hungarian Government "notes with satisfaction the notification of the withdrawal of the suits and also the fact

[1] On the same day, the Registrar, pursuant to the instructions of the Court, sent letters to the Agents of both Parties informing them that the Court desired that they should, before any argument, submit their respective views as to the scope of Article X of Agreement No. 11 of Paris (of April 28th, 1930) in relation to the statutory provisions governing the jurisdiction and working of the Court. Written observations on this question were filed by the Parties within a time-limit fixed, and subsequently extended, by the Court. In letters of March 30th, 1933, informing the Agents of the date for the beginning of the oral proceedings, the Registrar, on the instructions of the Court, announced that the Parties' oral observations should cover both the objections lodged by Hungary and the question referred to in the two letters of October 26th, 1932.

that, accordingly, these proceedings, which had been instituted before the Court by the Government of the Czechoslovak Republic, are now happily terminated and no longer affect the relations between the Kingdom of Hungary and the Czechoslovak Republic". The Court, holding that the withdrawal of the suits by the Czechoslovak Government, having been duly acquiesced in by the Hungarian Government and notified to the Court, terminated the proceedings begun, made an Order on May 12th, 1933, in which it noted the declarations of the two Agents, declared the proceedings in these suits terminated and decided that they should be removed from the list.

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## 57. ADMINISTRATION OF THE PRINCE VON PLESS (PROROGATION)

**Order of 4 July 1933 (Series A/B, No. 57)**

**Tenth Annual Report of the Permanent Court of International Justice (15 June 1933—15 June 1934), Series E, No. 10, p. 134**

For the summary of No. 57, see No. 59.

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## 58. POLISH AGRARIAN REFORM AND THE GERMAN MINORITY (INTERIM MEASURES OF PROTECTION)

**Order of 29 July 1933 (Series A/B, No. 58)**

## POLISH AGRARIAN REFORM AND THE GERMAN MINORITY (REMOVAL FROM LIST)

**Order of 2 December 1933 (Series A/B, No. 60)**

**Tenth Annual Report of the Permanent Court of International Justice (15 June 1933—15 June 1934), Series E, No. 10, pp. 130–133**

*Request for interim measures of protection—Dismissal of the request on the ground that it is not regarded as solely designated to protect the subject of the dispute*

*Application*

By an Application dated July 1st, 1933, filed with the Registry on July 3rd, the German Government, availing itself, in its capacity as a Member of the Council of the League of Nations, of the right conferred upon it by Article 12 of the Treaty between the Principal Allied and Associated Powers and Poland, signed at Versailles on June 28th, 1919, brought before the Permanent Court of International Justice a suit against the Polish Government concerning the application of the Polish agrarian reform to the German minority in the voivodeships of Posnania and Pomerelia and kindred questions. It was alleged in the Application that the Polish Government had acted inconsistently with the obligations

assumed by it under Articles 7 and 8 of the above-mentioned Treaty, by discriminating against Polish nationals of German race in these voivodeships, in the carrying out of its agrarian law, and that it had not fulfilled the obligations incumbent upon it in this respect under Article 1 of the same Treaty; the German Government requested the Court to declare that violations of the Treaty had been committed and to order reparation to be made.

Together with this Application, the Agent for the German Government—who had been appointed in a letter dated May 26th, 1933, whereby the German Government had announced the impending submission of the case—filed with the Registry a request for the indication of interim measures of protection, pursuant to Article 41 of the Statute and Article 57 of the Rules of Court. In this request, the Court was asked to indicate interim measures of protection to preserve the *status quo*, pending the delivery of final judgment in the case.

On receipt of this request, the Vice-President of the Court—who was acting as President—at once summoned the Court pursuant to Article 57 of the Rules, to meet in extraordinary session on July 10th, 1933, and arranged for a hearing on July 11th in order to give the Parties an opportunity, should they so desire, to present their observations.

The Court, when it met, decided, at the request of the Polish Government, to adjourn the hearings for some days. It then heard the statements, reply and rejoinder presented by the Parties' Agents at public sittings held on July 19th, 20th and 21st, 1933.

*Composition of the Court*

It was composed as follows on this occasion:

MM. Adatci, *President;* Guerrero, *Vice-President;* Baron Rolin-Jaequemyns, Count Rostworowski, MM. Fromageot, Anzilotti, Urrutia, Sir Cecil Hurst, MM. Schücking, Negulesco, Jhr. van Eysinga, M. Wang, *Judges*.

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*Order (analysis)*

The Court gave its decision upon the request for the indication of interim measures of protection in an Order made on July 29th, 1933.

The Order states in the first place that, under Article 41 of the Statute, concerning interim measures of protection, the essential condition which must necessarily be fulfilled in order to justify a request for such measures, should circumstances require them, is that they should have the effect of protecting the rights forming the subject of the dispute submitted to the Court. According to the terms of the Application, the subject of the dispute was the contention of the German Government that the Polish Government had acted inconsistently with its treaty obligations by discriminating against certain persons in its treatment of them; on the basis of this contention the Applicant asked the Court to declare that violations of these obligations had been committed and to order reparation to be made.

But, according to the verbal explanation of the request for interim measures given by the Agent for the German Government at the hearings, the Court was asked to indicate to the Polish Government that it should not include any further members of the German minority in the nominal lists for expropriation, that it should not proceed with the expropriation of the estates of members of the German minority included in the nominal lists already published, and that it should not transfer to other persons estates taken from members of the German minority or establish settlers upon such estates. Accordingly, whilst the suit brought by the German Government was presented as having for

its object the securing of a declaration confirming that, as alleged by it, infractions had been committed in certain individual cases where the measures in question had already been applied, and, if necessary, of reparation in respect of such infractions, the request for interim measures covered all future cases of the application of the Polish agrarian reform law to Polish nationals of German race and aimed at securing an immediate indication to the effect that henceforth, and until judgment had been pronounced, the Polish law in question should not be applied to such nationals. It followed that the interim measures asked for would result in a general suspension of the agrarian reform so far as concerned Polish nationals of German race and could not therefore be regarded as solely designed to protect the subject of the dispute and the actual object of the principal claim, as submitted to the Court by the Application instituting proceedings.

In these circumstances, the Court, irrespective of the question whether it might be expedient for it in other cases to exercise its power to act *proprio motu*, and without in any way prejudging the question of its own jurisdiction to adjudicate upon the Application instituting proceedings or the question of the admissibility of that Application, confined itself to the statement that the request for interim measures before it was not in conformity with the provisions of the Statute and accordingly dismissed it.

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*Dissenting opinions*

To the Order of Court are appended a dissenting opinion by Baron Rolin-Jaequemyns and a separate opinion by M. Schücking and by Jonkheer van Eysinga, these three judges having declared themselves unable to agree with the Order. M. Anzilotti declared that he disagreed with the Order to the extent indicated by him in another separate opinion likewise appended to the Order; he came, however, to the same conclusion as the Court.

*Opinion by Baron Rolin-Jaequemyns*

Baron Rolin-Jacquemyns is in favour of the indication of "interim measures" pursuant to Article 41 of the Statute and Article 57 of the Rules of Court, until the main question in regard to rights of landowners belonging to the German minorities in certain parts of Poland has been decided by the Court. He holds that the indication of such "interim measures" would considerably facilitate the reparation of these rights in the form of their preservation, rather than by compensation of their loss.

*Dissenting opinion by M. Anzilotti*

M. Anzilotti states that though he has reached the same conclusion as the Court, he is unable to subscribe to the reasons on which the Order is based. In his view, the only reason which made it impossible for the Court to grant the German Government's request was the uncertainty which the Application instituting the main proceedings allows to subsist as to what the said Government seeks to obtain from the Court, and, in consequence, as to the extent of any right which the interim measures would have to protect.

In the opinion of the Court, the proceedings instituted by the German Government were designed to obtain a declaration that certain alleged infractions of the Treaty had been committed in individual cases, in applying the agrarian reform law, and further to obtain reparation for the said infractions. M. Anzilotti, on the other hand, is inclined to think that the German Application concerns the whole body of acts by which the Polish authorities have applied the agrarian reform law and its inconsistency with the Treaty of June 28th, 1919.

However, M. Anzilotti admits that the Application is open to different interpretations, and this in regard to a point on which perfect clarity is essential. As it is only fair that a government should bear the consequences of the wording of a document for which it is responsible, he understands that the Court should, on that ground, refuse to grant the request for interim measures of protection.

*Dissenting opinion of M. Schücking and Jonkheer van Eysinga*

To explain the reasons why they are unable to concur in the Order made by the Court, M. Schücking and Jhr. van Eysinga recall the background of the case, including the examination of the matter by the Minorities Committee of the Council in 1930 and 1931 and its submission to the Council of the League in 1932. They state that the issue is that of violations of the Minorities Treaty committed by the Polish authorities in the execution of the agrarian reform law of December 28th, 1925, to the detriment of Polish nationals of German race. They further observe that the execution of this law is a continuous administrative process and fresh cases of expropriation are constantly being initiated. In their view, "the various questions" raised and "the violations of the Treaty of June 28th, 1919, committed to the detriment of Polish nationals of German race" mentioned in the Application instituting proceedings, are so many expressions denoting the same attitude which is made up of a number of individual acts, developing gradually, until they achieve their complete effect, and having their volume constantly augmented by fresh acts of the same description. It is the incompatibility of this attitude with the terms of the Minorities Treaty that the Member of the Council weeks to demonstrate to the Court, and it is the further persistence in this attitude which the request for interim measures of protection seeks to arrest, pending the Court's decision on the merits.

The dissenting judges consider that any attempt to read into the words formulating the object of the dispute, in the Application, a definite distinction between acts which have already been accomplished and those which belong to the future, would be an utter distortion of the clear meaning of the application. It would also be entirely inadmissible to construe the Application as meaning that it was the intention of the Member of the Council, who was impelled to draw the Court's attention to the illegal character of certain *previous* entries in the nominal lists, to refrain from contending that any action taken *in the future* to give effect to the expropriation already initiated was also illegal.

The dissenting judges find an absence of co-operation with a view to restoring that equilibrium so essential for the equality of treatment which is aimed at by the Minorities Treaty, and that minority estates which had previously been entered in the nominal lists are still being expropriated, and, hence, that infractions of the Minorities Treaty are still occurring.

M. Schücking and Jhr. van Eysinga are of the opinion that the Court has before it a typical case in which interim measures would be entirely appropriate to preserve the rights of the German minority in Poland. They consider that the effect of such measures of protection would be considerably to facilitate the *reparation* of these rights, by their preservation, rather than by compensation for their loss.

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*Withdrawal of the suit by the Applicant; acquiescence of Respondent in this withdrawal—Termination of the proceedings*

The time-limits for the written proceedings in the suit submitted by the German Government's Application had been fixed by an Order made by the Vice-President (acting as President of the Court) on July 4th, 1933. They were twice extended—on August 19th and September 25th, 1933—at the request of the German Government, so that the time-limit for the filing of the first document of the written proceedings, that is to say the Case of the latter Government, was to expire on November 1st, 1933.

On October 27th, 1933, the German Minister at The Hague sent to the Registrar of the Court a note to the effect that the German Government did not intend to proceed with the suit. Pursuant to the provisions of the Rules, a copy of this note was transmitted, for information and any necessary action, to the Agent of the Polish Government, who, by a letter of November 15th, 1933, replied that, in view of the attitude on the part of the German Government indicated by the note above mentioned, the Polish Government had no objection to the discontinuance of proceedings in this case and, as it accordingly considered them closed, requested the Court officially to record the fact.

By an Order made on December 2nd, 1933, the Court, considering that the withdrawal of the suit by the German Government and the acquiescence of the Polish Government in this withdrawal terminated the proceedings begun, noted this withdrawal, placed on record the acquiescence of the Polish Government therein, declared the proceedings terminated and decided that the case should be removed from its list.

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## 59. ADMINISTRATION OF THE PRINCE VON PLESS

### Order of 2 December 1933 (Series A/B, No. 59)

**Tenth Annual Report of the Permanent Court of International Justice (15 June 1933—15 June 1934), Series E, No. 10, p. 134**

*Withdrawal of the suit by the Applicant; acquiescence of Respondent in this withdrawal—Termination of the proceedings*

The suit concerning the Administration of the Prince von Pless was brought by the German Government against the Polish Government by means of an Application dated May 18th, 1932. The respondent Government raised a preliminary objection, which the Court joined to the merits by an Order made on February 4th, 1933, and subsequently the applicant Government filed an Application for the indication of interim measures of protection upon which the Court gave its decision in an Order made on May 11th, 1933. By an Order made on July 4th, 1933, the Vice-President (the acting President of the Court) finally fixed the time-limits for the filing of the Counter-Case, Reply and Rejoinder on the merits, the first of these time-limits expiring on December 29th, 1933.

On October 27th, 1933, the German Minister at The Hague sent to the Registrar of the Court a note to the effect that the German Government did not intend to proceed with the case concerning the Administration of the Prince von Pless which it had submitted to the Court. Pursuant to the provisions of the Rules of Court, a copy of this note was transmitted, for information and any necessary action, to the Agent for the Polish Government, who, by a letter dated November 15th, 1933, replied that, in view of the attitude on the part of the German Government indicated by the note above mentioned, the Polish Government had no objection to the discontinuance of proceedings in this case and, as it accordingly considered them closed, requested the Court officially to record the fact.

By an Order made on December 2nd, 1933, the Court, considering that the withdrawal of the suit by the German Government and the acquiescence of the Polish Government in this withdrawal terminated the proceedings instituted, noted this withdrawal, placed on record the acquiescence of the Polish Government, declared the proceedings terminated and decided that the case should be removed from its list.

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## 60. POLISH AGRARIAN REFORM AND THE GERMAN MINORITY (REMOVAL FROM LIST)

### Order of 2 December 1933 (Series A/B, No. 60)

**Tenth Annual Report of the Permanent Court of International Justice (15 June 1933—15 June 1934), Series E, No. 10, pp. 130–133**

For the summary of No. 60, see No. 58.

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## 61. APPEAL FROM A JUDGMENT OF THE HUNGARO-CZECHOSLOVAK MIXED ARBITRAL TRIBUNAL (THE PETER PÁZMÁNY UNIVERSITY)

### Judgment of 15 December 1933 (Series A/B, No. 61)

**Tenth Annual Report of the Permanent Court of International Justice (15 June 1933—15 June 1934), Series E, No. 10, pp. 135–142**

*Award of the Hungaro-Czechoslovak M.A.T. of February 3rd, 1933; its correctness in regard to the question of jurisdiction and on the merits—The "right of appeal" to the P.C.I.J. under Art. X of Agreement No. II signed at Paris on April 28th, 1930—Art. 250 of the Treaty of Trianon: conditions governing its application—The University of Budapest, a juridical person of Hungarian nationality (Art. 246 of the Treaty of Trianon). The University's right of ownership in respect of certain estates situated in transferred territory. Character of these estates as private property within the meaning of the Treaty. Nature of the measures referred to in Art. 250 of the Treaty of Trianon; cf. Art. 232 and the Annex following Art. 233: question of "discrimination". Subjection of the property in question to discriminatory measures in the form of compulsory administration and supervision within the meaning of the Article. Right of the University to the restitution of this property freed from the said measures. Art. 249 and 256 of the Treaty of Trianon; Protocol signed at Paris on April 26th, 1930*

*History*

In 1635, Cardinal Peter Pázmány, Prince Primate of Hungary, made over a sum of 100,000 florins to the Rector of the Jesuit College at Nagyszombat in Slovakia for the creation at the said college of a "University of Studies"; in the same year, at the Cardinal's request, the King of Hungary, Roman Emperor, conferred upon the University the customary privileges. The University, which was transferred in 1777 from Nagyszombat to Buda, and in 1783 to Pest, received several bequests and gifts in the course of the XVIIth and XVIIIth centuries. Thus, in 1775, after the dissolution of the Order of Jesuits, Queen Maria Theresa granted to the University, as a perpetual endowment and foundation, certain property at Nagyszombat in Slovakia that had previously belonged to the Jesuit College in that town; this property had been bestowed on that College in 1586 by the Emperor Rudolf II. The gift of Maria Theresa was confirmed in 1780, in the reign of Joseph II, and in 1804, in the reign of Francis I; the necessary formalities for entry into possession of the property were accomplished in 1781 and in 1804.

In 1777, as a result of the general re-organization of education which followed the dissolution of the Order of Jesuits, the administration of the University's possessions, which are sometimes referred to in the documents as the "University Fund", was entrusted to the "Royal Directorate of Public Foun-

dations", which has administered them ever since, except for an interval between 1848 to 1867. Since the year 1870, when the University first received a grant in aid from the State, an extract from the University's budget has been included in the budget of the Ministry of Public Education as also in the general budget of the Hungarian State.

In 1914, the University's estates in Slovakia were augmented by the acquisition of certain property, purchased with the permission of the King, Francis-Joseph.

Then came the war of 1914–1918. About the period of the armistice of November 3rd, 1918, the Austro-Hungarian troops—who had now become Czechoslovak troops—penetrated into the northern territories of Hungary, and were followed by the new Czechoslovak authorities, who took possession of the University's estates in Slovakia. In 1919 these estates were placed under the management and supervision of a "Central Commission", having power to decide on the employment of the revenues. The University did not receive these revenues, or any account of the administration of the property.

It is laid down in the Treaty of Peace (Art. 250), which was signed at Trianon on June 4th, 1920, and came into force on July 26th, 1921, that the property, rights and interests of Hungarian nationals situated in the territories of the former Austro-Hungarian Monarchy, shall be restored to their owners, freed from any measures of retention or liquidation taken since November 3rd, 1918, until the coming into force of the Treaty; that such possessions shall be restored in the condition in which they were before the application of the measures in question; and that claims made by Hungarian nationals under the said Article shall be submitted to the mixed arbitral tribunals. The Treaty further lays down (Art. 246) that the expression "Hungarian nationals" also includes juridical persons.

Founding itself on these provisions, the University instituted proceedings on December 24th, 1923, before the Hungaro-Czechoslovak Mixed Arbitral Tribunal, claiming the restitution of its possessions in Slovakia, freed from all measures restricting its right to dispose of them. The Czechoslovak Government, the respondent Party, having submitted an objection to the jurisdiction in November 1926, the Tribunal decided, on April 15th, 1932, to join the objection to the merits; and on February 3rd, 1933, it pronounced its decision, declaring itself competent under Article 250 of the Treaty of Trianon, and ordering the property in issue to be restored to the University, freed from all the measures to which it had been subjected by the Czechoslovak authorities, and in the condition in which it had been before the application of the said measures.

It is the above-mentioned decision of the Hungaro-Czechoslovak Mixed Arbitral Tribunal which, as a result of the circumstances about to be described, formed the subject of the judgment of the Permanent Court of International Justice. An agreement (Agreement No. II), which was signed at Paris on April 28th, 1930, by the signatory Powers of the Treaty of Trianon—not including Japan, China, Cuba and Siam—and also by Poland, provided, *inter alia*, that the Hungaro-Czechoslovak Mixed Arbitral Tribunal should be reinforced by the addition of two members to be designated by the Permanent Court of International Justice; it further declared (Art. X) that Hungary and Czechoslovakia agreed to recognize, without any special agreement, a right of appeal to the said Court from all judgments on questions of jurisdiction or of merits which might be given "henceforth" by this Mixed Arbitral Tribunal, in proceedings of certain kinds. Relying on this clause, the Czechoslovak Government proceeded, on May 9th, 1933, to lodge an appeal with the Court, by filing an Application dated May 3rd, with the Registry.

*Application*

This Application begins by specifying the subject of the dispute, namely, the judgment delivered by the Hungaro-Czechoslovak Mixed Arbitral Tribunal on February 3rd, 1933. Next, after reciting the facts which gave rise to the dispute, it prays the Court to find that the Mixed Arbitral Tribunal wrongly decided that it was competent, that the Peter Pázmány University was not justified in institut-

ing its claim before this Tribunal, and that the Czechoslovak Government was not bound to restore the property. Alternatively, the Court was asked to find that the Tribunal's judgment was null and void; alternatively, that the said judgment must be modified and the Applicant's claim must be dismissed; alternatively, that the Mixed Arbitral Tribunal should be invited to deliver a fresh judgment in accordance with principles to be laid down by the Court; alternatively, that the Czechoslovak State was not bound to give effect to the judgment, and was absolved from any obligation towards the University.

The Application was communicated, in accordance with Article 40 of the Statute and Article 36 of the Rules of Court, to all the States entitled to appear before the Court; furthermore, in accordance with Article 63 of the Statute and Article 60 of the Rules, the States which, together with Hungary and Czechoslovakia, had signed the Treaty of Trianon and Agreement No. II of Paris, were notified of the institution of the proceedings. The documents of the written proceedings were duly filed within the time-limits fixed—and subsequently extended—by the Court.

*Statements and hearings*

In the course of public sittings held between October 23rd and November 13th, 1933, the Court heard the observations, statements, reply and rejoinder submitted on behalf of the two Governments.

*Composition of the Court*

For the hearing of this case, the Court was composed as follows:

MM. Adatci, *President*; Guerrero, *Vice-President*; Baron Rolin-Jaequemyns, Count Rostworowski, MM. Fromageot, Anzilotti, Sir Cecil Hurst, MM. Schücking, Negulesco, Jhr. van Eysinga, M. Wang, *Judges.*

MM. Hermann-Otavskg and de Tomcsányi, appointed judges *ad hoc* by the Czechoslovak and Hungarian Governments respectively, also sat on the Bench for the hearing of the case.

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*Judgment (analysis)*

The Court's judgment was delivered on December 15th, 1933.

It begins by pointing out that, before hearing the pleadings of the Parties on the merits, the Court had invited their representatives to state their views on the question of the jurisdiction conferred upon it by Agreement No. II of Paris; and that, after hearing them, it had decided to postpone its decision on this question until it had heard the arguments on the merits. Furthermore, as the Czechoslovak Government's Agent had said that it was impossible for him to formulate his final submissions before being informed on that point, the Court declared that, since it was its intention only to pass upon the question of the nature of its jurisdiction in the judgment on the merits, there was no need for the Czechoslovak Government to make a final choice between the different submissions presented by it as alternatives.

The judgment also describes another incident in the procedure. Before the hearings opened (on October 23rd, 1933), the Czechoslovak Government's Agent had announced his intention of producing certain documents; all these texts were actually filed on October 25th, and most of them were read out during the hearings. As the Hungarian Government's Agent did not lodge an objection to the production of these documents until October 28th, the Court decided not to refuse to accept those which had already been produced, but to refuse to accept the document which had not yet been produced. In deciding thus, the Court, while taking count of the circumstances, peculiar to the case, in which the documents had been produced, was applying the principles observed in its previous practice. These

principles are as follows: In the absence of any special decision on the subject, the time-limit contemplated by Article 52 of the Statute for the production of new documents expires on the termination of the written proceedings; if new documents are produced after this time, the Court presumes the consent of the other party, unless the latter lodges an objection; in any case, the Statute allows the Court to refuse the documents in question, but does not oblige it to do so.

The judgment next sets forth the immediate origin of the case (application to the Hungaro-Czechoslovak Mixed Arbitral Tribunal; proceedings before the said Tribunal), and then goes on to examine the question of jurisdiction. There can be no doubt that Article X of Agreement II of Paris confers jurisdiction upon the Court; it is a special agreement between the signatory States of that Agreement in case of disputes between them relating to certain judgments of the Mixed Arbitral Tribunal; and the said signatory States include Czechoslovakia, the Applicant, and Hungary, the Respondent, in the case before the Court. The fact that the judgment in dispute was given in a litigation to which one of the Parties was a private individual does not prevent the judgment from forming the subject of a dispute between two States, capable of being submitted to the Court. In these circumstances, it is unnecessary for the Court to go into the various problems connected with the nature of the jurisdiction thus conferred upon it.

Proceeding finally to the merits, the judgment summarizes the facts concerning the creation, development and organization of the University up to the time of the seizure of its possessions in Slovakia. The judgment then recalls that the Czechoslovak Government had concluded, as its main submissions, that the Mixed Arbitral Tribunal had wrongly declared itself competent, and that the University was not justified in claiming the property in question. The Court does not, however, feel called upon to deal separately with the questions whether the Tribunal had jurisdiction, and whether the claim for the restoration of the property was justified: It States that it will confine itself to examining in succession whether, in the case under consideration, the conditions required by Article 250 of the Treaty of Trianon were fulfilled, and will then, according to the conclusions which it reaches, draw the necessary inferences for the decision of the case.

The first condition to be fulfilled, according to the aforesaid Article, is that the claim must be submitted by a Hungarian national. The Czechoslovak Government has argued that the University is not a personality in law; it does not deny that the University originally possessed such a personality, but it contends that it subsequently lost it as a result of the process of nationalization alleged to have begun at the end of the XVIIIth century.

The Court is, however, unable to accept this contention. It appears that the University enjoyed a personality in law as a consequence of Cardinal Pázmány's Deed of Donation. Furthermore, whatever may be the exact date at which it acquired personality in law in accordance with the law at that time in force in Hungary, it suffices to note that it was undoubtedly regarded as enjoying such personality at the end of the XVIIIth and at the beginning of the XIXth century. Was this status subsequently lost? At any rate, no legislative enactment calculated to produce such an effect has been communicated to the Court. And without going into the question whether the University's personality in law could be abolished in any other way, the Court thinks it sufficient to point out that such abolition could only result if the provisions in force were found to be really incompatible with the possession of personality in law. The Court finds that no such incompatibility exists. It points out that, in this connection, personality in law only means the capacity to own property, to receive legacies or donations, to conclude contracts in private law, etc.; it is therefore something that is consistent with State supervision of the University's scientific activities and of its exercise of its rights of ownership; it is also consistent with the fact that, as a general rule, the University is represented before the courts by the Board of Public Foundations.

The second condition to be fulfilled under Article 250 of the Treaty of Trianon is that the claim submitted must relate to property of Hungarian nationals. Though it is beyond doubt that the University,

as a juridical person, enjoys the status of a Hungarian national, the Czechoslovak Government contends that, be that as it may, the right of ownership in the property in dispute is not vested in the University but in the "University Fund", which that Government regards as a separate personality in law.

However, after examining the deeds of donation, the entries in the Land Register, and various laws and judicial decisions, the Court reaches the conclusion that there is no juridical person of that name in existence, and that the term "University Fund" simply means the University in the sphere of private law.

The Czechoslovak Government has, however, further contended that Article 250 only covers what is called private property; whereas the property in dispute is in the nature of public property.

The Court observes, on this point, that Hungarian law does not appear to make such a distinction: in Hungarian law all property, in so far as it forms the subject of the private law right of ownership, is private property. Moreover, it suffices to note that, in any case, this distinction is unknown to the Treaty of Trianon, which, for the application of its provisions, takes only two factors into account: the person to whom the property belongs and the territory in which it is situated.

The third condition to be fulfilled under Article 250 of the Treaty of Trianon is that the Hungarian nationals in question should have been deprived of their property as a result of measures of a particular kind: these measures, the revocation of which is enjoined by Article 250 itself, are, as the Court points out, first "liquidation" for purposes of reparation, or with the object of economic elimination, as also "retention", in the very wide sense of "exceptional war measures" which is given to that term by the Treaty, and which includes, in particular, measures of supervision and compulsory administration; as also measures which, though not taken for a purpose connected with the war, nevertheless resemble the former category in their nature and effects.

After an analysis of the measures to which the University's property has been subjected by Czechoslovakia, the Court arrives at the conclusion that they are undoubtedly measures of supervision and compulsory administration within the meaning of Article 250; as these measures were taken as early as 1918–1919 and were maintained after the coming into force of the Treaty of Trianon in 1921, they must be revoked.

Against this conclusion, the Czechoslovak Government has argued that it would only be bound to revoke the measures referred to in the Article if they involved an element of discrimination. In regard to this point, the Court shows that the Treaty does not make discrimination a necessary condition; further, that, in accordance with the Court's jurisprudence, a measure prohibited by an international agreement cannot become lawful by reason of the fact that the State applies it to its own nationals; and, lastly, that the measures taken in regard to the University's property were, in fact, of a definitely discriminatory character.

The Czechoslovak Government has further argued that the Czechoslovak authorities had merely continued the administration of the property which had been formerly conducted by the Hungarian Board of Public Foundations; that this step was unavoidable, because that authority, being a Hungarian State administration, could not exercise its functions in Czechoslovak territory. In regard to this argument the Court observes, however, that the Hungarian owner has not received any account of the administration of the property by the Central Czechoslovak Commission, and that the administration of this property by the Hungarian Board of Public Foundations on behalf of the owner did not possess the character of an exercise of governmental authority by the Hungarian State.

The Court, accordingly, finds that, in its Judgment of February 3rd, 1933, the Hungaro-Czechoslovak Mixed Arbitral Tribunal rightly decided that it was competent to take cognizance of the claim brought by the Peter Pázmány University; and that the Czechoslovak Government is bound to restore to the University the immovable property claimed by it, freed from any measure of transfer, compul-

sory administration or sequestration, and in the condition in which it was before the application of the measures in question.

Each of the Parties had prayed the Court to order the opposing Party to pay the costs of the appellate proceedings.

The Court did not, however, see any need to depart from the general rule laid down in Article 64 of the Statute, according to which each Party has to bear its own costs.

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*Dissenting opinion*

The Court's judgment was adopted by twelve votes against one. MM. Kellogg and de Bustamante took part in the deliberation, and stated that they agreed with the Court's conclusions, but they were obliged to leave The Hague before the delivery of the judgment.

M. Hermann-Otavský declared that he was unable to agree with the judgment, and appended thereto a statement of his separate opinion.

*Dissenting opinion by M. Hermann-Otavský*

M. Hermann-Otavský states that he is unable to concur in the judgment given by the Court. His opinion relates mainly to the question of the ownership of the estates in issue, in conjunction with that of the nature of the University Fund, and also to questions as to the applicability of Article 250 of the Treaty of Trianon in this case from the point of view of the character both of the estates and of the measures referred to in that Article.

With regard to the ownership of the estates in issue, M. Hermann-Otavský notes that two theories have to be considered: (1) that the owner is the University; (2) that the owner is the University Fund as a juridical person distinct from the University. In his view, no direct proof, eliminating any doubt, has been furnished in respect of either theory. He makes reference to the most significant clauses in several historical documents that weaken the theory that ownership belongs to the University. In addition, he refers to several factors including the intention of the Fund's founders, the legal character of other funds, entries in the land registers and its appearance as a Party to contracts that provide other evidence in support of the second contention. In his opinion, when the term University Fund is used, it is not merely employed as a synonym for the University, but it has the character of a separate juridical personality, and must be regarded as the owner of the property in dispute, at all events in so far as a special title cannot be produced proving that the University itself acquired a given estate.

M. Hermann-Otavský then analyses the applicability of Article 250 of the Treaty of Trianon. He observes that property which is not private, within the meaning of Article 250, or of Article 232, is not entitled to the protection from retention or liquidation accorded by the first paragraph of Article 250. Accordingly, he proceeds to examine the character of the property in dispute, as a condition for the applicability of Article 250. The question to be answered is whether the estates in dispute (whether belonging to the University or to the University Fund) are or are not private property, for the purposes of Article 250 or of Article 232. Taking into consideration the purpose to which the property is devoted, the special and close supervision and administration of this property managed by public officials and the fact that the property could only be disposed of with the King's consent or that of the Minister acting in his name, M. Hermann-Otavský holds that the property in issue is "non-private", no matter whether it belongs to the University or to the University Fund. It follows that the estates in dispute are not entitled to the protection accorded by the first paragraph of Article 250.

Finally, M. Hermann-Otavský, takes issue with the measures in question and Article 250. He observes that the right of retention and liquidation mentioned in Article 232 (b) and Article 250, paragraph 1, is granted to the Allied and Associated Powers for the purpose of reparations or economic elimination. As regards measures falling under Article 250, a distinctive feature, namely their discriminatory character, ensues from their very nature, i.e. in this case the measure falls upon the property because it is the property of Hungarian nationals, and only by reason of this characteristic of its owner. On the contrary, the discriminatory character does not attach to the measures in the present case; in this case the measures (retention, sequestration or compulsory administration) have another character which is the outcome of the circumstances in which they were taken. The measures in question were rendered necessary by the situation resulting from the extension of Czechoslovak sovereignty over the new territories; they have a definite purpose and are in the nature of protective measures; their purpose is to provide for the administration of the property; the latter is not confiscated not even its revenues.

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## 62. LIGHTHOUSES BETWEEN FRANCE AND GREECE

### Judgment of 17 March 1934 (Series A/B, No. 62)

**Tenth Annual Report of the Permanent Court of International Justice (15 June 1933—15 June 1934), Series E, No. 10, pp. 143–149**

*Concessionary contract entered into in 1913 between the Ottoman Govt. and a French firm, covering,* inter alia*, territories subsequently ceded to Greece—Interpretation of the Special Agreement, having regard to Protocol XII of Lausanne (July 24th, 1923) and to the discussions preceding the conclusion of the former—Scope of the contract, having regard to the intention of the Parties—Validity of the concessionary contract, according to Ottoman law; Art. 36 of the Turkish Constitution of 1876 (amended in 1909); the Turkish law of 1910 concerning concessions—Enforceability of the contract against Greece, having regard to the military occupation of certain territories at the time when the contract was entered into, and to Protocol XII of Lausanne*

*History of the case*

In 1860, the Ottoman Government granted the French firm Collas & Michel a concession for the management, development and maintenance of the system of lights on the coasts of the Ottoman Empire in the Mediterranean, the Dardanelles and the Black Sea. This concession, which began to run in 1864 and covered a period of twenty years, was based on the following principle: The concessionnaires were authorized to collect lighthouse dues, whence they were to obtain their remuneration, a portion of the receipts from this source being also reserved to the Ottoman Government. The latter likewise placed certain premises, etc., at the disposal of the concessionnaires. In 1879—i.e. five years before its expiry—the concession was renewed for a period of fifteen years, expiring in 1899. In the same way, it was renewed a second time in 1894 for a period of twenty-five years, expiring on September 4th, 1924.

It appeared that the Ottoman Government's share of the receipts might usefully be employed as security for loans, and on two occasions recourse was had to this expedient, the Government's share being ceded to the lender until the sum lent, together with interest, had been repaid in full.

On April 1st/14th, 1913, the concession was renewed for a third time, and it was this renewal which gave rise to the case submitted to the Court. By a decree-law issued on this date, the Sultan authorized the Ottoman Minister of Finance to conclude a convention renewing the concession for twenty-five years, i.e. until September 4th, 1949, and to sign instruments relating to a loan of £500,000 (T.), repayable in the same way as the loans above mentioned. The convention was signed the same day; the instruments relating to the loan, including the letters authorizing the payment to the lenders of the Ottoman Government's share of the lighthouse receipts, were signed on the next day. The decree-law was published in the Turkish Official Gazette in May, 1913, and ratified by Parliament in December, 1914. The law was promulgated on December 22nd, 1914/January 4th, 1915.

In April, 1913, when the concession was last renewed, military operations in the first Balkan war had been resumed; after the temporary failure (January, 1913) of the peace negotiations initiated in London, hostilities terminated on the fall of Scutari at the end of April, 1913. In the meantime, the Great Powers had submitted to the belligerents (March 31st) preliminary peace conditions, which were accepted by the Porte on April 1st and by the Balkan Allies on April 20th; the main lines of these conditions were followed in the Treaty signed in London on May 30th, 1913. This Treaty however was never ratified owing to the outbreak of the second Balkan war. The latter war was terminated, as regards Greece and Turkey, by the Treaty of Athens of November 1st/14th, 1913. This Treaty came into force on November 16th/29th of that year.

Then followed the war of 1914–1918 and the events which subsequently took place in Greece and Turkey. Relations between these two countries were only finally settled by the instruments signed at Lausanne in 1923, France being also among the signatories. The question of concessions was dealt with in Protocol XII of Lausanne signed on July 24th, 1923. That Protocol draws a distinction, in Article 9, between the territories detached from Turkey under the said Treaty and the territories which had been detached from that country after the Balkan wars. In regard to the former, the Protocol fixes October 29th, 1914, as the decisive date for the recognition of the concessionary contracts; in regard to the latter, it adopts the date of the entry into force of the Treaty under which the territory was transferred, in each case.

Now, some of the territories covered by the concession granted to Collas & Michel had passed under Greek sovereignty as a result of the Treaty of Athens of November 1st/14th, 1913. In December, 1914, the Greek Government announced that it was going to take over the management and maintenance of the lighthouses situated in its new territories. This decision, which was based on considerations of neutrality and national defence, was not however fully carried out until 1929. Towards the end of 1923, the Lighthouse Administration entered into conversations with the Greek Government for the settlement of certain questions of detail and also for the examination of the situation which had arisen, as a result of the Balkan wars and the Great war, in certain portions of Greek territory which fell within the Lighthouse Administration's area. In the course of these conversations, the Administration was informed that, in the view of the Greek Ministry of National Economy, the concession would expire on September 4th, 1924, the expiry date of the second renewal. The Lighthouse Administration thereupon brought the matter to the notice of the French Government, and in September, 1924, the question entered the phase of diplomatic negotiation.

*Special Agreement*

In April, 1931, the French and Greek Governments concluded a Special Agreement which was ratified two years later. Article 1 of this Special Agreement asks the Court to say whether the contract concluded on April 1st/14th, 1913, between the Ottoman Government and the Lighthouse Administration, extending the concession contracts granted to the latter, was duly entered into and is accordingly operative as regards the Greek Government in so far as concerns lighthouses situated in the territories assigned to it after the Balkan wars or subsequently. The Special Agreement also provides for a pro-

cedure, to follow the delivery of judgment by the Court, for the settlement by negotiation, or, should this method fail, by arbitration (the third arbitrator being appointed by the President of the Permanent Court of International Justice failing agreement between the Parties), of all pecuniary claims of the firm Collas & Michel against the Greek Government or *vice versa*, and of the sum payable for the buying out of the concession, should the Court's judgment declare the 1913 concession to have been duly entered into.

*Procedure*

The Special Agreement was notified to the Court on May 23rd, 1933; the communications provided for in Article 40 of the Statute and Article 36 of the Rules were duly despatched. The French and Greek Governments each filed a Case and Counter-Case within the time-limits fixed by an Order of Court in accordance with the proposal of the Parties (Art. 3 of the Special Agreement). The Court heard the oral statements, reply and rejoinder presented by the representatives of the Parties at public sittings held from February 5th to 8th, 1934.

*Composition of the Court*

For the examination of this case, the Court was composed as follows:

Sir Cecil Hurst, *President;* M. Guerrero, *Vice-President;* Baron Rolin-Jaequemyns, Count Rostworowski, MM. Fromageot, Anzilotti, Adatci, Schücking, Negulesco, Jhr. van Eysinga, M. Wang, *Judges*.

M. Séfériadès, who was appointed as Judge *ad hoc* by the Greek Government, also sat on the Court for the purposes of the case.

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*Judgment (analysis)*

The Court gave judgment on March 17th, 1934.

The Court first of all proceeds to determine the precise import of the question put to it. This it is obliged to do because the Parties, though agreed that the Court must examine the question whether the contract of April 1st/14th, 1913, is valid according to Ottoman law, disagreed in regard to whether the Court had also to consider what binding effect, if any, the contract possesses as regards Greece in the territories in which certain of the lighthouses covered by the concession are situated. According to the French contention, the Special Agreement did not cover this point. That Government based its argument mainly on Article 1 of Protocol XII of Lausanne, in which the expression "duly entered into" occurs in a context which does in fact clearly establish that this expression means: valid according to Ottoman law; and it contended that this expression, which is also used in the Special Agreement, bore the same meaning there.

The Court, however, holds that the expression "duly entered into" is not a technical term invariably possessing the same signification, and, being of opinion that the context does not clearly establish the meaning of the question put to it, it proceeds to examine the history of the Special Agreement in order to ascertain whether the Greek Government understood the expression in the precise sense in which it is used in Protocol XII. It arrives at the conclusion that that Government did not do so. The history of the Special Agreement does not exclude the possibility that the words "duly entered into", in Article 1 of that document, read in conjunction with the whole of the context, imply, besides a condition regarding conformity with Ottoman law, a condition regarding conformity with international law. Accord-

ingly, the Court decides not to omit from consideration the objections of an international character opposed by the Greek Government to the arguments of the French Government.

The French Government also contended that any argument based on the intention of the contracting Parties (the Ottoman Government and the firm Collas & Michel) as to the scope of the contract was irrelevant to the question put to the Court: the latter, on the contrary, considers that it cannot answer the question without satisfying itself that the contract of 1913 covered, in the intention of the contracting Parties, lighthouses now situated in Greek territories.

The Court therefore must deal with three questions of substance: it must determine the intention of the Parties as regards the scope of the contract; it must consider whether this contract was "duly entered into" according to Ottoman law, and whether it is enforceable against Greece.

With regard to the first point, Greece argued that it was impossible that the Parties, when signing the disputed contract on April 1st/14th, 1913, should have meant it to cover lighthouses situated in territories which had long been occupied by the Greek troops and the cession of which had just been agreed to by Turkey. The Court is not of this opinion. It considers in the first place that the object of the contract was to renew the old concession; and accordingly—in the absence of proof to the contrary, which however the Greek Government has not furnished—it may be presumed that the scope of the contract remained identical with that of the old concession, which indisputably covered the whole of the Ottoman lighthouses. Furthermore, it was to the interest of both contracting Parties not to reduce the previous scope of the concession. They had moreover already begun negotiations before the Balkan war, and, if the intention had been to restrict the scope of the contract as compared with the concession in force, the fact would, no doubt, have been expressly stated. Finally, the fate of all the occupied territories was not yet decided: if the Parties had really meant to except the territories occupied on April 1st/14th, 1913, there would have been, as regards the occupied territories subsequently restored to Turkey, a curious uncertainty as to the scope of the renewed concession. Even if there had been a generally accepted rule of international law forbidding a sovereign State from taking measures in respect of occupied territory, the Parties to the contract of 1913 might have had in view the possibility that special provisions in the future peace treaties would subsequently accord recognition to the concessions.

The Court next takes the second question: whether the contract was duly entered into, according to Ottoman law, i.e. whether all formalities were fulfilled and, in particular, whether legislative authorization was necessary and, if so, whether it was given.

The French Government held that the validity of the contract in Ottoman law was established by the fact that the contract was concluded on behalf and under the authority of the Ottoman Government. The Greek Government, on the other hand, argued that the decree-law which conferred this authority and under which the contract was made, did not fulfil the conditions laid down with regard to this particular method of legislation, and also that the ratification of the decree-law by Parliament, which only took place after the territories in which certain lighthouses were situated had been finally ceded, was equivalent, in so far as concerned these territories, to non-ratification; and that the effect of this was retrospectively to annul the decree-law.

The Court, for its part, confines itself to considering whether the Turkish decree-law was valid; for only if it were not valid would it become necessary to ascertain whether it was indispensable according to Turkish legislation in the matter of concessions. The Court holds that the decree-law fulfilled the formal conditions laid down by the Constitution. The next point is whether it also fulfilled the other conditions prescribed by the Constitution, that is to say, whether there was "urgent necessity" and whether the measure was one "for the protection of the State against some danger or for the preservation of public safety". The Court observes that the Ottoman Government, and subsequently the Turkish Parliament, were alone qualified to appreciate this point; accordingly, there is no need for the Court

to do so. But even if it had to undertake an examination of this point, good reasons might be given in favour of the view that the decree-law was valid: for, having regard to the position of the Ottoman Empire at the end of the Balkan wars, the Treasury must have been in urgent need of the loan.

With regard to ratification, the Court considers that only a refusal to ratify would be relevant and that, if Parliament did not intervene, the decree-law remained in force in the same way as any other ordinary law. In the present case, ratification by Parliament, in the Court's view, amounted rather to a confirmation of the Government's action than to the imposition of legal provisions, applicable to the future, on the inhabitants of the ceded provinces. Moreover, according to Turkish law, the decree-law itself was not tainted with nullity because some of the territories covered by the contract were in enemy occupation: In constitutional law, nothing short of definite cession can produce legal effects prejudicing the rights of the lawful sovereign. The question which arises in international law whether the succession State can be bound by a contract or a law made during military occupation lies entirely outside this subject.

The decree-law of 1913, and the contract authorized by it were therefore, the Court holds, valid in Turkish law.

There remains the third question: whether, in the field of international law, the contract is operative as regards the Greek Government. That Government's main argument was that the territorial sovereign is not entitled, in occupied territory, to grant concessions legally enforceable against the occupying State which subsequently acquires the territories occupied by it.

The Court does not think it necessary to consider this argument, having regard to the treaty provision contained in Article 9 of Protocol XII of Lausanne. The Court simply observes that the only objections to subrogation admitted by this provision are those based on the date or the validity of the concessionary contract: and it has already recognized that the contract of 1913 was valid and that it was made prior to the material date fixed by Article 9 of Protocol XII. This being so, the Court also rejects certain subsidiary arguments adduced by Greece in an attempt to show that this Article is not applicable to the concession in question.

For these reasons, the Court arrives at the conclusion that the contract was duly entered into and is accordingly operative as regards the Greek Government in so far as concerns lighthouses situated in territories assigned to it after the Balkan wars or subsequently. But it adds a reservation to the effect that it is not called upon to specify which are the territories detached from Turkey and assigned to Greece after the Balkan wars or subsequently where the lighthouses in regard to which the contract of 1913 is operative are situated.

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*Dissenting opinions*

The Court's judgment was adopted by ten votes to two. MM. Anzilotti and Séfériadès being unable to concur in the judgment, appended separate opinions thereto. Jhr. van Eysinga, though in agreement with the operative clause, was unable to accept certain of the grounds on which the judgment is based.

*Separate opinion of M. Anzilotti*

In explaining the reasons for his dissent, M. Anzilotti observes that the question submitted to the Court—a question which in his opinion is solely whether the contract of April 1st/14th, 1913, was regularly entered to—must be resolved by the application of Article 1 of Protocol XII of Lausanne.

M. Anzilotti notes that the Court has held that a concessionary contract was duly entered into (*dûment intervenu*) if it was validly made. His view, on the contrary, is that "concessionary contracts

duly entered into", within the meaning of Protocol XII, are concessionary contracts in regard to which all the conditions requisite under Ottoman law for the granting of the concession were fulfilled before the decisive date.

Having considered the terms of the relevant provisions in the Protocol, M. Anzilotti considers that, as the text does not itself give the information which would enable one to determine the true intention of the Parties, it is necessary to have recourse to the preparatory work. M. Anzilotti therefore studies the latter, which, in his view, places beyond doubt that the expression "concessionary contracts duly entered into before October 29th, 1914", in Article 1 of Protocol XII are concessionary contracts, in respect of which all the formalities required under Ottoman law for the granting of the concession had been fulfilled before that date.

The foregoing reasoning shows, in M. Anzilotti's opinion, that the Court was not simply called upon to decide as to the validity of the contract, but had also to decide whether the condition mentioned in Article 1 of the Protocol was fulfilled, namely, whether all the formalities required by Ottoman law for the prolongation of the concession had been accomplished. As regards the validity of the contract, M. Anzilotti entirely concurs in the Court's opinion. On the second question, however, he notes that one formality required by Ottoman law for the grant of the concession to which the contract relates, namely, the approval or ratification of Parliament, was not fulfilled at the date of the coming into force of the treaty providing for the transfer of the territories.

M. Anzilotti therefore concludes that the contract of April 1st/14th, 1913, . . . was not "duly entered into" (*dûment intervenu*) within the meaning of Article 1 of Protocol XII of Lausanne, and is accordingly not operative in regard to the Greek Government, within the meaning of Article 9 of the aforesaid Protocol, so far as concerns lights situated in territories assigned to Greece after the Balkan wars and prior to the Turkish Parliament's ratification of the provisional law, or decree law, which had authorized the conclusion of the contract.

*Separate opinion of M. Séfériadès*

In his opinion, M. Séfériadès first points to certain points of fact relating to the case which support a conclusion opposed to that of the Court. He then turns to the questions of law.

According to M. Séfériadès the contract of April 1st/14th, 1913, was not duly entered into, nor did it even cover the lights situated in the territories occupied by Greece at the time of signature. Furthermore, even if it had covered them it was definitely disapproved by Turkey; consequently, it can neither be considered valid as regards Turkey—at any rate so far as concerns lights which had passed out of her hands when the contract was signed; nor *a fortiori* can it be operative as regards Greece.

M. Séfériadès states that he is wholly in agreement with the arguments in M. Anzilotti's dissenting opinion that the contract, even if it existed, was not duly entered into because, in any case, a definitive Turkish law was necessary before it could be regarded as such.

M. Séfériadès then analyses the question of whether the contract of April 14th, 1913, and the provisional law of that date, which form an indivisible whole, cover the lights situated in the territories occupied by Greece at the time of signature and touches upon the issue of whether they were not in fact, disapproved in so far as concerns the lights in question. First, he notes that there is an inconsistency between the provisional law of April 1913 and the law of November of the same year ratifying the Treaty of Athens: On the one hand, the provisional law granted to the firm Collas & Michel a concession also covering the operation of lighthouses situated in the territories occupied, and shortly afterwards annexed, by Greece. On the other hand, the November law stated that Greece was to respect rights acquired up to the time of her occupation of the territories ceded to her by that Treaty; accord-

ingly, all rights granted in these territories after the occupation were excluded. However, he asserts that this inconsistency could not give rise to serious conflict since the provisional law had been indisputably revoked and replaced by the complete and definitive November law of 1913. It follows that the former law, being thus legally disapproved, in so far as concerns the territories occupied by Greece in April 1913, failed to comply with the conditions of substance and form required by Ottoman law; this cancelled provisional law could not therefore be invoked against the Porte, nor, in consequence, against the succession State of the Ottoman Empire.

M. Séfériadès adds that the intention of the contracting Parties in April 1913, when extending the concession from 1924 to 1949, not to include therein the lights in the territories which had been occupied by Greece some time before that date, and which it had already been decided that Greece was to annex, appears clear, distinct and indisputable. There is no ground for supposing that the Turkish Government in 1913 did anything so irregular as to cede rights to Greece which it had itself ceded to others, only a few months before. Consequently, there was no concessionary contract at all in respect of these territories.

Next, assuming that the contract was valid as between the contracting Parties, M. Séfériadès analyses if it could be binding upon Greece as regards lights in territories which were under military occupation by that country and which it had been decided that Greece was to annex. He considers the question of whether Turkey, in April 1913, was enjoying the usufruct and administration of the property forming the subject of the contract; or whether—supposing that she no longer enjoyed them—she could have recovered them at some later moment. In accordance with the principle *nemo dat quod non habet,* if Turkey no longer enjoyed the usufruct and administration, it was not possible for her to cede them. For these purposes, he discusses the extent of the occupying State's *vis-à-vis* the occupied State's powers in regard to administration and the collection of taxes, in the case of territories occupied by the said State in the course of a war. Further, he examines the granting of leases or concessions in respect of public property belonging to the occupied State. In his view, in accordance with the generally accepted rules of international law which are confirmed by Article 55 of the Hague Convention No. V, the occupying State, which has the administration and usufruct of public property in the occupied territory—i.e. Greece, in this case—alone has power to grant concessions capable of application whilst the occupation continues. Consequently, if Turkey had lost the administration of the territories occupied by Greece and the usufruct of the public property situated in the said territories, long before the signature of the contract of 1913, and if she subsequently lost the sovereignty over these territories, how could she have been able, legally, to grant concessions in favour of third parties? In this connection, he adds that the Parties themselves definitely acknowledged that they had no intention that the contract they were signing should cover the property of others by signing the Treaty of Athens and by limiting their claims to the period ending in 1924 when the question was put to them by the Financial Commission in 1913.

In view of the foregoing, M. Séfériadès considers it quite impossible even to admit the existence of a concessionary contract—much less of a concessionary contract duly entered into or even merely valid—made between the Turkish Government and the firm Collas & Michel, and which would be capable, pursuant to the terms of Protocol XII of Lausanne, of creating obligations incumbent either upon Turkey or—still less—upon Greece, in respect of the territories occupied by the latter Power in April 1913.

## 63. OSCAR CHINN

### Judgment of 12 December 1934 (Series A/B, No. 63)

**Eleventh Annual Report of the Permanent Court of International Justice (15 June 1934—15 June 1935), Series E, No. 11, pp. 129–135**

*Ministerial decision imposing upon a fluvial transport company in the Belgian Congo under governmental supervision a reduction of its rates, in consideration of a promise of repayment–which might be temporary only–of its losses—Convention of Saint-German of September 10th, 1919, revising the General Act of Berlin of February 26th, 1885, and the General Act and Declaration of Brussels of July 2nd, 1890. Principles of freedom of navigation, of freedom of trade and of equality of treatment—General international law: the principle of respect for vested rights. A "de facto monopoly"; special situation accorded to a company under government supervision; commercial competition. Discrimination based on nationality. Interests as opposed to vested rights*

*History of the case*

In 1925 a river-transport Company known as "Unatra" was founded in the Belgian Congo, more than one-half of the shares being owned by the Belgian Government. According to the terms of its *Cahier des charges* agreement, Unatra is under an obligation to the Colony to keep permanently in service a fleet capable of meeting the present needs and future expansion of transport traffic. The transport rates are to be approved by the Colonial Administration before being put into force. The Colony has the right to insist on the maintenance of services, even though they show a deficit, but is bound to make up the receipts to an amount equal to the running expenses. The Company cannot grant exceptional rates without the special permission of the Colony. The State, for its part, guarantees interest at 6% on the debentures of the Company and the amortization of these debentures, which also enjoy a partial relief from taxation.

In 1928, the Company asked the Government that its existing rates should be regarded as maximum rates; it represented that its receipts were constantly falling, owing to the fact, among others, that, having regard to the terms of its *Cahier des charges*, it was unable to face competition, in particular, by firms which were both producers and carriers. The Government acquiesced, and the Company was thus enabled to grant special tariffs to its regular and more important customers, with whom it concluded fidelity contracts, and contracts for the taking over and laying up of shipping.

In 1929, Mr. Chinn, a British subject, came to Leopoldville and established there a river-transport and ship-building and repairing business. His concern was, apart from Unatra, the only one exclusively engaged in the transport of goods belonging to third parties; there were, however, several producing enterprises which transported their own products, and, in addition, carried goods belonging to third parties, so far as cargo-space was available.

When the commercial depression began to be felt in the Congo, the Minister for the Colonies decided on June 20th, 1931, in order to reduce the cost price of colonial products, that, as from July 1st, 1931, the freight charges of Unatra (and of some other firms over which the Government could also exercise control) for the main categories of products should be lowered to a purely nominal figure. In consequence of the reduction in freight charges, the Government undertook to refund the losses incurred by the Company, subject to certain conditions.

This measure caused some dissatisfaction, and another enterprise engaged in transportation asked the Minister to state what conditions it must accept in order to receive the same treatment. The Min-

ister stated that he could not accede to the request, and six transportation companies had recourse to the courts, which dismissed their suit in September and December 1932. In the meantime however, on October 3rd, 1932, the Minister announced that he had decided to accede to their request within certain limits.

Mr. Chinn, who was one of those who had had recourse to the courts, had also appealed to his Government for protection, and the latter had taken up his claim. Negotiations ensued between the Government of the United Kingdom of Great Britain and Northern Ireland and the Belgian Government with a view to a friendly settlement. These negotiations proved fruitless, and the two Governments then agreed to submit the case to the Permanent Court of International Justice; with that object, they concluded a Special Agreement on April 13th, 1934.

*Special Agreement*

The Special Agreement requests the Court to say whether, having regard to all the circumstances of the case, the above-mentioned measures complained of by the Government of the United Kingdom were in conflict with the international obligations of the Belgian Government towards that Government. If the answer to the above question is in the affirmative, and if Mr. Oscar Chinn has suffered damage on account of the non-observance by the Belgian Government of the above-mentioned obligations, the Court is next requested to say what is the reparation to be paid by the Belgian Government to the Government of the United Kingdom. Before, however, fixing the amount that may be payable, the Court is requested to indicate the principles on which such reparation is to be calculated, and to determine the procedure whereby the amount is to be ascertained, if, within a time-limit to be fixed by the Court, the contracting Governments have not reached agreement as to the sum to be paid.

*Procedure*

The Special Agreement was filed with the Court on May 1st, 1934. The communications provided for in Article 40 of the Statute and Article 36 of the Rules of Court were duly despatched. Furthermore, in accordance with Article 63 of the Statute and Article 60 of the Rules, the Registrar gave notice of the institution of these proceedings to the States which, together with Belgium and the United Kingdom, had signed the Convention of Saint-Germain-en-Laye of September 10th, 1919, revising the General Act of Berlin of February 26th, 1885, and the General Act and Declaration of Brussels of July 2nd, 1890; when transmitting to the Court the text of the Special Agreement, the Government of the United Kingdom had drawn its attention to the fact that the case would raise questions as to the construction of certain articles of that Convention.

The following documents were filed within the time-limits fixed by an Order of the Court in accordance with the Parties' proposal (Art. 2 of the Special Agreement): a Case by the Government of the United Kingdom, a Counter-Case by the Belgian Government, a Reply by the Government of the United Kingdom, and a Rejoinder by the Belgian Government. In the course of public sittings held from October 23rd to 26th, 1934, the Court heard observations from the representatives of the Parties as to the procedure to be followed, besides oral statements, and a Reply and a Rejoinder.

For the hearing of this case the Court was composed as follows:

M. Guerrero, *Vice-President of the Court, officiating President*[1]*;* Baron Rolin-Jaequemyns, Count Rostworowski, MM. Fromageot, Altamira, Anzilotti, Urrutia, Sir Cecil Hurst, MM. Schücking, Negulesco, Jhr. van Eysinga, *Judges*.

[1] The President of the Court being a national of one of the countries, parties to the suit, the functions of President passed, in respect of this case, to the Vice-President in accordance with Article 13 of the Rules of Court.

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*Judgment (analysis)*

The Court's judgment was delivered on December 12th, 1934. After first noting that, having regard to the order in which, as proposed by the Parties, the documents of the written procedure were alternately filed, and the oral statements were delivered, it is evident that the British Government is, in fact, in the position of plaintiff, the Court specifies the questions it is called upon to decide, according to the tenor of the Special Agreement: it has to determine, in the first place, the nature of the measures of which the Government of the United Kingdom complains, the "circumstances of the case"—that is to say the circumstances which are peculiar to the present suit—and the international obligations with which, in the submission of the Government of the United Kingdom, these measures were in conflict.

It is apparent from the history of the case that these measures are primarily the decision of June 20th, 1931, followed by the refusal of the Belgian Government, until October 3rd, 1932, to extend the benefit of those measures to transport enterprises which had not been covered by that decision. In the opinion of the Court—which observes that the Parties are agreed on this point—these measures were governmental acts, and are to be accounted for by the right of supervision which the Government retained over Unatra. As regards the scope of these acts, which do not apply solely to Unatra, but also affect other land transport concerns, the Court distinguishes two features: the reduction in the transport tariffs, and the reimbursement—which is moreover recoverable—of the losses incurred.

As regards the "circumstances of the case", they include in the first place, in the Court's opinion, the peculiar importance of fluvial transport for the whole economic organization of the colony; secondly, the fact that Unatra, though having the form of a private Company, was none the less charged, owing to the terms of its *Cahier des charges* and to the supervision therein reserved to the State, with the conduct of an organized public service, involving special obligations and responsibilities, with a view primarily to satisfying the general requirements of the colony. Finally, there was the general economic depression, and the necessity of assisting trade—which was suffering severely from the fall in prices of colonial products—and of warding off the danger which threatened to involve the whole colony in a common disaster; in the Court's opinion, the Belgian Government was the sole judge of this critical situation and of the remedies it called for—subject, of course, to its duty of respecting its international obligations.

These obligations were clearly indicated by the Parties: they are, in the first place, the obligations arising from the international régime of the Congo basin under the Convention of Saint-Germain of September 10th, 1919, and, in the second place, the obligations resulting from the general principles of international law.

The Convention of Saint-Germain was the successor, so far as the Parties in the case are concerned and in the relations between them, of the General Act of Berlin of February 26th, 1885, and of the Act and Declaration of Brussels of July 2nd, 1890. Among the signatories of the latter instruments—which, according to the terms of the Convention, are to be considered as abrogated in so far as they are mutually binding on the Powers parties to the Convention—are certain States other than these parties. The Court notes, however, that the Convention of Saint-Germain has been relied on, in the present case, by the Belgian and British Governments as the Act which it is asked to apply, and that the validity of this Act has not so far, to its knowledge, been challenged by any government.

In regard to the general principles of international law, the Court observes that the principle at issue is that of respect for vested rights.

The Government of the United Kingdom had alleged that the Belgian decision of June 1931 was in conflict with the international obligations thus defined, in the following respects.

That decision, it is alleged, intentionally made it impossible for the fluvial transporters, other than Unatra—including Mr. Chinn—to carry on their business, and in this way it enabled Unatra to exercise a *de facto* monopoly, incompatible with the principles of freedom of commerce and navigation; and by organizing a régime, in the benefits of which Mr. Chinn, a British subject, was not entitled to share, it created a discrimination contrary to the principle of equality of treatment.

In regard to the first of these complaints, the Court observes that, according to the conception universally accepted, the freedom of navigation referred to by the Convention comprises two separate elements: freedom of movement for vessels, and freedom of transport, the latter implying, in certain respects, freedom of commerce also. In the present case, the British Government was concerned only with the latter, or what may be called the commercial aspect of freedom of navigation: and for that reason the Court, while recognizing that freedom of navigation and freedom of commerce are in principle separate conceptions, considers that it is not necessary to examine them separately. The Court notes that the Convention of Saint-Germain, while abolishing the régime of the open door stipulated by the Berlin Act, nevertheless maintained freedom of trade, in the sense of the right—in principle unrestricted—to engage in any commercial activity; but it observes that the provisions of the Convention, being less wide than those of the acts which it succeeded, do not lend themselves to a broad interpretation, and that in consequence the freedom of trade referred to in the Convention does not mean the abolition of competition. When Mr. Chinn established his business in the Congo, he could not have been ignorant of the serious competition which he would have to encounter on the part of Unatra, having regard to that Company's connection with the Government. As regards the so-called *de facto* monopoly said to have been created in favour of Unatra, the alleged concentration of transport business in the hands of Unatra would only have been incompatible with freedom of trade if it had involved the concession of a right precluding the exercise of the same right by others. The Court sees nothing indicative of such a prohibition. In what the Government of the United Kingdom describes as a *de facto* monopoly, the Court sees only a natural consequence of the situation of a service controlled by the State, as compared with private concerns, or a possible effect of commercial competition.

It is possible that Unatra took advantage of the lowering of its rates to eliminate its competitors; but it cannot be inferred that this was the motive and aim of the action of the Belgian Government.

In regard to the second complaint of the Government of the United Kingdom, the Court points out that the Convention of Saint-Germain proclaims the principle of equality of treatment as the characteristic feature of the legal régime established in the Congo basin. The form of discrimination which is forbidden is discrimination based upon nationality, and involving differential treatment as between persons belonging to different national groups, by reason of their nationality. But the special treatment accorded to Unatra by the governmental decision of June 1931 was bound up with the position of Unatra as a company under State supervision, and not with its character as a Belgian company.

Finally, as regards the argument which the Government of the United Kingdom had based upon the general principles of international law, the Court is unable to see in Mr. Chinn's position prior to the Belgian Government's decision anything in the nature of a genuine vested right. No enterprise can escape from the chances and hazards resulting from general economic conditions. It is true that in 1932 the Belgian Government decided to grant advances also to transporters other than Unatra. But this action appears to have been an act of grace, and cannot be regarded as an admission of a legal obligation to indemnify the transporters for an encroachment on their vested rights.

For these reasons, the Court holds that the answer to the first question in the Special Agreement must be in the negative. Accordingly, the second question does not arise.

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*Dissenting opinions*

The Court's judgment was adopted by six votes against five.

M. de Bustamante, Judge, who had taken part in the deliberation and in the vote, but who had to leave The Hague before the delivery of the judgment, stated that he agreed with the operative clause and with the recitals of the judgment.

Sir Cecil Hurst, President of the Court, MM. Altamira, Anzilotti and Schücking, and Jonkheer van Eysinga, Judges, declared that they were unable to agree with the judgment and appended thereto statements of their separate opinions.

*Dissenting opinion by M. Altamira*

In describing the two main reasons for his dissent, M. Altamira explains, first, that he interprets differently the relevant articles of the Convention of Saint-Germain of September 10th, 1919, and, secondly, that he takes a different conception of the question of law which confronts the Court having regard to "all the circumstances of the case".

M. Altamira begins by determining the international obligations of the Belgian Government towards the Government of the United Kingdom. He observes that, in accordance with Article I of the Convention of Saint-Germain, the signatories undertook to "maintain a complete commercial equality", covering all kinds of trade whether by land, river or otherwise. In his view, this idea is tantamount to a prohibition of any discrimination between the respective nationals of signatory Powers and of States, Members of the League of Nations, acceding to the Convention. After an analysis of the various articles relevant to the present case, M. Altamira affirms that the idea dominating the Convention with regard to the international obligations contracted therein is clearly the idea of equality of treatment in every matter dealt with, including not only the persons of foreign nationals and their commercial activities, but also their merchandise and vessels.

M. Altamira then considers the measures taken and applied in June 1931 and subsequently by the Belgian Government, in order to see whether they are consistent with the international obligations noted above. With regard to the decision of June 20th, 1931, consisting, on the one hand, of a reduction in the rates applying to the transport and handling of certain colonial products of the Congo, and, on the other hand, a promise to refund any losses occasioned by this reduction to certain companies, M. Altamira considers that this decision constituted a privilege, particularly insofar as it confined to one group only of the transporters its offer of enabling them to offset the losses which must necessarily follow the lowering of tariffs. Having regard to the international obligations which the Convention of Saint-Germain imposes on the riparian States, the above-mentioned decision undoubtedly constitutes one of those cases of inequality that is prohibited by the Convention. There is no ground for concluding that Unatra's affairs—however closely that Company may be controlled by the Belgian Government—are outside the boundary of the international obligations arising from the Convention of Saint-Germain. M. Altamira rejects the idea that acts of discrimination can only be regarded as infractions of the international obligations arising out of the Convention of Saint-Germain if the discrimination affects foreign nationals as compared to Belgian nationals.

M. Altamira's conclusion that there was inequality of treatment is based solely on the decision of June 20th, 1931. As regards the subsequent facts, M. Altamira only examines in detail the decision of June 28th, 1931, which most signally endows the decision of June 20th the character of a privilege, inconsistent with the terms of the Convention. Finally, M. Altamira refers to the "Public Notice" of

October 3rd, 1932, issued by the Governor-General of the Congo which rectified the policy expressed in the decision of June 20th in support of his decision to answer point A, 1, of the Special Agreement in the affirmative.

*Dissenting opinion by M. Anzilotti*

M. Anzilotti considers that the judgment fails to appreciate the true import of the main plea of the Government of the United Kingdom and does not satisfactorily deal with the question of law raised by that plea. Furthermore, he is of the opinion that the Court, before deciding the case on the merits, should have ordered the production of further evidence.

M. Anzilotti considers that the Government of the United Kingdom has not proved that the measures taken by the Belgian Government were bound to result and did in fact result in concentrating the river transport business in the hands of Unatra, by making it commercially impossible for other transporters to engage in that business. He observes that, in these circumstances, the Agent of the Government of the United Kingdom suggested that the Court should order an enquiry and the Agent of the Belgian Government raised no objection. That being the position and seeing that the case depended mainly on the appraisement of the facts, the Court, in his opinion, should have ordered the production of the necessary evidence.

According to M. Anzilotti, assuming that the facts are duly established, the question of law to be addressed by the Court is whether the measures adopted by the Belgian Government are in conflict with the international obligations incumbent on Belgium under the Convention of Saint-Germain. In this regard, he notes that Article 5 of that Convention lays down that navigation is to be free, both as regards movements of shipping, or navigation in the strict sense of the word, and as regards the carriage of passengers and cargo. It follows that an encroachment on the freedom to carry goods is a contravention of this Article, even if the Belgian Government's measures only affect the carriage of goods. The most delicate point of the problem is, however, the question whether the Article requires the signatory Powers to refrain from any measure which, though not interfering with the free movement of shipping or cargoes, is of such a nature as to render this freedom economically valueless. In this regard, M. Anzilotti observes that the purpose of Article 5 is to open the commercial exploitation of the waterways of the Congo Basin to everybody, so that everyone may reap the financial profits to be derived from it. The purpose of this Article would be entirely stultified if the State were entitled to make it impossible for the shipping business to earn any profits, so long as every one was left free to engage in it.

M. Anzilotti adds that if the measures adopted by the Belgian Government were contrary to the Convention of Saint-Germain, the circumstance that these measures were taken to meet the dangers of the economic depression cannot be admitted to consideration. In addition, the position of Unatra, as a Company under governmental control, has no bearing on the issue. The situation would have been entirely different if the Belgian Government had been acting under the law of necessity, since necessity may excuse the non-observance of international obligations. In M. Anzilotti's view, however, there are certain undisputed facts which appear inconsistent with a plea of necessity in the present case, including that the Belgian Government chose one from among several possible measures and that it was possible to concede advantages to all enteprises, similar to Unatra, and hence to avoid creating a *de facto* monopoly.

For these reasons, M. Anzilotti concludes that the facts alleged by the Government of the United Kingdom are not sufficiently established; but that if they were proved the measures adopted by the Belgian Government would be in conflict with Belgium's international obligations under the Convention of Saint-Germain towards the United Kingdom. Seeing then that further evidence was material to the

issue, it was the duty of the Court to order the necessary enquiries, to establish the truth impartially in regard to the disputed facts, and to obtain the requisite technical information to enable it correctly to appraise them.

*Dissenting opinion of Sir Cecil Hurst*

In explaining the reasons for his dissent, Sir Cecil Hurst observes that the basis of the British case must be that the measures taken by the Belgian Government were not lawful, either by reason of the intention with which they were taken, or by reason of the consequence which they were bound to entail and which should have been foreseen by the Belgian Government. He notes that no attempt is made in the documents of the written proceedings to adduce the evidence required to establish the illegality of the Belgian measures on account of the intention with which they were taken. Taking into account the industry of the colony, Sir Cecil Hurst considers that the Belgian Government must have realized that the effect of the June measure would be that Unatra, carrying at one franc a ton, would get all the business and a private transporter, such as Chinn, carrying at the old rates, would get none.

Sir Cecil Hurst then examines the measures adopted by the Belgian Government in detail. He notes that the Court has declined to appoint the expertise requested by the Agent for the United Kingdom. However, in his view, such an appointment would have been useless, as the results of the enquiry could not affect the ultimate decision as to whether Chinn was injured by measures which were inconsistent with Belgium's international obligations.

Sir Cecil Hurst rejects the contention that the Belgian measures were inconsistent with Belgium's obligations under general international law on the grounds that they interfered with Chinn's acquired rights. In his opinion, Chinn possessed no right, either under the Treaty of Saint-Germain or under general international law, which entitled him to find customers in the Congo. As regards Belgium's obligations under the Treaty of Saint-Germain, Sir Cecil Hurst notes that the principle of free trade provided for under Article 1 of the Berlin Act operates in the Belgian part of the Congo, and that the Belgian government is still under obligation to the Government of the United Kingdom to see that the trade of all nations enjoys complete freedom. The next question is whether a Government measure which enables one transporter to carry goods on the Congo so cheaply that he will attract all the business, violates the liberty of commerce to which other transporters are entitled. Sir Cecil Hurst considers that the reduction of Unatra's tariff to one franc a ton, even if it did result in that Company getting all the business, did not infringe the liberty of commerce to which Chinn was entitled, since it imposed no obstacle to the carrying on of the business; at most it made it unprofitable. Similarly, he expresses the view that the Belgian measures did not infringe the principle of liberty of navigation, under Article 5 of the Convention, since Chinn was as much at liberty to send his ships up and down the Congo after July, 1931, as he was before. Finally, so long as the Government measures left all transporters (including both Chinn and Unatra) free to carry on their business, the reduction of tariffs imposed upon Unatra did not infringe the commercial equality prescribed by the Treaty of Saint-Germain. That disposes the argument founded on the so-called *de facto* monopoly.

There remains the alternative argument that the Belgian measures amounted to discrimination in favour of Unatra and against Chinn, i.e. that by refusing to extend to the private transporters, including Chinn, the arrangement for the repayment of losses promised to Unatra, the Belgian Government failed to maintain that complete commercial equality between the nationals of the signatory Powers which they were bound by Article 1 of the Convention of Saint-Germain to do. In this regard, Sir Cecil Hurst considers that, under Article 1, it is not necessary to show that the discrimination was based on nationally, in the sense that the differentiation was made because the persons possessed a particular nationality: the parties to the Treaty intended to ensure the position of their nationals individually. He concludes that the refusal to extend the repayment of losses to private transporters was inconsistent

with such individual commercial equality and was therefore inconsistent with the international obligations of Belgium to the United Kingdom.

Finally, Sir Cecil Hurst notes that the injury to Chinn's ship-building business falls outside the scope of this principle, insofar as the damage is too remote.

*Dissenting opinion by Jonkheer van Eysinga*

Jhr. van Eysinga first addresses the matter of the source of the international obligations of the Belgian Government towards the Government of the United Kingdom. In this regard, he asks whether the signatory States of the Convention of Saint-Germain were really entitled to consider the General Act of Berlin and the Declaration of Brussels of July 2nd, 1890, as abolished *inter se*, and to replace these instruments *inter se* by the articles of the Convention of Saint-Germain. In his view, the General Act of Berlin does not create a number of contractual relations between a number of States, relations which may be replaced as regards some of these States by other contractual relations; it does not constitute a *jus dispositivum*, but it provides the Congo Basin with a régime, a statute, a constitution. This régime, which forms an indivisible whole, may be modified, but for this the agreement of all contracting Powers is required. In his view, this is a legal situation of such importance that a tribunal should reckon with it *ex officio*. The only convention which the Court could apply is the Act of Berlin.

With regard to the question of equality of treatment, Jhr. van Eysinga considers that the General Act of Berlin prescribes complete equality of individual treatment for all persons in the Congo Basin, and that any inequality of treatment is a contravention of the Berlin Act. He notes that this individual equality was not modified by the Convention of Saint-Germain. It results from the foregoing that the inequality of treatment created by the Belgian Government's measure of June 20th, 1931, in favour of Unatra and to the detriment of Mr. Chinn's business, is in conflict with the international obligations of the Belgian Government towards the United Kingdom.

As regards the freedom of fluvial navigation, Jhr. van Eysinga considers that it is the freedom of *commercial* navigation which the General Act of Berlin of 1885 provided also for the Congo and its tributaries; and there is nothing to show that the authors of Article 5 of the Convention of Saint-Germain intended to alter that situation. In his view, the Belgian contention to the effect that the measure of June 20th, 1931, could in no case be in conflict with freedom of navigation (and distinguishing in this regard between the spheres of the management of the national fluvial shipping industry and of the régime of navigation) is arbitrary. With regard to the relationship between freedomg of navigation and freedom of commerce, Jhr. van Eysinga is of the view that freedom of navigation certainly possesses a commercial aspect; but it is an independent notion, and is not determined by the provisions relating to freedom of trade. From the foregoing it follows that, if it were established that the measure taken by the Belgian Government on June 20th, 1931, had the effect of concentrating in the hands of Unatra the fluvial transport business by rendering it commercially impossible for Mr. Chinn to engage therein, that measure would be inconsistent with the right of entirely free navigation conferred on Mr. Chinn by Article 13 of the General Act of Berlin, which is reaffirmed as regards legal situations such as that existing in the present case by Article 5 of the Convention of Saint-Germain.

Nevertheless, the allegations of the Government of the United Kingdom—that it was commercially impossible for Mr. Chinn to carry on his transport business and that this was a consequence of the measure taken by the Belgian Government on June 20th, 1931—have not been established. In these circumstances, the Agent for the United Kingdom suggested that the Court should order an enquiry into the facts. The Belgian Agent left the matter to the Court. According to Jhr. van Eysinga, in the present case, it would seem that there were several reasons in favour of such an enquiry. In his view, the Court cannot omit to use any means which may enable it to ascertain the objective truth.

*Dissenting opinion by M. Schücking*

M. Schücking does not concur in the opinion expressed by the Court in its judgment; on the other hand, he is entirely in agreement with the dissenting opinion of Jhr. van Eysinga.

He recalls that, as pointed out by Jhr. van Eysinga, the Congo Act intended to prohibit a limited group of its authors from making any changes in the Act; if that is so, a tribunal cannot refrain from considering what are the ensuing consequences as regards the validity of a convention concluded in violation of that prohibition by some of the authors of the Congo Act. M. Schücking observes that the doctrine of international law in regard to questions of this kind is not very highly developed. In his view, however, once it is recognized that the intention was to create a Statute of the Congo which should not be liable to be altered by some only of its authors, the will of the Powers must be interpreted as being that no convention can acquire valid existence that is contracted in disregard of the rule forbidding a limited group of signatories of the Act to modify its terms. Accordingly, in his view, the nullity contemplated by the Congo Act is an absolute nullity, that is to say, a nullity *ex tunc*, which the signatory States may invoke at any moment, and the convention concluded in violation of the prohibition is automatically null and void. The fact that, up to the present time, those signatories of the Berlin Act who did not participate in the Convention of Saint-Germain have not impugned the latter instrument, cannot, therefore, in any way remedy the absolute illegality of its conclusion.

M. Schücking adds that it is an essential principle of any court, whether national or international, that the judges may only recognize legal rules which they hold to be valid. Therefore, if the Convention of Saint-Germain is not merely an act which the signatory States of the Congo Act are entitled to impugn, but one which is, in itself, invalid, then, as Jhr. van Eysinga has already pointed out, the Court ought not to apply the Convention.

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## 64. MINORITY SCHOOLS IN ALBANIA

### Advisory Opinion of 6 April 1935 (Series A/B, No. 64)

**Eleventh Annual Report of the Permanent Court of International Justice (15 June 1934—15 June 1935), Series E, No. 11, pp. 136–143**

*The Albanian Declaration of October 2nd, 1921, concerning the protection of minorities—General principles of the Minorities Treaties—The conception of "equality in law" and "equality in law and in fact"—Obligation to allow minorities to establish and maintain private schools*

*History of the case*

On December 15th, 1920, the Assembly of the League of Nations requested certain States, including Albania, in the event of their being admitted to the League of Nations, to take the necessary measures to enforce the principles of the so-called minorities treaties, the prototype of which was that concluded on June 28th, 1919, between the Allied and Associated Powers and Poland; these States were at the same time invited to arrange with the Council the details required to carry this object into effect. On December 17th, 1920, Albania was admitted to membership of the League of Nations.

Negotiations then took place between the Secretary-General and the Albanian Government concerning the question of the protection of minorities. On May 17th, 1921, the Greek Government sent to the

Secretariat a memorandum expressing the opinion that it would not suffice simply to apply to Albania the general principles laid down in the minority treaties, but that in the case of Albania the minorities régime should be supplemented: in particular, the Albanian Government should promise to take the necessary measures for the construction and preservation of buildings used for Christian worship; members of minorities should be entitled to establish, to administer and to control at their own expense, charitable, religious or scholastic institutions of all kinds, to employ their own language and to practice their own religion freely without interference by the authorities, provided that the interest of public order was safeguarded; and the ecclesiastical, scholastic and juridical privileges and immunities granted by the Sultan to non-Mohammedan inhabitants should be recognized and respected. To this memorandum the Albanian Government replied on June 21st, 1921, that there was at that moment no obstacle to the construction and up-keep of buildings devoted to the Christian faith, and that the ecclesiastical and legal prerogatives and immunities would be dealt with in a special law. On June 27th, the Council decided that the question should be investigated by the Secretariat in conjunction with the interested Governments, and that a report upon it should be prepared for the next session of the Council.

The outcome of this investigation was that, on October 2nd, 1921, a Declaration was signed by the representative of the Albanian Government and duly noted by the Council the same day. The report to the Council stated that the Declaration met most of the suggestions made by the Greek Government in its memorandum of May 17th, 1921, with certain exceptions which were explained and accounted for; these exceptions, however, did not affect the points above mentioned. The Greek representative on this occasion expressed his gratitude to the Council, but drew its attention to the necessity, in his view, of maintaining in Albania the secular, religious and educational privileges which the Greek nation had enjoyed in all the territories of the former Turkish Empire.

The Albanian Declaration closely follows the corresponding clauses of the minorities treaties, more especially the Treaty with Poland, but differs from them in certain respects. Thus, in particular, Article 1 of the Declaration, in addition to the usual provision as to the supremacy of the minority clauses, lays down that no act of State shall prevail over them "now or in the future"; again, paragraph 2 of Article 5 of the Declaration—according to which Albania has to present to the Council within six months detailed information with regard to the legal status of the minorities in her territory—does not occur in the Polish Treaty, and paragraph 1 of the same Article speaks of the "equal right" of the minority to "maintain, manage and control" certain institutions or to "establish" them in the future", whereas the Polish Treaty only mentions the right to "establish, manage and control".

In accordance with the undertaking to submit information given in paragraph 2 of Article 5 of the Declaration, the Albanian Minister for Foreign Affairs, on July 7th, 1922, sent the Secretary-General a letter stating amongst other things that Albanian communities, including the Orthodox community, had "full rights of establishing schools of various grades teaching in the language of the people over whom their religious heads have rights of jurisdiction". The Council noted these statements. It also appears from data furnished to the Court that already before October 2nd, 1921, complete freedom existed for the establishment by private initiative of educational institutions using the Greek language.

In 1923, however, the Albanian Government began to manifest an intention to abolish the right to maintain and establish private schools. This intention did not take shape for some time: thus a new Constitution promulgated in 1928 maintained this right. In 1930, however, steps were taken to secularize education, and in 1933 the abolition of private schools was completed by means of an amendment to the Constitution of 1928 which henceforward contained the following clause:

> "The instruction and education of Albanian subjects are reserved to the State and will be given in State schools. Primary education is compulsory for all Albanian nationals and will be given free of charge. Private schools of all categories at present in operation will be closed."

As a result of these developments, petitions were addressed to the League of Nations on behalf of the minorities; in accordance with the procedure in force, they were referred to a Committee of three members, which decided to have the question of the scope of the Albanian Declaration concerning minorities in regard to certain points placed upon the Council agenda.

*The Request*

The Council considered the matter at its meetings on January 14th and 18th, 1935. On the latter date it decided to ask the Court for an advisory opinion on the following points:

> "(1) whether, regard being had to the above-mentioned Declaration of October 2nd, 1921, as a whole, the Albanian Government is justified in its plea that, as the abolition of the private schools in Albania constitutes a general measure applicable to the majority as well as to the minority, it is in conformity with the letter and the spirit of the stipulations laid down in Article 5, first paragraph, of that Declaration;
>
> (2) and if so, whether the Council of the League of Nations can, on the basis of the second paragraph of the said Article, formulate recommendations going beyond the provisions of the first paragraph".

In accordance with the usual procedure, the Request was communicated to Members of the League of Nations and to other States entitled to appear before the Court. The Registrar also sent to Albania and Greece, which were regarded by the President—the Court not being in session—as likely to be able to furnish information on the question referred to the Court for advisory opinion, the special and direct communication mentioned in Article 73, No. 1, paragraph 2, of the Rules.

Two written statements, one on behalf of the Albanian Government and the other on behalf of the Greek Government, were filed within a time-limit fixed for the purpose. The Court, which was then in session, decided that these two Governments should also present oral statements. These were presented at public sittings held on March 11th and 12th.

*Composition of the Court*

The Court was composed as follows for the examination of this case:

Sir Cecil Hurst, *President;* M. Guerrero, *Vice-President;* Baron Rolin-Jaequemyns, Count Rostworowski, MM. Fromageot, Altamira, Anzilotti, Urrutia, Schücking, Negulesco, Jhr. van Eysinga, *Judges*.

The Court being satisfied that the question submitted to it for advisory opinion did not relate to an existing dispute, it followed that the second paragraph of Article 71 of the Rules, concerning the appointment of judges in accordance with Article 31 of the Statute, was not applicable.

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*The Opinion (analysis)*

The Court delivered its opinion on April 6th, 1935.

It first of all summarizes the opposing contentions. The Albanian Government's contention was that the Declaration of October 2nd, 1921, imposed no other obligation upon it, in educational matters, than to grant to its nationals belonging to racial, religious or linguistic minorities, a right equal to that possessed by other Albanian nationals. Once the latter ceased to be entitled to have private schools, the former could

not claim to have them either. This conclusion was—the Albanian Government alleged—in complete conformity with the meaning and spirit of the treaties for the protection of minorities, the essential characteristic of which is the full and complete equality of all nationals of the State, whether belonging to the majority or to the minority. On the other hand, it argued, any interpretation which would compel Albania to respect the private minority schools would create a privilege in favour of the minority.

According to the Greek Government, the fundamental idea of the Declaration was, on the contrary, to guarantee freedom of education to the minorities by granting them the right to retain their existing schools and to establish others; equality of treatment, the Greek Government contended, was merely an adjunct to this right, and could not impede the purpose in view, which was to ensure full and effectual liberty in matters of education. It also argued that the application of the same régime to a majority as to a minority, whose needs were quite different, would only create an apparent equality, whereas the Declaration, consistently with ordinary minority law, was designed to ensure a genuine and effective equality, not merely a formal equality. It contended, moreover, that the differences between the Albanian Declaration and the other undertakings of the same kind were precisely intended to ensure the continuation of the religious and educational autonomy that was enjoyed by the Greek communities in Albania.

The Court next proceeds to interpret the Albanian Declaration. In so doing it disregards the differences above mentioned, because they do not affect the essential features of that Act. What the Council asked Albania to accept and what Albania did accept, was a régime of minority protection substantially the same as the régimes already accepted by other States: as the Declaration was designed to apply to Albania the general principles of the minorities treaties, this is the point of view which the Court adopts.

The idea underlying the treaties for the protection of minorities is to secure for certain elements incorporated in a State, the population of which differs from them in race, language or religion, the possibility of living peaceably alongside that population and co-operating amicably with it, while at the same time preserving the characteristics which distinguish them from the majority and satisfying the ensuing special needs. With this object, the treaties lay down in particular the two following principles: perfect equality between nationals belonging to the minority and other nationals; the grant to minorities of suitable means for the preservation of their racial peculiarities, their traditions and their characteristics. These two principles are moreover interlocked, for there would be no true equality between a majority and a minority, if the latter were deprived of its own institutions and were consequently compelled to renounce that which constitutes the very essence of its being as a minority.

The Court goes on to say that the Albanian Declaration is certainly governed by these principles. The first articles of the Declaration provide for a régime of legal equality for all Albanian nationals; no standard of comparison is indicated, but the rights which are to be enjoyed equally by all are specified. As regards the first paragraph of Article 5—which is specifically referred to in the question on which the Court's opinion is asked—it makes special provision for Albanian nationals belonging to the minority. It gives them "the same treatment and security in law and in fact" as other nationals. In the Court's opinion, and having regard to the context, this must be taken to mean a notion of equality which is peculiar to the relations between the majority and minority, and the characteristic feature of which is equality in fact. Equality in fact supplements equality in law; it excludes a merely formal equality. While equality in law precludes discrimination of any kind, equality in fact may involve the necessity of different treatment in order to attain a result which re-establishes an equilibrium between different situations. It is easy to imagine cases in which equality of treatment would result in inequality in fact: but the equality prescribed must be an effective genuine equality.

The first paragraph of Article 5 goes on to provide that members of the minority in Albania shall "in particular have an equal right to maintain, manage and control . . . or to establish in the future . . . schools . . .", so that it is natural to conclude that it envisages a particularly important illustration of the

application of the principle of identical treatment in law and in fact. The abolition of these schools, which alone can satisfy the special requirements of the minority groups, and their replacement by government institutions, would destroy this equality of treatment, for its effect would be to deprive the minority of the institutions appropriate to its needs, whereas the majority would continue to have them supplied in the institutions created by the State. Accordingly, far from creating a privilege in favour of the minority, this stipulation ensures that the majority shall not be given a privileged position as compared with the minority.

In the same connection, the Court also observes that the expression "equal right" implies that the right thus conferred on members of the minority cannot in any case be inferior to the corresponding right of other Albanian nationals. In other words, the members of the minority must always enjoy the right stipulated in the Declaration and, in addition, any more extensive rights which the State may accord to other nationals. The right provided by the Declaration is in fact the minimum necessary to guarantee effective and genuine equality as between the majority and the minority; but if the members of the majority should be granted a right more extensive than that which is provided, the principle of equality of treatment would come into play and would require that the more extensive right should also be granted to the members of the minority.

The Court also considers that the history of the clause confirms the construction it has placed upon it. The Court therefore finds that paragraph 1 of Article 5 of the Declaration of October 2nd, 1921, ensures for Albanian nationals of racial, religious or linguistic minorities the right to maintain, manage and control at their own expense, or to establish in the future, charitable, religious and social institutions, schools and other educational establishments, with the right to use their own language and to exercise their religion freely therein, and that, consequently, the contention of the Albanian Government is not well-founded. The answer to the first question of the Council of the League of Nations being in the negative, the second question formulated by the Council does not arise.

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*Dissenting opinions*

The opinion of the Court was adopted by eight votes to three.

Sir Cecil Hurst, President of the Court, Count Rostworowski and M. Negulesco, Judges, declared that they were unable to concur in the opinion and appended thereto a joint dissenting opinion.

*Dissenting opinion by Sir Cecil Hurst, Count Rostworowski and M. Negulesco*

Sir Cecil Hurst, Count Rostworowski and M. Negulesco find no adequate reason for holding that the suppression of the private schools effected in Albania in virtue of Articles 206 and 207 of the Constitution of 1933 is not in conformity with the Albanian Declaration of October 2nd, 1921.

In interpreting the first paragraph of Article 5 of the Declaration, the dissenting judges observe that the first sentence stipulates for the treatment and the security being the same for the members of the minority as for the other Albanian nationals. The second provides that as regards certain specified matters the members of the minority shall have an equal right. The second sentence is a particular application of the principle enunciated in the first.

The dissenting judges observe that, as the opinion of the Court is based on the general purpose which the minorities treaties are presumed to have had in view and not on the text of Article 5, paragraph 1, of the Albanian Declaration, it involves to some extent a departure from the principles hitherto adopted by this Court in the interpretation of international instruments, that in presence of a

clause which is reasonably clear the Court is bound to apply it as it stands without considering whether other provisions might with advantage have been added to it or substituted for it, and this even if the results following from it may in some particular hypothesis seem unsatisfactory.

Analyzing the Albanian Declaration, the dissenting judges hold that the value of the addition provided by Article 5 is that it emphasizes the principle that the members of the minority—over and above the theoretical equality mentioned in Article 4—are to enjoy the same *treatment* and the same *security* in law and in fact as the other Albanian nationals: that means that, on the one hand, in actual practice they are to be treated in the same manner as their fellow-nationals and, on the other hand, there is to be given to them equal opportunity to give effect to their rights and to have them respected. There is nothing, however, in the wording of the provision to show that this equality in law may be disregarded and replaced by a system of different treatments for the minority and the majority so as to establish an equilibrium between them.

According to the dissenting judges, the suppression of the private schools—even if it may prejudice to some appreciable extent the interests of a minority—does not oblige them to abandon an essential part of the characteristic life of a minority. In interpreting Article 5, the question whether the possession of particular institutions may or may not be important to the minority cannot constitute the decisive consideration. There is another consideration entitled to equal weight. That is the extent to which the monopoly of education may be of importance to the State. The two considerations cannot be weighed one against the other: Neither of them—in the absence of a clear stipulation to that effect—can provide an objective standard for determining which of them is to prevail.

The dissenting judges then address the drafting history of the Albanian Declaration, in light of minority treaties. They observe that a comparison of the text of the Albanian Declaration with the Polish Minority Treaty of June 28th, 1919, shows that it follows closely the wording of the latter. They consider that Article 5 of the Albanian Declaration, which is in line with Article 8 of the Polish Treaty, does not show the intention to grant an unconditional right to the minority to maintain institutions and schools. The object is stated to be that of excluding discrimination, i.e. differential treatment.

The opinion turns to the question of whether the text of the Albanian Declaration, taken as a whole and apart from such indications as exist of the intentions of the minority treaties and declarations in general, affords any support to the view that "equal right" in Article 5 was intended to convey an unconditional right and not to mean that the rights of the minority were to be equal to the rights possessed by the other Albanian nationals. The dissenting judges are of the view that Article 5 is conceived on a different plan than Articles 2, 3 and 4 of the Declaration, in that it introduces a standard of comparison by prescribing that the treatment or the security is to be the same as that enjoyed by the other Albanian nationals. They conclude, therefore, that there are no sufficient reasons for discarding the natural meaning of the words employed in the second sentence of paragraph 1 of Article 5.

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*Effects*

A report upon the opinion of the Court was laid before the Council of the League of Nations at the third meeting of its 86th Session (May 23rd, 1935). The report reproduces the following statement made to the rapporteur (the Spanish representative) by the Albanian delegate to the Council:

> "The Albanian Government, which in its legislation concerning public education had adopted the principle of State-regulated education based on the interpretation given by it to article 5 of the Albanian Declaration of October 2nd, 1921, has decided to adopt provisions corresponding to the present situation.

On the other hand, as the adoption of the said provisions requires a certain time, the Albanian Government considers that the question of the minority schools in Albania should be adjourned to the September session of the Council."

The rapporteur adds that "the vague terms in which this declaration of the Albanian Government is couched"—and which he personally regrets—"make it impossible to form an idea of the practical scope of the provisions therein announced". In these circumstances, he considers that the Council would be well advised to adjourn the framing of any recommendations under Article 5, paragraph 2, of the Albanian declaration on minorities until its next ordinary session, so as to give the Albanian Government the necessary time to submit to the Council information enabling it to gain an exact idea of the real practical bearing of the provisions proposed. Only then will the Council be in a position to decide with a full knowledge of the facts what should be the tenor of the recommendations it will have to make to the Albanian Government or, possibly, whether the provisions announced by that Government will be such as to make those recommendations unnecessary. The rapporteur considers however that one special point should be mentioned forthwith: It must be understood that the measure contemplated by the Albanian Government, as also any measures that it may ultimately have to take as a result of the Council's recommendations, will be put into effect in the school year starting in October next.

After the report had been read, the Albanian representative asked permission to make one remark on the passage in the report drawing attention to the vagueness of the Albanian declaration. He held that, though the declaration was short, it was sufficiently clear and definite and met the circumstances. It was necessary to take into account the situation of the Government, which was obliged to ask for a vote from the legislature, or perhaps even from the Constituent Assembly, upon any amendment to the laws on national education. Such being the case, a premature declaration might do more harm than good and might defeat the purest intentions of a government in regard to the protection of the minorities placed under its sovereignty. For these reasons the Albanian representative asked that this question be postponed till the Council's next session, as that procedure should facilitate its settlement.

The Turkish representative then said that, after hearing the remarks of the Albanian representative, his mind was much clearer as to the significance of the expression "provisions corresponding to the present situation" which appeared in the report. He understood that phrase to mean that the Albanian Government intended to conform spontaneously to the opinion of the Court. The Italian representative next stated that he was sure that the Albanian Government, in this spontaneous declaration, intended to give the Council an assurance that it would observe the undertakings it had freely assumed.

The rapporteur then took note of the fact that Albania was actuated by the purest intentions with a view to ensuring for the minorities as satisfactory a position as legislative and constitutional possibilities allowed. The Turkish representative also explained that his previous remarks were to be understood as signifying that he hoped that, at the next session, the Council would be able to record that the Greek Government was satisfied with the results of the Albanian Government's efforts as regards the legislative and other provisions which the latter Government was about to introduce in order to ensure the protection of the minorities in question.

In these circumstances, the Council adopted the proposal that discussion of the question should he adjourned until its next session.

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## EFFECTS OF THE ADVISORY OPINION OF APRIL 6th, 1935

**Twelfth Annual Report of the Permanent Court of International Justice (15 June 1935—15 June 1936), Series E, No. 12, pp. 161–168**

Following the opinion given by the Court on April 6th, 1935, in the case concerning Minority Schools in Albania, a declaration on the subject made on behalf of the Albanian Government was laid before the Council of the League of Nations. On May 23rd, 1935 (3rd meeting of the 86th Session), the Council held that the vague terms in which this declaration was couched made it impossible to form an idea of the practical scope of the provisions announced by the Albanian Government. Accordingly, the Council adjourned the question to its next session, so as to give the Albanian Government time to furnish it with information on this subject. The Council would then be in a position either to frame the recommendations which it might have to make to the Albanian Government under Article 5 of the Declaration of October 2nd, 1921, concerning the protection of minorities in Albania, or on the contrary to see whether the provisions announced by the Albanian Government were such as to make these recommendations unnecessary.

On August 30th, 1935, the Albanian Government sent to the Secretary-General of the League of Nations a draft regulation on private minority schools. This was laid before the Council on September 23rd, 1935 (2nd meeting of the 89th Session). At this meeting, and subject to certain amendments, the Council found that the part of the draft relating to linguistic minorities was reasonable and in conformity with the Declaration of October 2nd, 1921, as construed by the Court, but that, as regards the provisions concerning Catholic confessional schools, this was not the case. As the position of the Catholic schools was then the subject of negotiations between Tirana and the Vatican, the Council confined itself to instructing the Rapporteur to keep in touch with the Albanian Government and to report on the stage which the question had reached at the next session.

On January 23rd, 1936, the matter once more came before the Council (5th meeting of the 90th Session). At that meeting the Council took note of certain provisions which the Albanian Government had adopted in the form of a regulation and expressed the opinion that they represented a solution of the question of private linguistic minority schools in perfect conformity with the proposals previously made by the Rapporteur. With regard however to the question of Catholic confessional schools, the Council found that the situation was stationary; it expressed the hope that it would be able to place on record the successful settlement of the question at its session in May 1936.

The provisions adopted by the Albanian Government and noted by the Council are as follows:

"REGULATION ON PRIVATE SCHOOLS FOR MINORITIES

*Article 1.*—Under Article 5 of the Albanian Declaration made to the League of Nations on October 2nd, 1921, private schools for minorities in the Kingdom may be conducted, in accordance with this Regulation, by schoolmasters chosen by the minority and approved by the Ministry of Education.

*Article II*—Requests for permission to open private minority schools shall be made by the Council of Elders of the locality and shall be addressed to the Ministry of Education through the Prefecture. In villages with a mixed population, the request shall be made by the minority members of the Council of Elders and, should the minority not be represented on this local council, the latter shall elect a special Council of Elders exclusively for this purpose.

This request must state:

(*a*) the desire to open a private minority school to be maintained at the expense of the local population;

(*b*) the number of children of both sexes of compulsory school-age according to the law;

(*c*) the name and short personal history of the schoolmaster or schoolmasters;

(*d*) the monthly sum which the population undertakes to pay to the schoolmaster.

There shall be appended to this request the documents attesting the scholastic attainments of the schoolmaster or schoolmasters selected.

*Article III.*—Every candidate for a post of schoolmaster in a private minority school must fulfil the following conditions:

(*a*) possess Albanian citizenship;

(*b*) be twenty-one years of age and without any disqualification from a military point of view;

(*c*) be able, to a certain extent at least, to read and write the Albanian language; this condition shall come into force in three years' time;

(*d*) must not be excluded from public office;

(*e*) possess a diploma of a training-college; this requirement shall not become effective until two years after the entry into force of this Regulation;

(*f*) must not have performed military service in a foreign country;

(*g*) must not have had, or have, any relations with anti-Albanian organizations;

(*h*) must be paid solely by the local population which is opening the private minority school.

*Article IV.*—A candidate fulfilling the conditions laid down in Article III shall be approved by the Ministry of Education after the contract concerning his duties and monthly salary has been concluded with the Council of Elders of the locality. The contract shall be signed in the presence of the local administrative authorities. In villages with a mixed population, the contract shall be drawn up by the minority members of the Council of Elders and, should the minority not be represented on this local council, the latter shall elect a special Council of Elders exclusively for this purpose.

*Article V.*—A schoolmaster of a minority school shall take up his duties after obtaining the decree of the Ministry of Education. The decision of the Ministry of Education concerning the issue of the decree shall be taken within a period of one month as from the date on which the relevant request was submitted by the Council of Elders.

*Article VI.*—Although the local population shall have the right to supervise the activities of its schoolmaster and private school, there shall also be official supervision, both from a scholastic and administrative point of view, exercised in absolute conformity with the provisions of the law, by the Ministry of Education through the agency of an inspector from the said Ministry.

*Article VII.*—The relevant provisions of the organic law on education, with the exception of the withholding of salary and transfer, shall apply in the case of any schoolmaster who, after official investigation, shall have been proved to be not fulfilling his duties according to the existing laws or to have been guilty of incorrect moral or political conduct.

*Article VIII.*—The provisions of the organic law on education shall apply, as regards the school year, to scholars' reports, classification, examinations, the school system and curricula, and the compulsory school-age. The school curriculum shall be the official curriculum for State schools,

but in all subjects and in all classes the pupils shall be taught solely in the language of the minority. Religious instruction not included in the official curriculum may be given in the language of the minority.

*Article IX.*—Minority schools shall employ the books and other scholastic material drawn up in the language of the minority according to the official programme, only after these have been approved by the Ministry of Education.

The Ministry of Education shall be responsible for the preparation of the texts of school-books in the minority language in conformity with the official curriculum.

Pending the preparation of these texts, the Ministry of Education may approve such existing texts in the minority language as may be best adapted to the official curriculum.

*Article X.*—In the case of localities inhabited by minorities who expressly state that they do not desire or cannot afford to maintain private schools, the Ministry of Education, on the strength of Article 6 of the Albanian Declaration of October 2nd, 1921, shall open State schools in which the whole curriculum shall be taught in the minority language. For this purpose, the Ministry of Education shall send to these schools schoolmasters possessing the necessary qualifications.

*Article XI.*—In minority schools, the Ministry of Education shall be entitled to cause Albanian to be taught as a compulsory subject.

*Article XII.*—This Regulation shall come into force from the beginning of the school year 1935–1936.

*Article XIII.*—The Ministry of Education shall be responsible for the carrying-out of this Regulation."

On May 13th, 1936 (3rd meeting of the 92nd Session), the Council had before it a letter from the Albanian Minister for Foreign Affairs to the Secretary-General dated May 6th, 1936, and the text of a law on the operation of the schools which had just been promulgated by the Albanian Government. These documents were as follows[2]:

### LETTER FROM THE MINISTER FOR FOREIGN AFFAIRS OF ALBANIA TO THE SECRETARY-GENERAL OF THE LEAGUE OF NATIONS

"Tirana, May 6th, 1936

Sir,

I have the honour to inform you that the Royal Government of Albania, paying special attention to the interest taken by the League of Nations in the operation of the confessional schools in Albania, has taken particular pains to find a suitable solution for the problem.

With that object, in accordance with the statement made by the delegate of Albania to the Council of the League of Nations at its session in September 1935, and repeated on January 23rd, 1936, the Albanian Government was anxious to arrive at a settlement of the question by concluding a Concordat with the Holy See.

Despite the Albanian Government's good will, however, it has not proved possible to attain this object. On the other hand, the Albanian Government, not wishing to leave the question of the schools unsettled any longer, has lately taken steps to provide a final solution.

[2] The text of the law reproduced below contains two additions which the Albanian Government had made subsequently and to which it drew the attention of the Rapporteur, who informed the Council at the meeting on May 13th, 1936.

I have therefore the honour to inform you that the Royal Government recently promulgated a law, which is now in force, whereby every Albanian national, whether a natural or a juridical person, has the right to open and maintain schools. This category includes religious communities.

My Government is convinced that the provisions of the law in question are such as will give satisfaction to the Council, and that consequently the latter will be able, at its next session, to record this fact as a final settlement of the school problem in Albania.

I have the honour, etc.

(Signed) F. ASLANI
Minister for Foreign Affairs

[Translation]

DECREE-LAW ON SCHOOLS

1.—The rights of the State in connection with public instruction shall be exercised through the officials of the Ministry of Public Instruction in schools and educational institutions of all kinds.

These rights may also be exercised with the approval of the Ministry of Public Instruction, previously endorsed by the Council of Ministers, in schools or institutions opened and maintained by natural or legal persons explicitly empowered for the purpose.

2.—The opening of schools and institutions authorized in the above manner is allowed in the following circumstances:

(*a*) where the parents of not less than forty children express a wish to send their children to a school of this kind;

(b) where the need for the opening of the school is proved, having regard to the educational requirements of the population and the geographical position of the place in which the school is to operate.

3.—Authorized schools shall be of two kinds:

(*a*) ordinary schools, which follow the official State programme of education in its entirety;

(*b*) special schools, which follow a different programme, or have a different time-table previously approved by the Ministry of Public Instruction.

4.—To obtain permission to open an authorized school, the applicant, if acting in his own behalf, must comply with the following conditions:

(*a*) he must be of Albanian nationality and be able to read and write the Albanian language;

(*b*) he must be in possession of civic rights and be of good reputation;

(*c*) he must prove that he has sufficient financial means for the establishment and upkeep of the school.

When permission is applied for on behalf of a community or legal person, the representative of the body concerned must show that such community or legal person fulfils condition (*c*) above.

5.—Authorized schools must in all cases have a responsible head, who must comply with the conditions laid down by the present decree-law for teachers.

6.—Instruction in authorized schools shall be given solely by teachers who are authorized to teach by the Ministry of Public Instruction.

7.—Teachers' certificates shall be issued to persons complying with all the conditions laid down in the organic decree-law on teaching published September 28th, 1934[3].

Teachers' certificates shall also be issued to lay or religious teachers of religion, science, or other subjects engaged for the purpose of teaching the same in authorized schools, provided they prove they have completed a course of training in a seminary, teachers' training college or higher educational institution according to the subject or branch of study they are authorized to teach.

8.—Foreign teachers must have special permission from the Ministry of Public Instruction to teach in authorized schools.

Such permission shall be granted on the strength of their educational credentials, and at the request of the person authorized to keep the school, when the Ministry of Public Instruction is convinced of the need for making use of foreign teachers.

9.—In the authorized schools, instruction cannot be given in a foreign language without previous authorization by the Ministry of Public Instruction.

In special schools authorized by the State, the teaching of the Albanian language, Albanian history and geography and branches of these studies shall be compulsory for Albanian pupils, and shall be given by teachers of Albanian nationality in the Albanian language only.

The teaching of Albanian pupils in primary schools shall be in Albanian only.

10.—School certificates issued by authorized schools shall be recognized only after examinations passed in official schools.

11.—Text books for use in authorized schools must be submitted beforehand to the Ministry of Public Instruction.

Text books not so submitted and test books which are prohibited may not be used.

12.—All authorized schools without exception shall be subject to supervision by the Ministry of Public Instruction acting through its regular officials.

13.—The head of an authorized school shall be responsible for its satisfactory working and for its compliance with the provisions of the present decree-law.

14.—Wherever the Ministry of Public Instruction observes defects in the observance of the provisions of the present decree-law, or failure to comply therewith, it may take disciplinary action. If the offence is repeated, or the disciplinary action prescribed is not enforced by the management

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[3] Organic decree-law on public instruction published in the Official Journal of the Kingdom under Heading No. 54, dated September 28th, 1934:

"*Article 96.*—After the entry into force of this law, the following shall be nominated as teachers:

(1) those who have completed the teachers' course (*école normale*);

(2) those who have won diplomas from a school of higher education and who, having undergone a teachers' course, have obtained their degrees (*école normale des instituteurs*).

*Article 364.*—The headmaster and masters must be in possession of diplomas from a recognized secondary school, and must have undergone as regular pupils a suitable university or higher school course, having passed all examinations required for an academic degree recognized according to the laws of the State in which the university or higher school is situated.

Those who are nominated after the entry into force of this decree-law shall be considered as substitutes during the first two years of their service."

*N.B.*—Article 96 refers to elementary schools: Article 364 refers to secondary schools.

of the school in question, the matter shall be referred to the Council of Ministers, which shall have the right to close the school temporarily or permanently.

15.—Provisions of existing laws which conflict with the provisions of the present decree-law are hereby repealed.

16.—The present decree-law shall come into force on the date of its publication in the Officia1 Gazette.

17.—The Ministry of Public Instruction is entrusted with the application of the present decree-law."

The Rapporteur in his report to the Council expressed the opinion that the provisions of the law adequately fulfilled the stipulations of the Albanian Declaration of October 2nd, 1921, and that they could therefore be regarded as providing a satisfactory solution of the question of confessional schools in Albania. In particular, he pointed out that, according to the explanations given him by the Albanian representative, the provisions contained in Article 9 of the law, regarding the use of the Albanian language in schools, either exclusively, or compulsorily for certain subjects, were not intended to affect the provisions contained in the previous Regulation concerning the free use of the mother-tongue of pupils in the minority schools. This Regulation being based on the Albanian Declaration of October 2nd, 1921, its clauses took precedence, as regards the minorities concerned, over all other laws and regulations in force.

In these circumstances, the Council declared the examination of the question closed and conveyed to the Albanian Government its keen appreciation of the good will which that Government had displayed.

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## 65. CONSISTENCY OF CERTAIN DANZIG LEGISLATIVE DECREES WITH THE CONSTITUTION OF THE FREE CITY

### Advisory Opinion of 4 December 1935 (Series A/B, No. 65)

**Twelfth Annual Report of the Permanent Court of International Justice (15 June 1935—15 June 1936), Series E, No. 12, pp. 169–173**

*The international element in the question raised as to the constitutionality of the decrees of August 9th, 1935 (Ishii report of November 17th, 1920; Advisory Opinion of the Court of February 4th, 1932)—Changes made by these decrees in the penal law previously in force—Principles of the Constitution of Danzig: the Free City is a* Rechtsstaat *(State governed by the rule of law); the Constitution guarantees the fundamental rights of individuals (Art. 71, 74, 75 and 79)—Inconsistency of the decrees with this latter principle and with the provisions which express it*

*History of the case*

On August 29th, 1935, the Senate of the Free City of Danzig adopted two decrees, which came into force on September 1st, 1935, modifying the criminal law in force at Danzig. One of these decrees concerned the Penal Code; in particular it replaced Article 2 of this Code—according to which "an act is only punishable if the penalty applicable to it has been prescribed by a law in force before the commission of the act"—by the following clause:

"Any person who commits an act which the law declares to be punishable or which is deserving of penalty according to the fundamental conceptions of a penal law and sound popular feeling, shall be punished. If there is no penal law directly covering an act, it shall be punished under the law of which the fundamental conception applies most nearly to the said act."

The object of the second decree was, amongst other things, to embody the following clauses in the Code of Criminal Procedure:

"*Article* 170 a.—If an act which, according to sound popular feeling, is deserving of penalty is not made punishable by law, the Public Prosecutor shall consider whether the fundamental conception of any penal law covers the said act and whether it is possible to cause justice to prevail by the application of such law by analogy (Art. 2 of the Penal Code).

*Article* 267 a.—If, in the course of the trial, it appears that the accused has committed an act which, according to sound popular feeling, is deserving of penalty but which is not made punishable by law, the Court must satisfy itself that the fundamental conception of a penal law applies to the act and that it is possible to cause justice to prevail by the application of such law by analogy (Penal Code, Art. 2).

Article 265, paragraph 1, shall apply *mutatis mutandis*."

These decrees had been issued under the "law for the relief of the distress of the population and the State", of June 24th, 1933, usually described as an "enabling law"; incidentally, other similar laws had already before 1933 given the Senate power to legislate by decree in regard to certain matters.

On September 4th, 1935, the National German, the Centre and the Social-Democrat Parties at Danzig presented a petition to the High Commissioner of the League of Nations, contending that the amendments to the criminal law made under the decrees of August 29th, 1935, fundamentally altered the whole system of the administration of justice in criminal cases and opened the doors wide to arbitrary decisions; the introduction of these amendments constituted, on the submission of the petitioners, a violation of the Constitution of the Free City. The petition concluded with a request to the High Commissioner to support the efforts of the petitioners "for the maintenance of legal and constitutional conditions in the Free City".

The High Commissioner, in a letter dated September 5th, 1935, invited the Senate as soon as possible to present any observations which it might wish to make in regard to the petition. And on September 7th, 1935, the High Commissioner sent to the Council of the League of Nations the text of the decrees of August 29th, 1935, together with the petition and the observations of the Danzig Senate.

*The request*

The Council considered the question on September 23rd, 1935; it then decided to ask the Court for an advisory opinion "on the question whether the said decrees are consistent with the Constitution of Danzig, or, on the contrary, violate any of the provisions or principles of that Constitution".

In accordance with the usual procedure, the Council's request was communicated to Members of the League of Nations and to other States entitled to appear before the Court. Furthermore, the Registrar sent to the Free City of Danzig, which was regarded by the President—the Court not being in session—as likely to be able to furnish information on the question referred to the Court for advisory opinion, the special and direct communication mentioned in Article 73, No. 1, paragraph 2, of the Rules then in force.

Before the expiry of the time-limit fixed for the purpose, a written statement was filed on behalf of the Free City. Furthermore, the Registrar, on the instructions of the President, had requested the

Secretary-General of the League of Nations to inform the petitioners that if they desired to supplement the statement contained in their petition, the Court would be prepared to receive an explanatory note from them; two documents constituting this note were transmitted to the Court by the petitioners. Finally, at public sittings held on October 30th and 31st and November 1st, 1935, the Court heard the oral statements presented by the representative of the Free City.

*Composition of the Court*

The Court was composed as follows for the examination of the case:

Sir Cecil Hurst, *President*; M. Guerrero, *Vice-President*; Baron Rolin-Jaequemyns, Count Rostworowski, MM. Fromageot, de Bustamante, Altamira, Anzilotti, Urrutia, Jhr. van Eysinga, MM. Wang, Nagaoka, *Judges*.

By a letter dated October 5th, 1935, the Senate of the Free City of Danzig had requested the Court to authorize it to appoint a judge *ad hoc* to sit in the case. At the invitation of the Court, the arguments in support of this request were fully expounded by the Agent for the Free City at the hearing of October 30th. On the following day, the President of the Court announced at the hearing that, after deliberation, the Court had decided that there was no ground for granting the request made on behalf of the Free City and that this decision would be embodied in an order which would be drawn up later. This order, which was dated October 31st, 1935, is annexed to the opinion. The Court observes therein that its decision must be in accordance with its Statute and its Rules, and that the constitution of the Court is governed by the Statute, which, in Article 31, makes provision for the presence of judges *ad hoc* on the Bench only in cases in which there are parties before the Court. That condition is not fulfilled in the present case.

Though the Court, by its Rules, has made the provisions concerning the appointment of judges *ad hoc* applicable to advisory proceedings, it has only envisaged cases in which such proceedings relate to an existing dispute between two or more States or Members of the League of Nations. At present, that provision constitutes the only exception to the general rule; it cannot therefore be given a wider application than is laid down for it.

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*The opinion (analysis)*

The Court delivered its opinion on December 4th, 1935.

After setting out the facts, the Court observes that the Constitution of the Free City occupies a special position in regard to the League of Nations. Though the interpretation of this Constitution is an internal question, it may nevertheless involve the guarantee of the League of Nations. It is also clear that when the constitutionality of the decrees is challenged, this may raise questions the solution of which depends upon the interpretation of its Constitution; accordingly the petition leading to the submission of the request for an opinion necessarily involves the League's guarantee. This suffices to establish the international element in the case, which element is not excluded by the fact that the Court will have to examine municipal legislation of the Free City, including the Constitution.

Any inconsistency between the decrees and the Constitution may be due either to an inconsistency between the terms of the decrees and the articles of the Constitution or its principles, or to the fact that the decrees overstep the limits of the powers granted, or to the fact that these powers may themselves be contrary to the Constitution. Observing firstly that the question put is whether the decrees are necessarily in conflict with the Constitution so that they cannot be applied without violating it, and, secondly, that if any article or principle of the Constitution is violated by the decrees, that will suffice

to show that the latter are not consistent with the Constitution, the Court states that it will consider the question from the point of view of the contents of the decrees.

Accordingly, it sets out to ascertain the changes brought about by the decrees in the criminal law of the Free City. The decrees substitute the rule *Nullum crimen sine pœna* for the rules *Nullum crimen sine lege* and *Nulla pœna sine lege*: a person may be prosecuted not only, as heretofore, under an express provision of the law, but also in accordance with the fundamental idea of a law and with sound popular feeling, and a system under which the criminal character of an act and the penalty attached to it were known both to the judge and to the accused person is replaced by a system in which this knowledge will be possessed by the judge alone. Moreover, sound popular feeling is a very elusive standard and one which will vary from man to man.

Such being the tenor of the decrees, what principles emerge from the Constitution? The Constitution endows the Free City with a form of government under which all organs of the State are bound to keep within the confines of the law (*Rechtsstaat*, State governed by the rule of law). In the next place, it provides for a series of fundamental rights the free enjoyment of which it guarantees within the bounds of the law; it also lays very special emphasis on the importance and the inviolability of the individual liberties which ensue from these fundamental rights. All these rights are not absolute and unrestricted; but restrictions can only be imposed by law. This is stated in a large number of articles of the Constitution, and this is precisely the import of the guarantee afforded to these liberties or fundamental rights.

The rule that a law is required in order to restrict the liberties provided for in the Constitution therefore involves the consequence that the law itself must define the conditions in which such restrictions of liberties are imposed. If this were not so, i.e. if a law could simply give a judge power to deprive a person of his liberty without defining the circumstances in which his liberty might be forfeited, it could render entirely nugatory the guarantees provided by the Constitution. But the decrees, so far from supplying any such definition, empower a judge to deprive a person of his liberty even for an act not prohibited by the law, provided that he relies on the fundamental idea of a penal law and on sound popular feeling. These decrees therefore transfer to the judge an important function which, owing to its intrinsic character, the Constitution intended to reserve to the law so as to safeguard individual liberty from any arbitrary encroachment on the part of the authorities of the State.

It is true that a criminal law does not always regulate all details. By employing a system of general definition, it sometimes leaves the judge not only to interpret it, but also to determine how to apply it. The question as to the point beyond which this method comes in conflict with the principle that fundamental rights may not be restricted except by law may not be easy to solve. But there are some cases in which the discretionary power left to the judge is too wide to allow of any doubt but that it exceeds these limits: in the view of the Court the present is such a case.

The Court accordingly arrives at the conclusion that the decrees are not consistent with the Constitution of Danzig, of which they violate certain provisions and principles.

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*Dissenting opinions*

The Court's opinion was adopted by nine votes to three.

Count Rostworowski, M. Anzilotti and M. Nagaoka declared that they were unable to concur in the opinion and appended thereto statements of their individual opinions.

*Individual opinion by M. Anzilotti*

M. Anzilotti considers that the Court should not have given the opinion for which it was asked by the Council. With reference to a memorandum by Judge J.B. Moore submitted to the Court on February 18th, 1922 (reproduced in *Series D, No. 2*, pp. 383–398), M. Anzilotti considers that Article 14 of the Covenant is not to be regarded as placing the Court under an obligation in all circumstances to give advisory opinions, but that it allows the Court a measure of discretion and consequently the option of refusing to do so when circumstances render that course advisable or essential. In his view, in the present case, there were very good reasons why the Court should not have given the opinion for which it was asked.

According to M. Anzilotti, the question submitted to the Court is one purely of Danzig constitutional law; international law does not come into it at all. While acknowledging that the Court may have—and has often had—to decide as to the meaning and scope of a municipal law, M. Anzilotti observes that it has however done so only if and in so far as this is necessary for the settlement of international disputes, or in order to answer questions of international law. The interpretation of a municipal law as such and apart from any question or dispute of an international character is no part of the Court's functions: it is fitted neither by its organization nor by its composition to undertake this; its authority and prestige have nothing to gain therefrom.

M. Anzilotti sets out that the Constitution of the Free City of Danzig has been placed under the guarantee of the League of Nations, which customarily exercises it through the Council, and that this guarantee forms the subject of an international stipulation, namely Article 103 of the Treaty of Peace of Versailles. This fact, however, would seem to be irrelevant so far as the point under consideration is concerned. For the question referred to the Court is entirely unconnected with the nature and scope of the guarantee of the League of Nations, or with the interpretation of the article providing for this guarantee. Although it is the right and obligation of the Council to obtain any information which it considers useful or necessary, it is equally true that it must do this by appropriate methods, and must not seek to impose on the Court duties differing from those for which it was created and organized.

The opinion turns to two further deviations from the rules of the Court that have occurred in this opinion. First, in regard to the method in which the Court has to proceed when it has to interpret a municipal law, M. Anzilotti observes that, in performing its function as an organ of international law, the Court may have to consider municipal laws from two entirely distinct standpoints. In the first place, it may have to examine municipal laws from the standpoint of their consistency with international law. Secondly, the Court may find it necessary to interpret a municipal law, quite apart from any question of its consistency or inconsistency with international law, simply as a law which governs certain facts, the legal import of which the Court is called upon to appraise. He holds that in this matter however, the only issue is that of the consistency of certain Danzig legislative decrees with the Constitution of Danzig.

M. Anzilotti further avers that the Court appears to have held that it ought not to concern itself with the jurisprudence of the Danzig courts, but that it should freely interpret the Constitution and decrees in question. It is indeed highly probable that this was the Council's intention when it sought the opinion of the Court. He states that it is very difficult to agree that the Court, which is a judicial body and an organ of international law, should undertake to give its own interpretation of a municipal law, with which it is not reputed to be acquainted and of which it is certainly not an organ.

As regards the second deviation, concerning its own rules of procedure, M. Anzilotti points out that those who could supply the Court with the necessary information, and who were in a position to put forward arguments and counter-arguments in support of one standpoint or the other, were the National-Socialist Party, on the one hand, and the three minority parties, on the other hand. In con-

sequence a special and direct communication was sent to the Senate informing it that the Court was prepared to receive a written memorial and to hear an oral statement at a public sitting to be held for that purpose. On the other hand, as the minority parties did not fulfil the conditions laid down in Article 73, paragraph 1, sub-paragraph 2, of the Rules of Court, the communication provided for therein was not sent to them. In this way, the two Parties to the dispute, to which the question before the Court relates, were placed on a footing of manifest inequality. According to M. Anzilotti, the hearing of both sides and the submission of the arguments in support of the respective contentions is designed to furnish the Court with all data for its decision and is therefore provided for in the essential interests of justice and consequently of the Court.

M. Anzilotti concludes that the essential point is that the Court, in order to be able to give this Opinion, was obliged either to set aside its Rules and create a procedure *ad hoc,* or to deviate from a rule so fundamental as that of the equality of parties; and the reason for this was that the case concerned a question of municipal law arising in connection with a domestic political dispute. The Court therefore should not have given the opinion.

*Declaration by Count Rostworowski*

Count Rostworowski declares that he is unable to concur in the Opinion given, because, in his view, the two decrees in question of 1935 are not, in substance, inconsistent with the Constitution of the Free City of Danzig and do not violate any of its provisions or conflict with any of its principles.

On the other hand, he considers that these same decrees of 1935, having been issued by the Senate alone, are, as regards the form of their enactment, contrary to Article 43, paragraph 1, of the Constitution, which requires that legislation must receive the concurrent assent of the *Volkstag* and the Senate. He finds that there being no provision in the Constitution authorizing this law, it appears to be a deviation from the terms of the Constitution which can only be made lawful by means of the express approval of the League of Nations. In the absence of such approval, the law of 1933 does not suffice to render the impugned decrees of 1935 lawful and accordingly they remain, as regards the form of their enactment, inconsistent with the Constitution of Danzig.

*Individual opinion by M. Nagaoka*

M. Nagaoka states that the view that the expression "law", as used in Part II of the Constitution of Danzig, means a law passed in accordance with Article 43 of that Constitution is not convincing; for it is impossible that a law of the kind contemplated in this part of the Constitution should always go into full detail. He notes that this is why it is generally recognized that a penal law may leave details to be provided for by means of administrative regulations. It is also the fact that a penal law may—and that penal laws do in fact frequently—leave the details of its application to the courts.

M. Nagaoka sets out that, in order to ascertain whether the two decrees are inconsistent with the Danzig Constitution, it must be ascertained whether these legislative decrees leave too much latitude to the courts, allowing them so absolute a discretion in rendering judgment that they may even ignore the provisions of the Constitution. He finds that it is difficult to see how the answer to this question can be in the affirmative.

On the other hand, he notes that the Constitution of the Free City of Danzig was drawn up in agreement with the High Commissioner of the League of Nations and can only be altered with the authorization of the League. Hitherto the League of Nations has considered that the measures provided by Danzig legislation afford the necessary guarantee that the Constitution will be respected.

M. Nagaoka concludes that the legislative decrees in question of August 29th, 1935, are consistent with the Constitution; on the other hand, when a judgment is rendered in application of the terms of these legislative decrees, there may be a question whether that judgment is or is not in conformity with the Constitution.

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*Effects*

On January 24th, 1936 (6th meeting of the 90th Session), the Council of the League of Nations passed a resolution under which it adopted the opinion and noted with satisfaction that (according to a communication from the President of the Senate of the Free City to the Rapporteur) the Senate was taking measures to conform to the said opinion by making the necessary amendments in the two legislative decrees in question.

On May 11th, 1936, the Secretary-General of the League of Nations sent to the Council for information (Doc. C. 215. 1936. VII) a letter from the High Commissioner of the League of Nations dated May 5th, 1936, annexed to which was a copy of a note from the President of the Senate of the Free City, communicating the text of certain legislative decrees: one of these, dated February 20th, 1936, abrogates the decrees of August 29th, 1935, and restores the old text of Article 2 of the Criminal Code.

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## 66. PAJZS, CSÁKY, ESTERHÁZY (PRELIMINARY OBJECTION)

### Order of 23 May 1936 (Series A/B, No. 66)

**Twelfth Annual Report of the Permanent Court of International Justice (15 June 1935—15 June 1936), Series E, No. 12, pp. 174–178**

*Joinder of objections to the merits, and fixing of further time-limits*

*Application*

On December 6th, 1935, the Hungarian Government filed with the Registry of the Court an Application instituting proceedings against the Yugoslav Government in regard to three judgments (Nos. 749, 750 and 747) rendered on July 22nd, 1935, by the Hungaro-Yugoslav Mixed Arbitral Tribunal.

The Application is founded firstly on Article X of Agreement II signed at Paris on April 28th, 1930, according to which the signatories—which include Hungary and Yugoslavia—agree to recognize a right of appeal to the Court from all judgments on questions of jurisdiction or merits which may be given by the Mixed Arbitral Tribunals in certain cases brought before those tribunals and which are not in the nature of "legal proceedings in regard to the agrarian reforms" (undertaken in Czechoslovakia, Roumania and Yugoslavia) within the meaning of Article I of Agreement II. Secondly, the Application is founded on Article XVII of Agreement II and Article 22 of Agreement III (of the same date), which provide (in slightly different terms) that signatories shall be entitled to have recourse to the Court by unilateral application in the event of any difference as to the interpretation or application of Agreements II and III.

In so far as the Application is founded on Article X of Agreement II, it constitutes an "appeal" from the three judgments above mentioned, whereby the Mixed Arbitral Tribunal declined jurisdiction in the cases brought before it against the Yugoslav Government by Pajzs, Csáky and Esterházy; in so far as the Application is founded on Article XVII of Agreement II and Article 22 of Agreement III, it prays the Court, alternatively, to interpret the Agreements of Paris and cause them to be correctly applied, so as to redress the situation created by the attitude of the Yugoslav Government, ordering that Government, in conformity with Article 250 of the Treaty of Trianon, to accord to all Hungarian nationals who have been affected by the Yugoslav agrarian reform and who do not receive compensation out of the Agrarian Fund created under Agreement II, the treatment applicable to nationals as regards the payment of local indemnities in respect of their expropriated lands.

The notifications provided for by Article 40 of the Statute and Article 36 of the Rules of Court (text in force prior to March 11th, 1936) were duly despatched. Furthermore, under Article 63 of the Statute and Article 60 of the same Rules, the Application was notified to all States which were parties either to the Treaty of Trianon or to Agreements II and III of Paris, since the Hungarian Government had relied on these instruments in asking the Court for judgment.

The time-limits for the presentation of the documents of the written proceedings in the case were, after successive extensions, ultimately fixed so that the Hungarian Memorial was to be filed by January 20th, 1936, and the Yugoslav Counter-Memorial by March 5th, 1936. The Memorial, which was duly filed by the prescribed date, prayed the Court:

"A. 1. To admit the appeal;

2. To adjudge and declare, as a matter of law, after admitting the appeal, preferably by way of revising the three judgments in question, that the Mixed Arbitral Tribunal has jurisdiction to adjudicate upon the claims of the Hungarian nationals, stating fully the reasons on which the judgment is based and requiring the Mixed Arbitral Tribunal to conform to such statement of reasons;

B. Alternatively or cumulatively, as the Court may see fit:

1. To adjudge and declare, generally, how Agreements II and III of Paris are to be interpreted and applied, and to redress the situation created by the Yugoslav Government's attitude, since that Government, either under its domestic legislation as portrayed in Article 11, paragraph 3, of its law of June 26th, 1931, or under an erroneous interpretation of that legislation by the administrative authorities—though alleged by it to be authorized by and in conformity with Agreements II and III of Paris—at present refuses to recognize in respect of all Hungarian nationals its obligation to pay the sums due to them in accordance with the national treatment applicable to them under its domestic legislation in respect of their lands expropriated in the course of its agrarian reform—extending to them an entirely new and unforeseen treatment discriminatory in character and not provided for in Agreements II and III of Paris—instead of only proceeding in this way in the case of Hungarian nationals who submitted claims in respect of the same lands before the Mixed Arbitral Tribunal and who have had their claims recognized by judgments of the Mixed Arbitral Tribunal against the Agrarian Fund, as laid down in Agreements II and III of Paris;

2. To order the Kingdom of Yugoslavia, in particular:

(*a*) in its attitude and proceedings, strictly to conform to the interpretation and application of Agreements II and III, so laid down as correct, and to respect the rights of which the existence was assumed by those Agreements;

(*b*) to make good the damage and refund the costs and expenses occasioned to Hungarian nationals by its present attitude and proceedings which are unwarranted by Agreements II and III of Paris;

C. To adjudge and declare that the Kingdom of Yugoslavia is also under an obligation to indemnify the Government of the Kingdom of Hungary for all costs and expenses incurred by the latter in obtaining redress for its nationals for whose situation the Kingdom of Yugoslavia, in spite of warning, is responsible, including the cost and expenses of the present proceedings before the Court."

*Preliminary Objection*

Within the time-limit fixed for the presentation of the Counter-Memorial, the Yugoslav Government filed a document entitled "Counter-Memorial of the Yugoslav Government including the formal submission of an objection presented to the Court in the proceeding", praying the Court:

"1. To adjudge and declare, before entering upon the merits, that the appeal of the Royal Hungarian Government against the three judgments of the Hungaro-Yugoslav Mixed Arbitral Tribunal cannot be entertained and is contrary to Article X of Agreement II of Paris;

2. To adjudge and declare, before entering upon the merits, that the request of the Royal Hungarian Government for a general interpretation by the Court of Agreements II and III of Paris cannot be entertained because the essential conditions laid down by Article XVII of Agreement II and Article 22 of Agreement III have not been fulfilled;

3. Alternatively, to adjudge and declare that the appeal of the Hungarian Government under Article X of Agreement II is ill-founded, and to confirm the three judgments of the Hungaro-Yugoslav Mixed Arbitral Tribunal;

4. Alternatively, to adjudge and declare that the three judgments of the Hungaro-Yugoslav Mixed Arbitral Tribunal are in accordance with the true interpretation of the Paris Agreements;

5. To order the Royal Hungarian Government to refund to the Royal Yugoslav Government all costs and expenses incurred in the present proceedings."

By an Order made on March 10th, 1936, the Court, holding the first two submissions of the Yugoslav Government to be in the nature of preliminary objections, fixed April 3rd, 1936, as the date by which the Hungarian Government might present a written statement of its observations and submissions in regard to these objections. The objections were also communicated to States Members of the League of Nations and to States entitled to appear before the Court; and, since one of them was founded on Agreements II and III of Paris, a special and direct communication in regard to them was sent to States parties to these instruments. The Hungarian Government in its observations, which were duly filed with the Registry by the date fixed, prayed the Court to overrule the objections. At public hearings held on April 29th and 30th and May 1st, 4th, 5th and 6th, 1936, the Court heard the oral observations of the two Parties upon the Yugoslav objections.

*Composition of the Court*

The Court was composed as follows:

Sir Cecil Hurst, *President*; M. Guerrero, *Vice-President*; Baron Rolin-Jaequemyns, Count Rostworowski, Fromageot, de Bustamante, Altamira, Anzilotti, Urrutia, Negulesco, Jhr. van Eysinga, M. Nagaoka, *Judges*.

MM. de Tomcsányi and Zoričić, respectively nominated as judges *ad hoc* by the Hungarian and Yugoslav Governments, also sat in the Court for the purposes of the case.

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*The Order (analysis)*

On May 23rd, 1936, the Court made an order in regard to the preliminary objections. It declares that it is confronted with the two preliminary objections:

"(1) that the appeal of the Hungarian Government based on Article X of Agreement II of Paris cannot be entertained because, contrary to the contentions of the Hungarian Government, the cases forming the subject of the judgments appealed against are not, as required by Article X, cases other than those referred to in Article 1 of that Agreement and because the said judgments are not judgments on questions of jurisdiction or merits within the meaning of Article X;

(2) that the request of the Hungarian Government based on Article XVII of Agreement II and Article 22 of Agreement III cannot be entertained because that Government has lodged an applica-

tion with the Court without its first having been established that the Parties concerned have failed to agree on the choice of a single arbitrator".

The Court considers that the questions raised by the first of these objections and those arising out of the appeal as set forth in the Hungarian Government's Memorial are too intimately related and too closely inter-connected for the Court to be able to adjudicate upon the former without prejudicing the latter. With regard to the second objection, its purpose is to frustrate a request presented alternatively by the Hungarian Government; and in so far as this request is in the nature of an alternative, the objection in respect of it can likewise only be dealt with in the alternative. Moreover, the Court considers that the further proceedings on the merits, by enabling it to obtain a clear understanding of the relation in which the "appeal" stands to the request for the interpretation of Agreements II and III, will place it in a better position to adjudicate with a full knowledge of the facts upon the second objection.

For these reasons, the Court joins the objections to the merits in order to adjudicate in one and the same judgment upon these objections and, if need be, upon the merits. At the same time it fixes the further time-limits for the filing of the Hungarian Reply and of the Yugoslav Rejoinder on the merits. As a result of the time-limits thus fixed, the case will become ready for hearing on August 14th, 1936.

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## 67. LOSINGER & CO. (PRELIMINARY OBJECTION)

### Order of 27 June 1936 (Series A/B, No. 67)

**Twelfth Annual Report of the Permanent Court of International Justice (15 June 1935—15 June 1936), Series E, No. 12, pp. 179–183**

*Joinder of objection to the merits, and fixing of further time-limits*

*Application*

By an Application filed with the Registry on November 23rd, 1935, the Swiss Federal Government instituted proceedings before the Court against the Yugoslav Government. The Application adduced the declarations made by Switzerland and Yugoslavia accepting the Optional Clause of Article 36, paragraph 2, of the Court's Statute, and asked the Court to declare that the Yugoslav Government could not, founding itself on a legislative measure subsequent in date to a contract concluded between it and the Swiss firm of Losinger & Co., S. A., release itself from the observance of an arbitration clause contained in that contract.

The Swiss Government filed its Memorial by the date fixed for that purpose. The Yugoslav Government, for its part, after obtaining two extensions of the time-limit originally fixed for the filing of the Counter-Memorial, presented within the time-limit as finally fixed a document entitled "Document submitting the objection of the Yugoslav Government".

*Preliminary Objection*

When this document was filed, the Rules of March 11th, 1936, had come into force; under Article 62 of these Rules, the lodging of the objection involved the suspension of the proceedings on the

merits, and a time-limit was fixed for the filing by the Swiss Confederation of its observations and submissions upon the objection.

The Swiss Memorial on the merits prayed the Court:

> "I. To declare that the Government of the Kingdom of Yugoslavia cannot, founding itself on the Yugoslav law of July 19th, 1934, concerning the conduct of State litigation, which came into force on October 19th, 1934, release itself from the observance of an arbitration clause in a contract concluded prior to this legislative measure with the firm of Losinger & Co., S. A., of Berne;
>
> II. To declare that the denial of jurisdiction lodged by the Government of the Kingdom of Yugoslavia, at the hearing on October 7th, 1935, and founded on this law, before the umpire in the arbitration proceedings pending between the State of Yugoslavia and the firm of Losinger & Co., S. A., is contrary to the principles of the law of nations."

The Yugoslav objection prayed the Court to declare that it had no jurisdiction and, alternatively, to declare that the application could not be entertained because the means of obtaining redress placed at the disposal of the firm of Losinger & Co. by Yugoslav municipal law had not been exhausted.

Finally, in the Swiss Observations in regard to the objection, it was contended that, in form, the document submitting the objection was invalid because it had not been filed in conformity with the terms of the Rules of Court, and that, in substance, the objection itself was ill-founded, so that the Court should declare that it had jurisdiction and that the Yugoslav Government's alternative submission to the effect that the application could not be entertained should be rejected.

As prescribed by the Statute and Rules, the Swiss Application and the Yugoslav objection were transmitted to the Members of the League of Nations and to States entitled to appear before the Court.

At public sittings held on June 4th, 5th, 8th and 9th, 1936, the Court heard the oral observations presented by the two Parties in regard to the Yugoslav objection. On June 27th, 1936, it made an Order upon the objection.

*Composition of the Court*

The Court was composed as follows: Sir Cecil Hurst, *President*; M. Guerrero, *Vice-President*; Count Rostworowski, MM. Fromageot, de Bustamante, Altamira, Anzilotti, Urrutia, Negulesco, Jhr. van Eysinga, M. Nagaoka, *Judges*.

MM. Max Huber and Zoričić, respectively nominated as judges *ad hoc* by the Swiss and Yugoslav Governments, also sat in the Court for the purposes of the case.

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*The Order (analysis)*

In its order, the Court first of all summarizes the facts of the case in so far as relevant from the point of view of the order:

On March 2nd, 1929, a company registered in the United States of America, known as the Orientconstruct, and the autonomous District of Pozarevac (Kingdom of the Serbs, Croats and Slovenes) concluded a contract for the construction of certain railway lines for which the District had secured a concession from the Serb-Croat-Slovene Government and for the financing of their construction. This contract, which was approved by the Yugoslav Minister of Finance, contained the following arbitration clause:

"*Article XVI.—Disputes.*—Any differences of opinion or disputes which may arise between the contracting Parties in connection with the carrying out or interpretation of the clauses and conditions of this contract shall be settled by compulsory arbitration, if a friendly settlement cannot be reached by the contracting Parties. Within thirty days of a demand made by either of the contracting Parties, each Party shall appoint an arbitrator for the joint settlement of the disputes. If these two arbitrators fail to agree, or if one of the Parties fails to appoint an arbitrator within the time specified, the case shall be referred either to the President of the Swiss Federal Court or to a neutral person who shall be appointed by the latter and who shall in the capacity of umpire give his decision alone upon the dispute. The same shall apply if the arbitrators have not made a final award within six months, reckoned from the date on which the last of them was appointed, or within an extended period fixed by mutual agreement between them. The award of the arbitrators or of the umpire shall be rendered in Yugoslavia. There shall be no appeal from this decision."

Subsequently, the firm of Losinger & Co., S. A., of Berne, and the Yugoslav Government were respectively substituted for the original parties to the contract; nevertheless, this only applied in respect of the construction works, and the question of financing was arranged in another manner, The various agreements effecting the substitution of new parties to the contract of March 2nd, 1929, were authorized by a Yugoslav law in 1931.

In 1933 difficulties arose in connection with the execution of the contract. These were settled in accordance with the arbitration clause; the President of the Swiss Federal Tribunal, acting in the capacity of umpire, gave his award on October 31st, 1934. In the meantime, on July 30th, 1934, the Yugoslav Government had cancelled the contract with Losinger & Co.; furthermore, on October 19th, 1934, a law concerning the conduct of State litigation in Yugoslavia had come into force; this law laid down that actions against the State could only be brought before the ordinary courts of the State.

In November 1934, Losinger & Co. once more had recourse to arbitration. The same umpire was nominated, this time as a "neutral person", as he had ceased to be President of the Swiss Federal Tribunal. Before the umpire, the representatives of Yugoslavia raised certain preliminary questions, more particularly based on the law of 1934 concerning Yugoslav State litigation, and it was submitted that the umpire had no jurisdiction. The latter then declared that he had no jurisdiction to adjudicate upon this plea, and, without relinquishing the case, suspended the arbitration proceedings until the "law had been ascertained".

These being the facts, the Court first considers whether the document submitting the Yugoslav objection is valid. The Swiss Government had maintained that it was invalid for the two following reasons: first, because it had not been filed in fifty-one copies within the prescribed time-limit and, secondly, because the Rules of Court, when defining the time-limit for the lodging of an objection, had in view only the original time-limit fixed by the Court for the filing of the Counter-Memorial and the definition did not cover subsequent extensions. The Court however holds that, in accordance with its consistent practice, documents submitting preliminary objections are, as regards the number of copies to be filed, assimilated to instruments instituting proceedings, whereas the rule prescribing the filing of fifty-one copies, instead of one, only relates to documents of the written proceedings (Memorial, Counter-Memorial, etc.); moreover, a time-limit which has been extended is, in principle, for all purposes the same time-limit as that originally fixed. Again, the Court would, in any case, have power under its Rules to decide, in certain circumstances, "that a proceeding taken after the expiration of a time-limit shall be considered as valid". The filing of the document submitting the Yugoslav objection is, accordingly, valid.

As regards the objection itself, the Court observes that it includes, besides a plea to the Court's jurisdiction, an alternative objection to the admissibility of the application. Taking into consideration

the written submissions of the Yugoslav Government, the Court holds that the real purpose of the plea to the jurisdiction is to prevent it from adjudicating on the submissions in the Swiss Memorial on the merits; accordingly, the competence of the Court and its power to entertain the application depend on the meaning and purport attaching to these submissions. The latter, though they may have been the subject of divergent interpretations, give rise to questions which are intimately connected with those raised by the objection, which may therefore from this point of view be regarded as a part of the defence on the merits, or as founded on arguments which might be employed for the purposes of that defence. If therefore the Court were to adjudicate at once upon the objection, it might be in danger of passing upon questions appertaining to the merits or of prejudging their solution: but it cannot enter in any way upon the merits before the Parties have had an opportunity of exercising their right of submitting two written pleadings each and of making oral statements on the merits, which they have not yet done. In these circumstances, the objection to the Court's jurisdiction should be joined to the merits.

As regards the objection relating to the admissibility of the suit, that objection is submitted as an alternative; moreover, the facts and arguments adduced for or against the two objections are largely inter-connected and even in some respects indistinguishable. Accordingly, the objection to the admissibility of the application must be treated in the same way as the objection to the jurisdiction.

The Court, after deciding to join the objections to the merits, fixes time-limits for the filing of the Yugoslav Counter-Memorial, the Swiss Reply, and the Yugoslav Rejoinder. These time-limits are settled in such a way that the case will become ready for hearing on September 11th, 1936.

In this connection, the Court adds that these time-limits are fixed without prejudice to any modifications which it might be desirable to make in case those concerned, or one of them, should decide to resort to the means of redress mentioned in the course of the oral proceedings by the Agent for the Yugoslav Government.

This refers to a point mentioned by the Court in its summary of the facts, namely that that Agent had specified that the law of 1934 concerning State litigation in Yugoslavia contained no provision giving it retrospective effect and that, in regard to this point, its character remained to be determined by the Yugoslav courts; moreover, that if the ordinary Yugoslav courts ruled that the plea which had caused the umpire to suspend the arbitration proceedings was not well-founded, the Yugoslav Government would abandon that argument.

The Court also mentions the possibility of modifying the time-limits fixed for the written proceedings on the merits, in the case of negotiations between the Parties for an amicable settlement.

# 68. PAJZS, CSÁKY, ESTERHÁZY (MERITS)

## Judgment of 16 December 1936 (Series A/B, No. 68)

**Thirteenth Annual Report of the Permanent Court of International Justice (15 June 1936—15 June 1937), Series E, No. 13, pp. 129–134**

*Agrarian reform in Yugoslavia. The Paris Agreements of April 28th, 1930—Judgments rendered by the Hungaro-Yugoslav M.A.T. on July 22nd, 1935. Appeal to the P.C.I.J. from these judgments under Art. X of Agreement II of Paris; conditions in which such appeal can be entertained; meaning of the expressions "proceedings referred to in Article I" of Agreement II of Paris and "proceedings in regard to the agrarian reform"—Difference as to the interpretation and application of Agreements II and III of Paris alternative request on this subject presented on the basis of Art. XVII of Agreement II and Art. 22 of Agreement III. Alleged refusal of the Yugoslav Government to pay the so-called "local" indemnities for expropriation direct to Hungarian nationals affected by the agrarian reform in Yugoslavia. Régime established by the Paris Agreements with regard to such nations*

*History of the case*

Even before the final organization of the new Yugoslav State after the war of 1914–1918, an agrarian reform had been contemplated in that country. With this end in view, a series of measures having the force of law and relating to the expropriation of large landed estates were promulgated in February 1919 and subsequently.

The steps taken under this legislation in respect of large estates situated in Yugoslav territory but belonging to Hungarian nationals, gave rise to actions brought by these nationals before the Hungaro-Yugoslav Mixed Arbitral Tribunal under Article 250 of the Treaty of Trianon.

The same thing had occurred with regard to the other country of the Little Entente before the Hungaro-Roumanian and the Hungaro-Czechoslovak Mixed Arbitral Tribunals. These tribunals, by a series of decisions rendered in typical cases, held that they had jurisdiction to adjudicate upon the merits of the claims which had been submitted to them. The differences of opinion which arose on this subject between Hungary and Roumania were submitted to the Council of the League of Nations, but no settlement had yet been reached when the conferences convened for the settlement of questions concerning liabilities for war reparations met at The Hague in August 1929 and in January 1930. The second of the conferences at The Hague resulted in the adoption of texts laying down the bases on which—at a conference held subsequently at Paris—four Agreements relating to the obligations resulting from the Treaty of Trianon were concluded on April 28th, 1930. These Agreements and the general preamble preceding them were signed by Hungary (with the exception of Agreement IV, in which she was not interested) and by the States of the Little Entente.

Article I of Agreement II provides that, in "any legal proceedings which Hungarian nationals may later institute before the Mixed Arbitral Tribunals in regard to the agrarian reform against Yugoslavia", the responsibility will under certain conditions be solely incumbent upon a Fund to be called the "Agrarian Fund". The same Article also states that "it has been agreed that Yugoslavia shall promulgate the definitive law" concerning agrarian reform in that country "before July 20th, 1931". According to Article XVI of the same Agreement, "after the promulgation of the definitive law, the Governments of Hungary and Yugoslavia will reach an agreement in order to determine from what act laid down in the said law the period of limitation (six months) shall begin to run". Until the promulgation of the Yugoslav law, the time-limits allowed for the filing of applications were those fixed by the rules of procedure

of the Tribunal. Lastly, under Article X of Agreement II, the States of the Little Entente and Hungary recognize in certain circumstances "a right of appeal" to the Permanent Court of International Justice, while under Articles XVII of Agreement II and 22 of Agreement III any State interested is entitled, in the event of a difference as to the interpretation or application of these Agreements and subject to certain conditions, to address itself to the Court by written application.

Among the landowners in Yugoslavia affected by the measures of agrarian reform were the Hungarian nationals Pajzs, Csáky and Esterházy. In December 1931, they instituted proceedings before the Mixed Arbitral Tribunal against the Agrarian Fund created by the Paris Agreements, asking *inter alia* for indemnities in respect of their lands which had been expropriated. The Mixed Arbitral Tribunal however, in judgments reached in April 1933, declared the applications out of time and dismissed the petitioners' claims.

The latter then instituted fresh proceedings before the Mixed Arbitral Tribunal, this time against Yugoslavia as Defendant. The petitioners, invoking Article 250 of the Treaty of Trianon, asked for judgment against Yugoslavia for an indemnity in respect of the estates in question payable to them. In two of the applications, this indemnity was described as the "local indemnity" which Yugoslavia pays to her own nationals owning large estates expropriated under the agrarian reform.

To these applications the Yugoslav Government lodged a preliminary objection and, on July 22nd, 1935, the Mixed Arbitral Tribunal delivered judgment in the three cases, declaring that the applications could not be entertained because they were based on Article 250 of the Treaty of Trianon.

Following upon these judgments, the Hungarian Government, on December 6th, 1935, filed with the Registry of the Court an Application instituting proceedings. A summary of this Application, of the preliminary objections to the Court's jurisdiction lodged by the Yugoslav Government and of the Order of May 23rd, 1936, whereby the Court joined the objections to the merits, will be found in the Twelfth Annual Report (pp. 174–178). In this Order the Court fixed the time-limits for the filing of the subsequent documents of the written proceedings on the merits—namely the Hungarian Reply and the Yugoslav Rejoinder, since the document filed by the Yugoslav Government and containing its objections constituted in itself, according both to its title and contents, a Counter-Memorial on the merits.

*Composition of the Court*

The documents were filed by the dates thus fixed; and in the course of sittings held between October 26th and November 13th, the Court heard the arguments presented orally by the Parties' representatives.

The Court was composed as follows:

Sir Cecil Hurst, *President*; M. Guerrero, *Vice-President*; Count Rostworowski, MM. Fromageot, de Bustamante, Altamira, Anzilotti, Negulesco, Jhr. van Eysinga, MM. Nagaoka, Hudson, Hammarskjöld, *Judges*.

MM. de Tomcsányi and Zoričić, respectively nominated as Judges *ad hoc* by the Hungarian and Yugoslav Governments, also sat in the Court for the purposes of the case.

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*The judgment (analysis)*

The Court's judgment upon the Application of the Hungarian Government and upon the objections of the Yugoslav Government was delivered on December 16th, 1936.

The Hungarian Government, in its final submissions, asked the Court *inter alia* to declare that it had jurisdiction to admit the appeal under Article X of Agreement II of Paris and, preferably, to review the judgments complained of, adjudging that the Mixed Arbitral Tribunal was competent. Alternatively, the Hungarian Government asked the Court to adjudge by means of the interpretation and application of Agreements II and III, under Article XVII of Agreement II and Article 22 of Agreement III, that the attitude adopted by Yugoslavia towards all Hungarian nationals—an attitude described in the Hungarian submissions—was inconsistent with the provisions of Agreements II and III.

The Yugoslav Government, for its part, prayed the Court, *inter alia*, before entering upon the merits, to declare that the appeal of the Hungarian Government could not be entertained and was contrary to Article X of Agreement II, and to declare that the request of the Hungarian Government for an interpretation could not be entertained because the essential conditions laid down by Article XVII of Agreement II and Article 22 of Agreement III had not been fulfilled. Alternatively, the Yugoslav Government submitted, *inter alia*, first, that the three judgments should be confirmed, and secondly, that the three cases in question should be declared covered by the settlement on a lump-sum basis in the Paris Agreements.

Accordingly the Court had first to consider whether it could entertain the appeal of the Hungarian Government. In so doing it analyzes Article X of Agreement II, which runs as follows:

> "Czechoslovakia, Yugoslavia and Roumania, of the one part, and Hungary, of the other part, agree to recognize, without any special agreement, a right of appeal to the Permanent Court of International Justice from all judgments on questions of jurisdiction or merits which may be given henceforth by the Mixed Arbitral Tribunals in all proceedings other than those referred to in Article I of the present Agreement.
>
> The right of appeal may be exercised by written application by either of the two Governments between which the Mixed Arbitral Tribunal is constituted, within three months from the notification to its Agent of the judgment of the said Tribunal."

The Court finds that, in the Pajzs, Csáky and Esterházy cases, the judgments of the Mixed Arbitral Tribunal to the effect that the applications could not be entertained, are based on the view that the Paris Agreements are applicable, i.e. a view involving the actual merits of the applications.

There remains the question whether or not the Pajzs, Csáky and Esterházy cases were, as laid down in Article X of Agreement II, proceedings referred to in Article I of that Agreement; the Court in this connection must examine the three applications not only from the point of view of their form, but also from the point of view of their substance. After analyzing Article I of Agreement II, the Court finds that the Pajzs, Csáky and Esterházy cases present the characteristics specified by that Article which are as follows: they are cases brought (*a*) by Hungarian nationals; (*b*) after January 20th, 1930; (*c*) in regard to the agrarian reform in Yugoslavia; (*d*) before the Mixed Arbitral Tribunals; (*e*) in respect of properties which are already, by virtue of the laws and decrees in force, subject to the agrarian reform and in regard to which the owner's right of free disposal has been limited by the effective application to his property prior to January 20th, 1930, of these laws and decrees.

This conclusion is not affected by the conditions or terms in which the Pajzs, Csáky and Esterházy cases were instituted. One of the principal arguments adduced by the Hungarian Government was that two of the petitioners claimed the right to be treated on a footing of equality with Yugoslav nationals, and this fact, in their view, entitled them to hold the Yugoslav State liable to pay them the expropriation indemnities granted to Yugoslav nationals by their national laws. The Hungarian Government's contention was that the Paris Agreements did not render the Yugoslav national régime any less applicable to the Hungarian nationals. The legal proceedings referred to in Article I were—it is argued—exclusively proceedings directed, like those that were pending in 1930, against the application of the agrarian

reform, having as their object either the restitution or the payment of the full value of the lands expropriated.

The Court does not consider that such an interpretation can be reconciled with the comprehensiveness of the text in question. Moreover, if the scope of the Paris Agreements is restricted, in the manner contended by the Hungarian Government, the Agreements would scarcely appear to give effect to the principle of lump-sum payments which they were intended to establish.

The Court finds that, in view of the express terms of Article I of Agreement II, the three judgments were not delivered in proceedings other than those referred to in that Article. The Court therefore finds that it cannot entertain the appeal lodged against these judgments.

The appeal having been rejected, the Court had next to examine the alternative submission of the Hungarian Government concerning the interpretation and application of Agreements II and III.

In regard to this point, the Court first shows that the preliminary objection taken by the Yugoslav Government to the Hungarian Government's alternative submission is ill-founded.

With regard to the substance of the Hungarian alternative submission, the Court observes that it relates to the attitude of Yugoslavia, which takes the form of withholding from the Hungarian nationals who are in the same position as the three petitioners and from other Hungarian nationals who have never had any intention of claiming more than Yugoslav national treatment, the "local" indemnities, payable under Yugoslav agrarian legislation to other expropriated landowners.

As regards Hungarian nationals who are in the same position as the three petitioners, the Court observes that the reasons why the appeal against the three judgments rendered by the Mixed Arbitral Tribunal on July 22nd, 1935, cannot be entertained by the Court are furnished by the interpretation and application of the Paris Agreements. Where the circumstances are the same, the same interpretation and the same application can but be repeated.

With regard to Hungarian nationals who have never had any intention of claiming more than national treatment, the Court points out that the Hungarian argument really is that the Yugoslav régime of national treatment remains applicable to all Hungarian nationals who have not been admitted to claim against the Agrarian Fund. Here again, the Court considers that it is really confronted with the argument already put forward by the Hungarian Government as to the limited scope of the Paris Agreements. But the Court has been led to discard that argument precisely by means of interpreting and applying the Agreements.

The Court concludes that the attitude of Yugoslavia towards the Hungarian nationals affected by the agrarian reform measures in Yugoslavia has been consistent with the aforesaid Agreements.

The Court rejects an alternative Yugoslav submission praying it to declare that the three Hungarian nationals in question must be allowed to present their claims against the Agrarian Fund.

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*Separate opinions*

The Court's judgment was adopted by eight votes to six.

MM. Anzilotti, Nagaoka, Hudson and Hammarskjöld, Judges, and M. de Tomcsányi, Judge *ad hoc*, declared that they were unable to concur in the judgment of the Court and, availing themselves of the right conferred upon them by Article 57 of the Statute, appended their separate opinions to the judgment.

Jonkheer van Eysinga, Judge, concurred in the opinion expressed by Mr. Hudson.

*Separate opinion of M. Anzilotti*

M. Anzilotti states that he dissents from the Court's judgment and that he agrees, generally speaking, with the separate opinion of Judge M.O. Hudson.

The fundamental ground of his dissent relates to the manner in which the question of the admissibility of the appeal ought to have been presented and decided. The appeal had been submitted under Article X of the Agreement II of Paris; its admissibility, therefore, depended upon the fulfilment of the conditions prescribed by that Article. According to M. Anzilotti, the issue should be resolved by determining what are the essential features which characterize the category of "proceedings . . . referred to in Article I", and then to ascertain whether these features are present in the three suits in question.

He states that the essential features of the proceedings referred to in Article I of Agreement II emerge with perfect clearness from the provisions of that Agreement. The features are summarized as follows: as regards the Parties, the proceedings must lie between the Hungarian nationals and the Agrarian Fund; as regards the grounds for the claim, the *causa petendi*, they must be expropriations carried out in application of the agrarian reform, in so far as rights are thereby conferred upon the Hungarian nationals in virtue of Agreement II; lastly, as regards the object of the claim, the *res petita*, the proceedings in question must be suits in which nothing else is claimed than the indemnity referred to in Agreement II, which consists in a share in the apportionment of the assets of the Agrarian Fund.

M. Anzilotti then examines the applications of the Hungarian nationals in the suits which culminated in the judgments under appeal, and notes the following dissimilarities to the above essential features: that the proceedings were instituted against Yugoslavia and not against the Agrarian Fund; that the applications were based on Article 250 of the Treaty of Trianon, and not upon Agreement II; that the object of the claims was the indemnity prescribed by the national legislation, or at any rate—possibly, in the Esterhazy application—an indemnity other than that laid down in Agreement II. He holds that the procedure observed was not that laid down for agrarian suits. M. Anzilotti therefore concludes that the suits in which the judgments under appeal were delivered were not the proceedings referred to in Article I of Agreement II, and that the appeal was therefore admissible.

M. Anzilotti avers that the appeal having been found to be admissible, the Court should have proceeded to examine the Hungarian Government's grounds of complaint against the impugned judgments, and, from this standpoint, should have determined whether Article I of Agreement II excluded the possibility of proceedings other than the proceedings referred to in that Article being instituted in regard to the agrarian reforms. According to M. Anzilotti, the Paris Agreements, judging by their terms, their origin and their purpose, do not contemplate all cases in regard to the agrarian reforms but only certain of these cases, namely: (a) Actions which had been brought before January 20th, 1930, and in which Hungarian nationals, denying the consistency of the agrarian reforms with Article 250 of the Treaty of Trianon, claimed the restitution of their lands or, alternatively, full compensation; (b) Future actions, whereby the Agreements, in order to avoid the reappearance of difficulties such as that which had just been settled, afforded Hungarian nationals, who had not yet instituted proceedings, the possibility of obtaining—subject to conditions and time limitations which were strictly defined advantages corresponding to those granted to petitioners of the first category.

He notes that if the actions contemplated by Article I of Agreement II were the only actions in regard to the agrarian reform which could still be brought under the Paris Agreements, it would obviously follow that these Agreements, derogating from the ordinary law, imposed on all Hungarian nationals whose estates had been subjected to the agrarian reform in Yugoslavia and who desired to

obtain any compensation at all, an obligation to bring proceedings with this object against the Agrarian Fund.

M. Anzilotti finds no justification for this view. He notes that nowhere in the Paris Agreements is to be found any express provision laying down that it is incumbent on Hungarian nationals to bring proceedings against the Agrarian Fund in order to obtain compensation. As stated above, the wording used in Article I of Agreement II suggests the contrary. Furthermore they contain no provision from which it is possible implicitly to deduce an intention on the part of the contracting parties to impose such an obligation. The only argument which the Yugoslav Government had been able to adduce in this connection is the lump-sum character of the payments which Yugoslavia has to make to the Agrarian Fund. However, M. Anzilotti holds that the relevant provisions expressly say that the sum which Yugoslavia pays in full discharge of her obligations to the Agrarian Fund, represent a lump-sum settlement in respect of the local indemnities for lands forming the subject of proceedings under Article I of Agreement II. To deduce from this that Hungarian nationals are obliged to bring such proceedings is clearly a *petitio principii.*

M. Anzilotti concludes that, if these Hungarian nationals do not wish to or cannot avail themselves of the advantages afforded them under the special law created by the Paris Agreements, the ordinary law continues to apply to them and they must be treated in this matter on the same footing as nationals.

*Separate opinion of M. Nagaoka*

M. Nagaoka states that he is in complete agreement with the separate opinion of Mr. Hudson. He sets out that the question arising is whether legal proceedings which are instituted in regard to the agrarian reforms must necessarily, in all cases, fall within the category of the proceedings referred to in Article I of Agreement II. In other words, the question is whether the authors of the Paris Agreements intended that the words "all legal proceedings" should be understood as meaning all kinds of legal proceedings, of whatever description, instituted in regard to the agrarian reforms.

M. Nagaoka states that the question cannot be answered in definite and precise terms unless the spirit of the Paris Agreements be first considered. From examining the actual events that induced the Powers to conclude the Agreements, he holds that it is thus evident that there would have been no dispute between the Little Entente States and Hungary if the Hungarian nationals had been content, from the outset, to accept the local indemnities.

He examines the Paris Agreements to find the nature of the arrangement by which it was found possible to reach an agreement with a view to putting an end to this dispute. M. Nagaoka makes the following observations: (a) On the one hand, the States of the Little Entente were only required to make payments in respect of the local indemnities. On the other hand, it was decided, in order to meet the demands of the Hungarian nationals, that, in addition to the above-mentioned payments, the annuities laid down in Article 2 of Agreement III should be contributed by Powers other than the three States referred to above; (b) All these sums were to be paid into the Agrarian Fund, which was created by Agreement II of Paris; (c) The Agrarian Fund was not required to make any payment until it had received notification of the whole of the judgments.

M. Nagaoka finds that two conclusions emerge from the foregoing: (1) the suits referred to in Article I of Agreement II must be suits instituted with the object of obtaining indemnities from the Agrarian Fund, that is to say, indemnities on a higher scale than the local indemnities; (2) the Agrarian Fund was created solely in order to pay these indemnities, on a higher scale than the local indemnities. He holds therefore that the legal proceedings referred to in Article I of Agreement II only include proceedings instituted in order to obtain indemnities larger than the local indemnities from the Agrarian Fund.

Finally, M. Nagaoka holds that the Paris Agreements in no way modify the position of the Hungarian nationals, in regard to their right to claim local indemnities. The lump-sum payment made by Yugoslavia to the Agrarian Fund, under Article 10 of Agreement III, cannot relieve that State of her liability to the Hungarian nationals in respect of local indemnities. The fact that the Paris Agreements confer larger rights than those enjoyed by Yugoslav nationals cannot in any way prejudice the fundamental rights to which the Hungarian nationals are entitled.

*Separate opinion of Mr. Hudson*

Mr. Hudson states that an interpretation of Article X involves, necessarily, some consideration of all the Paris Agreements, in the course of which the Court must take account of their history and of both the general and the specific purposes which they were designed to serve. In so far as these Agreements dealt with questions relating to agrarian reform, they were designed to afford escape from the difficulties which over a period of several years had paralyzed the Mixed Arbitral Tribunals. He adds notes that Agreement No. II, especially, embodied a transaction between Czechoslovakia, Roumania and Yugoslavia on the one hand and Hungary on the other hand. The special limits of that transaction must be respected; on both sides, the Governments expressly refused to surrender the rights derived by their nationals from the Treaty of Trianon "in respect of any questions the settlement of which is not envisaged" in Agreement No. II.

Mr. Hudson holds that in this case, the first condition under Article X for the "right of appeal" to this Court—that the judgments appealed from must be "judgments on questions of jurisdiction or merits"—was fulfilled. The second condition is that the judgments appealed from must have been given by a Mixed Arbitral Tribunal in "proceedings other than those referred to in Article I". He finds that the reason for this exception was because the proceedings "referred to in Article I" were made subject to a special procedure, the purpose of which would in some measure be defeated if appeal were allowed. Appeal was envisaged only as to proceedings in which the normal judicial procedure was applicable. In the three cases to which this appeal relates, the special procedure was not applicable, and neither the applicants nor Yugoslavia nor the Mixed Arbitral Tribunal sought to apply it. Mr. Hudson concludes that as the special procedure was not applicable to the cases to which this appeal relates, the proceedings in these cases did not fall within the exception in Article X. Hence the judgments appealed from were given in "proceedings other than those referred to in Article I"; and the appeal should be entertained.

Mr. Hudson then turns to the merits of the appeals, and whether the Mixed Arbitral Tribunal correctly interpreted the Paris Agreements. He notes that the Paris Agreements contain no indication of a general purpose to deal with all possible claims "in regard to the agrarian reform". If this had been the desire of the negotiators at The Hague and at Paris, apt terms could easily have been found for effectuating such a purpose. The guarded language in the Agreements, particularly in Agreement No. II, is consistent only with the idea that the Agreements were to serve a more limited purpose.

Mr. Hudson observes that on 20th January, 1930, more than five hundred proceedings were pending before the three Mixed Arbitral Tribunals, all of them of the same general character. Basing themselves on Article 250 of the Treaty of Trianon, the applicants attacked the legality of the measures of agrarian reform applied to their properties, and they sought either restitution or complete indemnities in lieu of restitution. According to Mr. Hudson, it would seem, then, that to the extent that proceedings instituted after 20th January 1930 are referred to in Article I of Agreement No. II, they must be proceedings of the same general character. Not only is this conclusion consistent with the general purpose which Agreement No. II was designed to serve; it is also impelled by the language used and by the general nature of the arrangement made for impersonalizing agrarian claims.

Mr. Hudson notes that various provisions of the Agreements indicate that later-instituted proceedings were, like the proceedings brought before 20th January 1930, envisaged as proceedings in which the applicants sought complete indemnities in lieu of restitution. Nor is this indication rebutted by the provisions of Article 10 of Agreement No. III concerning a "lump-sum settlement of the total indemnities" to be allotted by the new Yugoslav law; the "lump-sum settlement" was only "for the expropriated lands of present and future claimants within the terms of Article I of Agreement No. II", "whatever may be the extent" of those lands.

Mr. Hudson therefore states that the proceedings before the Hungarian-Yugoslav Mixed Arbitral Tribunal were not of that character; all three of these proceedings were, therefore, outside the categories of "proceedings referred to in Article I" of Agreement No. II, and the Court should have found the decisions of the Mixed Arbitral Tribunal erroneous.

*Separate opinion of Mr. Hammarskjöld*

Mr. Hammarskjöld states that the two conditions required for the Court to entertain an appeal of these three cases have been fulfilled, concurring with M. Anzilotti and Mr. Hudson on their arguments set forth in their respective separate opinions.

Turning to the merits of the applications lodged, M. Hammarskjöld notes that two questions are raised: (1) whether, after the coming into force of the Paris Agreements, it was still open to the claimants to make application to the Mixed Arbitral Tribunal for national treatment under Article 250 of the Treaty of Trianon; (2) and, if so, whether the conditions laid down by that Article were fulfilled in the particular cases.

He addresses the first question by stating that the special meaning of Article I implies that there are cases which, though "in regard to the agrarian reform", are not covered by Article I of Agreement II. The three cases before the Court are among those to which the Paris Agreements are inapplicable. On the second question—namely the question of the application as distinct from the applicability of Article 250 of the Treaty of Trianon—Mr. Hammarskjöld states that it does not, in view of the circumstances of the case, arise before the Court adjudicating "on appeal". This question should therefore be referred back to the Mixed Arbitral Tribunal for decision.

M. Hammarskjöld continues that if one takes the standpoint, as adopted by the Court, that the appeal cannot be entertained, the next questions which present themselves are the admissibility of the request for the interpretation and application of the Agreements, and the definition of the "attitude" of Yugoslavia, which is referred to in that request. In regard to these points, he is in agreement with the judgment of the Court.

He draws a very clear distinction between, on the one hand, the three petitioners in the proceedings forming the subject of the main submission to the Court (with such other Hungarian nationals as may be similarly situated, and may have filed applications after April 28th, 1930) and, on the other hand, the Hungarian nationals "who have never had any intention of claiming more than national treatment". In regard to the former category, it follows, by hypothesis—seeing that the appeal has been rejected—that their cases come under Article I of Agreement II of Paris; petitioners (and the other similar cases) fall by hypothesis under Article I of Agreement II, that the whole of the Agreements, including Article 10 of Agreement III, are also applicable to them. However, M. Hammarskjöld avers that Article 10 does not apply in regard to lands belonging to Hungarian nationals who—like the petitioners in the three suits—did not become claimants until after the above-mentioned date. It follows that the local indemnities of claimants belonging to the latter category of claimants set out above fall inevitably—if the hypothesis in question is accepted—within the scope of the lump-sum settlement referred to in Article 10 of Agreement III.

M. Hammarskjöld states that the position is different in regard to the Hungarian nationals, owners of large estates in Yugoslavia, who have been expropriated under the agrarian reform but have never instituted any legal proceedings before the Mixed Arbitral Tribunal; for their cases cannot be considered as being covered by the Paris Agreements. Moreover, even if it were admitted that these cases, as such, came under the Paris Agreements, claims for local indemnities would not be covered by the only clause in Article I of Agreement II which might possibly be thought applicable, *viz.*: sub-paragraph 2 of paragraph 2 of that Article. Neither would, therefore, the provisions of Agreement III be applicable to them. If one adopts the latter standpoint, it is, accordingly, manifest that the "attitude" of the Yugoslav Government towards the Hungarian nationals in question was not consistent with the Paris Agreements.

He continues that if, however, one takes the view that the cases of these Hungarian nationals are not covered by the Agreements, one also arrives at the same conclusion. He holds that since the cases in question were not expressly provided for in the Agreements, it is impossible to find in the latter any ground for refusing treatment in accordance with the régime of ordinary law to the parties concerned. A "refusal" based on such grounds, and producing such effects, would not therefore be consistent with the Paris Agreements.

*Separate opinion of M. de Tomcsányi*

M. de Tomcsányi refers to Mr. Hudson's dissenting opinion, for what is stated therein is entirely in accordance with his view. He states that the Hungarian Government's appeal should have been entertained. As the Court did not entertain the appeal, it should have declared that the attitude of Yugoslavia was not warranted by the Paris Agreements, for it constituted discriminatory treatment of the Hungarian nationals.

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## 69. LOSINGER & CO. (DISCONTINUANCE)

### Order of 14 December 1936 (Series A/B, No. 69)

**Thirteenth Annual Report of the Permanent Court of International Justice (15 June 1936—15 June 1937), Series E, No. 13, pp. 127–128**

*Withdrawal of the suit—Removal of the case from the list*

In the case of Losinger & Co., in which proceedings had been instituted against the Yugoslav Government by an Application filed with the Registry on November 23rd, 1935, by the Swiss Federal Government, a preliminary objection had been lodged by the Respondent, which objection had been joined by the Court to the merits by an Order made on June 27th, 1936. In this Order the Court had fixed the time-limits for the filing of the Yugoslav Counter-Memorial, of the Swiss Reply and of the Yugoslav Rejoinder, so that the case should become ready for hearing on September 11th, 1936; the Court had also specified that these time-limits had been fixed without prejudice to any modifications which it might be desirable to make, for instance in case the Parties should enter into negotiations for an amicable settlement.

The Yugoslav Counter-Memorial was duly filed within the time-limit laid down (August 3rd, 1936); but in a letter of August 7th, 1936, the Agent for the Swiss Government, invoking the above-mentioned clause of the Order of June 27th, 1936, asked for an extension of the time-limit for the filing of the Swiss Reply until October 15th, 1936, in view of the negotiations in progress. This extension was granted by

an Order of the acting President, dated August 11th, 1936. The time-limit for the filing of the Reply was further extended until December 1st, 1936, by an Order made by the President of the Court on October 6th, in response to a further request of the Swiss Agent based on the stage reached in the negotiations.

By a letter of November 23rd, 1936, the Agent for the Yugoslav Government informed the Registry that a definite agreement had been reached between the Parties to discontinue the proceedings instituted by the Swiss Application; he gave notice that the Parties were not going on with these proceedings and requested the Court officially to record the conclusion of the settlement. The Agent for the Swiss Government addressed a similar communication to the Registry, dated November 27th.

By an Order made on December 14th, 1936, the Court, under Article 68 of the Rules, placed on record the communications from the Agents to the effect that their Governments were discontinuing the proceedings instituted by the Application of the Swiss Federal Government, and ordered the case to be removed from the list.

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## 70. DIVERSION OF WATER FROM THE MEUSE

### Judgment of 28 June 1937 (Series A/B, No. 70)

**Thirteenth Annual Report of the Permanent Court of International Justice (15 June 1936—15 June 1937), Series E, No. 13, pp. 135–141**

*Interpretation of the Treaty of May 12th, 1863, between Belgium and the Netherlands concerning the régime of diversions of water from the Meuse: this Treaty did not invest either contracting Party with a right of control which the other Party might not exercise—The obligation to take water solely through the feeder at Maestricht is imposed on both contracting Parties; the normal use by the Parties of locks is not inconsistent with the Treaty, provided that such use does not prejudice the régime instituted by the Treaty; subject to the same condition, each Party is entitled to alter or enlarge the canals coming under the Treaty, so far as concerns canals which are situated in its territory and do not leave it—The Netherlands were within their rights in altering the level of the Meuse at Maestricht, without the consent of Belgium, since the régime set up by the Treaty was not thereby prejudiced—The Juliana Canal cannot be considered as a canal below Maestricht, within the meaning of the Treaty*

*History of the case*

The Meuse, an international river rising in France and traversing Belgium and the Netherlands, fulfils as its most important function, at all events in the two latter countries, that of a reservoir for other waterways. In the XIXth century, the construction of canals—the Zuid-Willemsvaart from Maestricht to Bois-le-Duc opened in 1826; the Liége-Maestricht Canal (1845); the Canal de la Campine, the Canal de Hasselt, etc., designed to effect a junction with the Scheldt and to provide means of communication for the district of the Campine—as well as the irrigation schemes in the Campine made it necessary to divert greater quantities of water from the river. Belgium found herself obliged to construct works to enable water to be drawn from the Liége-Maestricht Canal, but this led to an increased current in the Zuid-Willemsvaart which impeded navigation (in consequence of the new frontier between Belgium and the Netherlands, this canal, both ends of which were in Netherlands territory, traversed Belgian territory). Furthermore, at times, the irrigation works in the Campine caused flooding in the Netherlands district of Brabant.

The Belgian and Netherlands Governments negotiated for some ten years with a view to finding a solution of the problem. They concluded a treaty concerning the régime for taking water from the Meuse, which was signed on May 12th, 1863, together with two other treaties regarding the abolition of tolls on the Scheldt and commercial relations between the two countries.

The main problem to be solved as regards the waters of the Meuse was, as has been stated, the excessive speed of the current in the Zuid-Willemsvaart. The Treaty of 1863 overcame this difficulty by the combined effects of three groups of measures: the raising of the level of the Zuid-Willemsvaart throughout its whole course from Maestricht to Bocholt, so as to increase the transverse section and, consequently, to allow more water to flow along it without increasing the speed of the current; the concentration of diversions of water from the Meuse at a new intake placed at Maestricht, i.e. further upstream at a point where it could feed the canal, notwithstanding the raising of the level of the latter; the extension of the programme of works to be carried out on the common section of the Meuse so as to make it possible to take more water from the Meuse without affecting the navigability of the common section of the river, a question which at that time was of importance to both countries.

At the beginning of the XXth century, the expansion of trade led the two Governments to enter into negotiations with a view to improving navigation on the Meuse by means of works to be carried out by mutual agreement. These negotiations had not been concluded when the war of 1914–1918 broke out. In 1925 they led to the signature of a treaty which would have enabled the waterways desired on either side to be constructed; but this treaty was rejected by the Netherlands First Chamber. The Netherlands then began the construction of the Juliana Canal from Maestricht to Maasbracht, and also of the Borgharen barrage and the lock at Bosscheveld. While in 1930, Belgium began the construction of the Albert Canal, designed to connect Liége with Antwerp, and of the Neerhaeren Lock amongst others. These two programmes led to diplomatic correspondence in the course of which each Government expressed doubts as to the compatibility of the works undertaken by the other with the Treaty of 1863. As no progress was made with the settlement of these differences, the Netherlands, on August 1st, 1936, instituted proceedings against Belgium before the Court, relying upon the declarations made by both States recognizing the jurisdiction of the Court as compulsory, in conformity with Article 36, paragraph 2, of the Statute.

The case related to the question whether, on the one hand, the execution by Belgium of various works in connection with the construction of the Albert Canal and, on the other hand, the manner in which, without the consent of the Netherlands, Belgium at present supplies and appears to intend in future to supply with water existing or projected canals in the north of her territory, are consistent with the rights ensuing to the Netherlands from the Netherlands-Belgian Treaty of May 12th, 1863, concerning the régime for taking water from the Meuse.

*Procedure*

The Parties duly filed the documents of the written proceedings (Memorial by the Netherlands, Counter-Memorial by Belgium, Reply by the Netherlands, Rejoinder by Belgium) within the time-limits which had been fixed. In its Counter-Memorial the Belgian Government presented a counter-claim praying the Court to declare that the Netherlands Government had committed a breach of the Treaty of 1863 by constructing the Borgharen barrage and that the Juliana Canal, being a canal below Maestricht, within the meaning of Article 1 of the Treaty, was subject, as regards the supply of water to it, to the same provisions as the canals on the left bank of the Meuse below Maestricht.

*Inspection of the locality*

In the course of public sittings held on May 4th, 5th, 7th, 10th, 11th, 12th, 18th, 20th and 21st, 1937, the Court heard the representatives of the Parties. At the hearing on May 7th, 1937, the Agent for the Belgian Government suggested that the Court should pay a visit to the locality in order to see on the spot all the installations, canals and waterways to which the dispute related. This suggestion met with no opposition on the part of the Agent for the Netherlands Government, and the Court decided, by an Order made on May 13th, 1937, to comply with it. Adopting the itinerary jointly proposed by the Agents of the Parties, the Court carried out this inspection on May 13th, 14th and 15th, 1937. It heard the explanations given by the representatives who had been designated for the purpose by the Parties and witnessed practical demonstrations of the operation of locks and of installations connected therewith.

*Composition of the Court*

The Court was composed as follows for the examination of the case:

M. Guerrero, *President*; Sir Cecil Hurst, *Vice-President*; Count Rostworowski, MM. Fromageot, de Bustamante, Altamira, Anzilotti, Negulesco, Jhr. van Eysinga, MM. Nagaoka, Cheng, Hudson, de Visscher, *Judges*.

(M. de Visscher, who was elected a member of the Court by the Assembly and Council of the League of Nations on May 27th, 1937, had been, at the beginning of the case, nominated as judge *ad hoc* by the Belgian Government.)

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*Judgment (analysis)*

The Court's judgment was delivered on June 28th, 1937.

After summarizing the facts, the Court observes that the points submitted to it by the Parties must all be determined solely by the interpretation and application of the Treaty of 1863, without reference to the general rules of international law. Then, after recalling the relevant provisions of this Treaty, the Court proceeds to examine the submissions of the Applicant.

The Netherlands Government, in its first submission, asked the Court to declare that the construction by Belgium of works rendering it possible for a canal situated below Maestricht to be supplied with water taken from the Meuse elsewhere than at the intake at that town was contrary to the Treaty of 1863; these works, it was alleged, infringed the Netherlands' privilege of control over diversions of water, and the quantities of water diverted exceeded the maximum fixed by the Treaty. In this connection, the Netherlands Agent laid stress on the fact that the Neerhaeren Lock contained side-channels for filling and emptying the lock chamber, which channels could easily be converted into a lateral conduit enabling water to be discharged in large quantities.

In the Court's view, the Treaty of 1863 did not place the Parties in a situation of legal inequality by conferring on one of them a right of control to which the other could not lay claim: for the Treaty is an agreement freely concluded between two States seeking to reconcile their practical interests with a view to improving an existing situation. Article 1 of the Treaty is a provision equally binding on the Netherlands and on Belgium. If, therefore, it is claimed on behalf of the Netherlands Government that, over and above the rights which necessarily result from the fact that the new intake is situated on Netherlands territory, the Netherlands possess certain privileges in the sense that the Treaty imposes on Belgium, and not on them, an obligation to abstain from certain acts connected with the supply to

canals below Maestricht of water taken from the Meuse elsewhere than at the treaty feeder, the argument goes beyond what the text of the Treaty will support.

In its second submission, the Netherlands Government asked the Court to declare that the feeding of certain canals in Belgium (the Belgian section of the Zuid-Willemsvaart, the Canal de la Campine, the Hasselt Canal, etc.) with water taken from the Meuse elsewhere than at Maestricht was contrary to the Treaty.

Examining the régime of water supply established by the Treaty, the Court finds that this régime consists both in the construction in Netherlands territory of an intake which was to constitute the feeding conduit for all canals situated below Maestricht, and in the fixing of the volume of water to be discharged into the Zuid-Willemsvaart at a quantity which would maintain a minimum depth in that canal and would ensure that the velocity of its current did not exceed a fixed maximum. As regards the canals which the Treaty had in view when it referred to canals situated below Maestricht, these canals are: the Zuid-Willemsvaart and the canals which branch off from it and are fed by it.

Such being the treaty régime, it is clear, the Court says, that any work which disturbs the situation thus established constitutes an infraction of the Treaty: and this holds good for works above Maestricht just as much as for works below it. Thus the functioning of an intake other than the Maestricht feeder instituted by the Treaty would not be compatible with the Treaty. With regard to the question whether the passage of water through a lock constitutes an infraction of Article 1—as contended by the Netherlands Government and denied by the Belgian Government—the Court holds that neither the Belgian nor the Netherlands contention can be accepted in its entirety. To adopt the Belgian contention to the effect that no lock, when used for navigation, and no volume of water discharged through a lock when being utilized for that purpose, can constitute an infraction of Article 1, would open the door to the construction of works and the discharge of water in such quantities that the intentions of the Treaty would be entirely frustrated. On the other hand, to adopt the Netherlands contention and to hold that any discharge of water into the Zuid-Willemsvaart through the Neerhaeren Lock, instead of through the treaty feeder, must result in an infraction of Article 1—irrespective of the consequences which such discharge of water might produce on the velocity of the current in the Zuid-Willemsvaart, or on the navigability of the common section of the Meuse—would be to ignore the objects with which the Treaty was concluded. In the view of the Court, the use of the Neerhaeren Lock would contravene the object of the Treaty if it produced an excessive current in the Zuid-Willemsvaart or a deficiency of water in the Meuse; but this has not been established. Another circumstance which must be borne in mind in connection with the submission of the Netherlands Government regarding the Neerhaeren Lock is the construction by the latter Government of the lock at Bosscheveld, which is even larger than the Neerhaeren Lock and which leads directly from the Meuse into the Zuid-Willemsvaart. The Court cannot refrain from comparing the cases of the two locks, and it holds that there is no ground for treating one more unfavourably than the other. Neither of these locks constitutes a feeder, yet both of them discharge their lock-water into the canal, and thus take part in feeding it with water otherwise than through the treaty feeder though without producing an excessive current in the Zuid-Willemsvaart. In these circumstances, the Court finds it difficult to admit that the Netherlands are now warranted in complaining of the construction and operation of a lock of which they themselves set an example in the past.

The third submission of the Netherlands Government is fundamentally concerned with the construction and bringing into use of the Albert Canal from Liége to Antwerp. This canal, which is fed from an intake at Liége-Monsin, follows for a certain distance the course of the old Hasselt Canal, and the Court is asked to declare that the feeding of this section with water taken from the Meuse elsewhere than at Maestricht is contrary to the Treaty. The Court rejects this submission. It holds that the Treaty forbids neither the Netherlands nor Belgium to make such use as they may see fit of the canals covered by the Treaty in so far as concerns canals which are situated in Netherlands or Belgian territory, as the

case may be, and do not leave that territory. As regards such canals, each of the two States is at liberty, in its own territory, to modify them, to enlarge them, to transform them, to fill them in and even to increase the volume of water in them from new sources, provided that the diversion of water at the treaty feeder and the volume of water to be discharged therefrom to maintain the normal level and flow in the Zuid-Willemsvaart is not affected.

Moreover, the contention of the Netherlands Government is invalidated by the singular result to which it would lead in practice. For it would amount to criticizing Belgium for having made the new canal follow the line of the old. She need only have sited the new canal a little to one side and then she would not have contravened the Treaty. No such effect can have been intended by the contracting Parties, nor can it result from a proper interpretation of the Treaty.

For the same reasons the Court rejects the fourth submission of the Netherlands Government, which is similar to the foregoing.

Having thus arrived at the conclusion that there is no justification for the various complaints made by the Netherlands Government against the Belgian Government, the Court proceeds to consider the latter Government's counter-claim which, as it points out before doing so, is directly connected with the principal claim.

In its first submission, the Belgian Government prays the Court to declare that the Borgharen barrage, by raising the level of the Meuse, has altered the local situation at Maestricht, and that this, having been done without the consent of Belgium, is contrary to the Treaty. The Court rejects this submission; for the Treaty does not forbid the Netherlands to alter the depth of water in the Meuse at Maestricht without the consent of Belgium, provided that neither the discharge of water through the feeder nor the volume which it must or can supply, nor again the current in the Zuid-Willemsvaart, are thereby affected. Furthermore, the Belgian Government has not produced evidence to show that the navigability of the Meuse has suffered; and in any case, barge traffic, under whatever flag, now has at its disposal the Juliana Canal which is much better adapted to its needs.

In the second submission of its counter-claim, the Belgian Government prays the Court to declare that the Juliana Canal is subject, as regards its water supply, to the same provisions as the canals on the left bank of the Meuse below Maestricht. The Court holds that the Juliana Canal, situated on the right bank of the Meuse, cannot be regarded as a "canal situated below Maestricht" within the meaning of Article 1 of the Treaty. The question of how the Juliana Canal is, in fact, at present supplied with water would only require to be considered if it were alleged that the method by which it is fed was detrimental to the régime instituted by the Treaty for the canals situated on the left bank. Belgium however does not allege that this is the case.

For these reasons, the Court rejects the various submissions both of the Memorial presented by the Netherlands Government and of the counter-claim presented in the Belgian Counter-Memorial.

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The decision of the Court in regard to the principal claim was adopted by ten votes to three; the counter-claim was also rejected by ten votes to three.

*Separate opinions*

To the judgment are appended a number of separate opinions: that of M. Anzilotti who was unable to concur in the judgment; those of M. Altamira and Jonkheer van Eysinga who were unable to concur in all the Court's findings; that of Sir Cecil Hurst who was unable to concur in the findings of the judgment in regard to the counter-claim. Mr. Hudson, while concurring in the judgment, appended his

observations. M. de Visscher declared that he was unable to concur in the findings of the judgment in regard to the counter-claim.

*Dissenting opinion of Sir Cecil Hurst*

Sir Cecil Hurst expresses his disagreement with the decision of the Court on the Belgian counter-claim.

As regards the first submission of that counter-claim, Sir Cecil Hurst considers that the construction of the Borgharen barrage is a violation of the Treaty of 1863. He declares that the purpose which the Treaty had in view was that the quantity of water to be withdrawn from the Meuse should depend on the depth of water in the sections of the river below Maestricht. It is therefore permissible to draw the deduction that the intention of the framers of the Treaty was that the maximum of ten cubic metres per second should only be withdrawn from the river when there was a certain depth of water in the river below Maestricht and down to Venlo. He finds that the action of the Netherlands Government in constructing the Borgharen barrage has had the effect of excluding altogether the application of a provision in the Treaty which must be regarded as having been intended to safeguard the interests of navigation on the Meuse between Maestricht and Venlo. Such action is incompatible with the Treaty, and for that reason the first submission in the Belgian counter-claim should be admitted. He adds that the provision in the second paragraph of Article V enabling the Netherlands Government to increase its share of the water withdrawn from the Meuse at Maestricht affords no justification for the construction of the Borgharen barrage.

The dissenting opinion turns to the second submission in the Belgian counter-claim relating to the Juliana Canal. Sir Cecil Hurst states that no sufficient evidence has been submitted on behalf of the Belgian Government that the Juliana Canal is or has been fed with water from the Meuse; in fact, the contrary has been submitted. He concludes that a finding to that effect would have been sufficient to dispose of the case as regards the Juliana Canal, and to justify the rejection of the Belgian submission. The question whether or not the Juliana Canal is a canal below Maestricht within the meaning of Article 1 need not in that case have been considered.

Sir Cecil Hurst observes that there is no doubt that in 1863 the canals situated below Maestricht were all situated on the left bank of the river, and there is nothing to show that at that date any such canal as the Juliana Canal had been thought of. It does not follow, however, that it was the intention of the Treaty that the prohibition contained in Article 1 of the Treaty was not intended to apply to a canal on the right bank. There can be no sufficient reason for reading into the Treaty of 1863 a supposed intention to restrict its operation to the left bank if the plain language of the text is broad enough to cover canals on the right bank. For these reasons, according to Sir Cecil Hurst, the Juliana Canal would fall within the prohibition prescribed by Article 1 of the Treaty if it was fed with water from the Meuse. It is merely because of lack of proof as to this point that the Belgian submission should be rejected.

*Separate opinion by M. Altamira*

M. Altamira expresses his dissent on the two points of the interpretation of the Treaty of 1863 and the findings upon the submissions of the Applicant. He does not accept all the grounds on which the judgment is based, though he reaches, for different legal reasons, the same conclusions as the findings of the judgment, with the sole exception of the finding in regard to the Neerhaeren Lock.

Preliminarily, M. Altamira makes two general observations. First of all, every one of the obligations, whether common to the two contracting Parties or peculiar to one of them, contained in the Treaty, is essential in respect of the type of interests to which it relates; but it follows that none of them takes precedence over the others and still less can render them superfluous. Second, the Treaty of May

12th, 1863, involves obligations and that these obligations must be fulfilled. The fact that the Treaty is chiefly concerned with the adjustment of the Parties' interests and not with differences of a really legal nature does not mean that no legal relationship is established as regards the fulfillment of the agreement in regard to interests. These interests may have been the reason for the conclusion of the Treaty, but once the Treaty has come into existence, the rights and obligations which it expressly or implicitly creates take precedence. The interests remain in the background and can only be taken into account in so far as is permitted by the legal provisions embodied in the agreement between the Parties. They can never take the place of these provisions or impede their execution.

M. Altamira proceeds to the interpretation of the articles of the Treaty. In particular, he sets out the obligations that arise from Article 1. One, common to both Parties, is the obligation not to make—or not to retain—another intake having the same purpose or the same result in practice as that which the Maestricht feeder is henceforward alone to serve. The other obligation, likewise common to both Parties, is the obligation to do nothing which—apart from a supplying of water from a source forbidden by the first obligation—would make it impossible to execute Article 1 completely and consequently also the other articles which constitute its complement or corollary. He posits that this is all that is to be found or can be deduced from the terms of Article 1—which is very clear—without going beyond its scope. Any further obligation or right on the part of the Netherlands Government or the Belgian Government is only to be found in the following articles of the Treaty. He adds that, as regards what canals were referred to by the words in the Article "below Maestricht", everyone knew quite well in 1863 which canals were meant, and the Treaty did not need to enumerate them.

M. Altamira then sets out an analysis of the express or implied obligations contained in each of the Treaty's articles. The Treaty does not appear to impose any other obligation upon either Party. However, each of these obligations must be observed irrespective of the others, and the fulfilment of the others cannot excuse the non-fulfilment of one.

M. Altamira notes that among the practical consequences to be drawn from an interpretation of the 1863 Treaty—thus passing beyond the sphere of law—the fact that the obligations under this Treaty are perhaps somewhat restrictive, having regard to circumstances that have since developed. This is certainly not a question for the Court or for a judge to examine, but it arises quite naturally from a study of the legal elements contained in the Treaty and from knowledge of present-day conditions. As long as the Treaty remains in force, it must be observed as it stands. It is not for the Treaty to adapt itself to conditions. But if the latter are of a compelling nature, compliance with them would necessitate another legal instrument.

M. Altamira states the grounds of his dissent from the finding concerning the Neerhaeren Lock, as contained in the reasons for the present judgment arise from application of his interpretation of Article 1 of the Treaty of 1863 and his general remarks on the Treaty system. He dismisses the case of lock 19 as acting to refute this argument.

*Dissenting opinion of M. Anzilotti*

M. Anzilotti dissents from the Court's judgment on two points: the rejection of submission I *b* of the Application (the Neerhaeren Lock) and the rejection of submission I° of the Counter-claim (the Borgharen barrage). He finds that the Court should have accepted both these submissions.

He observes that the operative clause of the judgment merely rejects the submissions of the principal claim and of the Counter-claim. In his view, in a suit the main object of which was to obtain the interpretation of a treaty with reference to certain concrete facts, and in which both the Applicant and the Respondent presented submissions indicating, in regard to each point, the interpretation which they respectively wished to see adopted by the Court, the latter should not have confined itself to a mere rejection of the submissions of the Applicant: it should also have expressed its opinion on the submis-

sions of the Respondent; and, in any case, it should have declared what it considered to be the correct interpretation of the Treaty.

With regard to the claim concerning the the Neerhaeren Lock, M. Anzilotti interprets the obligations of the Parties under Article 1 of the Treaty of May 12th, 1863. In his view, this Treaty is based on the fundamental principle that a certain quantity of water, and no more, will be taken from the Meuse to supply the needs of the canals situated below Maestricht and for the irrigation works in the Campine and the Netherlands. It follows that the essential purpose of Article 1 is not to exclude other feeders. Its object is rather to exclude any feeding of the canals in question with water withdrawn from the Meuse elsewhere than at the treaty feeder. He considers therefore that the obligation which the Parties assumed in that Article is not merely an obligation to refrain from constructing other feeders, but is an obligation to refrain from supplying these canals with water taken from the Meuse elsewhere than at the treaty feeder, no matter by what method it is taken or by what method it is discharged into the canals in question. Therefore, he finds that the functioning of the Neerhaeren Lock is contrary to this Treaty.

M. Anzilotti avers that it would be going beyond the reasonable intentions of the Parties to seek to infer from the fact that because lock 19, in affording passage to barges, discharges into the Zuid-Willemsvaart a volume of water which supplements that taken from the Meuse by the treaty feeder, it is lawful to construct other locks, performing the same function and producing the same effects. This would subvert the whole system of the Treaty.

M. Anzilotti notes that the Belgian Government asked for the interpretation of the Treaty with reference to the Neerhaeren Lock just in the same way as this had been requested by the Netherlands Government: this circumstance suffices to oblige the Court to give a decision on submission I *b* of the Application and on submission 2° of the Counter-Memorial, without concerning itself in any way with the existence of the Bosscheveld Lock.

The dissenting opinion examines another aspect of the question. In submission II *b* of the Application, the Netherlands asked the Court to condemn Belgium "to discontinue any feeding held to be contrary to the said Treaty and to refrain from any further such feeding". M. Anzilotti notes that, in its Rejoinder, the Belgian Government presented an alternative submission worded as follows: "To find that, by constructing certain works contrary to the terms of the Treaty, the Applicant has forfeited the right to invoke the Treaty against the Respondent". He states that the Court should have given a decision on the alternative submission. According to M. Anzilotti, the admissibility of this submission depends on two conditions, namely, whether the legal rule on which it founds itself is applicable in relations between States, and whether the Netherlands, by constructing the Bosscheveld Lock, were failing to execute the obligation imposed on them by the Treaty. As regards the first point, M. Anzilotti declares that the principle underlying this submission (*inadimplenti non est adimplendum*) is so just, so equitable, so universally recognized, that it must be applied in international relations also. In any case, it is one of these "general principles of law recognized by civilized nations" which the Court applies in virtue of Article 38 of its Statute. As regards the second point, he also finds that the Belgian Government's objection is well founded.

M. Anzilotti finds that the interpretation of the Treaty of 1863 which led to the conclusion that the Neerhaeren and Bosscheveld Locks are contrary to the Treaty leads to a like conclusion in regard to the Borgharen barrage. A structure which abolishes the variations of water depth and quantity set out in the Treaty as is done by the barrage at Borgharen is consequently, by reason of that very fact, contrary to the Treaty.

Finally, M. Anzilotti disregards the argument that Belgium has suffered no injury by the construction of the barrage, but that she has rather benefited by it. The existence of an injury would be relevant if Belgium had made a claim for damages, but she has simply asked for the interpretation of the Treaty.

*Separate opinion by Jonkheer van Eysinga*

Jhr. Van Eysinga sets out his separate views on certain parts of the case.

Jhr. Van Eysinga first examines the character, the scope and the interpretation of the Treaty of 1863, stating that the Treaty put an end, by means of a compromise, to a dispute which had existed between the two countries for several years. He discusses the history of the construction of the canals and the drafting of the Treaty. In his view, the essential feature of the Treaty was that a considerable portion of the discharge of the international river was assigned to Belgium, even at periods of the year when the Meuse is very low. The Treaty, therefore, derogated from the normal state of affairs, according to which the discharge of an international river belongs to that river. It was the withdrawal of large quantities of water from the Meuse, on the one hand, and the measures to offset the undesirable consequences of that withdrawal, on the other hand, that constituted the compromise established by the Treaty, which, as its Preamble states, regulated, permanently and definitively, the régime of diversions of water from the Meuse.

Jhr. Van Eysinga holds that Belgium's contention which implies that, above Maestricht, it would be lawful to divert water from the Meuse in order to feed canals situated below Maestricht, does not appear to be justified. He further finds that there is no justifiable exception to the conclusion that, when it was laid down that the intake at Maestricht was to be henceforward the only feeder for the supply of Meuse water to canals situated below that town, the granting of this monopoly to the new intake carried with it a prohibition of all feeding at other places, whether by conduits, by discharging culverts, by lock-water or by any other means by which Meuse water might be introduced into canals situated below Maestricht.

Jhr. Van Eysinga declares that the immense quantities of Meuse water which now enter the canals below Maestricht through the modern locks at Neerhaeren and Bosscheveld, though the discharge of the river has not altered, are contrary to the Treaty.

He observes that every international convention, unless it expressly excludes it, implies a control by the contracting parties to see whether the convention is being strictly applied. This control may lead among other things to diplomatic representations and, if necessary, to legal proceedings. The right of control is in principle mutual or, more strictly speaking, it is mutual wherever the convention is mutual. He finds that Belgium regarded the control over the volume of water as a control over navigation and traffic such as the Netherlands have not claimed.

Jhr. Van Eysinga states that submissions I *a*, I *b*, I *c* and I *d* of the Netherlands submissions are all justified.

The dissenting opinion finally considers the counter-claims of Belgium. Jhr. Van Eysinga holds that Article V, paragraph 2, does not possess the very wide scope given to it by the Netherlands case, and that some of the consequences which that argument seeks to deduce therefrom are not justified. He finds that the Borgharen barrage was not constructed contrary to the terms of this Treaty; the question of the feeding of the Juliana Canal with water from the Meuse is not touched upon by the Treaty of 1863; and that the Netherlands' deduction from paragraph 2 of Article V that Belgium by that Article disclaimed all interest in navigation over the frontier section of the Meuse, this navigation being left to the discretion of the Netherlands, is not justified.

*Individual opinion by Mr. Hudson*

Mr. Hudson concurs in the judgment of the Court, and presents some additional reasons for the result reached in regard to one point.

Mr. Hudson examines the connection between the Bosscheveld Lock and the Neerhaeren Lock, which, according to him, in law as well as in fact, are in the same position. The latter cannot be treated more unfavourably than the former. This leads to the question of whether in this case the Court must pronounce upon the legality or the illegality of the alimentation which results from the operation of either the Neerhaeren Lock or the Bosscheveld Lock, and if the Netherlands has in some measure *perdu le droit d'invoquer* the Treaty against Belgium.

Mr. Hudson observes that what are widely known as principles of equity have long been considered to constitute a part of international law, and as such they have often been applied by international tribunals. The Court has not been expressly authorized by its Statute to apply equity as distinguished from law. Nor, indeed, does the Statute expressly direct its application of international law. Article 38 of the Statute expressly directs the application of "general principles of law recognized by civilized nations", and in more than one nation principles of equity have an established place in the legal system. The Court's recognition of equity as a part of international law is in no way restricted by the special power conferred upon it "to decide a case *ex aequo et bono,* if the parties agree thereto". Mr. Hudson states that, under Article 38 of the Statute, if not independently of that Article, the Court has some freedom to consider principles of equity as part of the international law which it must apply.

According to Mr. Hudson, it is an important principle of equity that where two parties have assumed an identical or a reciprocal obligation, one party which is engaged in a continuing nonperformance of that obligation should not be permitted to take advantage of a similar non-performance of that obligation by the other party. In a proper case, and with scrupulous regard for the limitations which are necessary, a tribunal bound by international law ought not to shrink from applying a principle of such obvious fairness.

Applying this finding to the case at hand, Mr. Hudson declares that, in its operation of the Bosscheveld Lock, the Netherlands itself is now engaged in taking precisely similar action, similar in fact and similar in law. This seems to call for an application of the principle of equity stated above. One result of applying the principle will be that even if the Court should be of the opinion that the Belgian action with regard to the functioning of the Neerhaeren Lock is contrary to the Treaty of 1863, it should nevertheless refuse in this case to order Belgium to discontinue that action. In equity, the Netherlands is not in a position to have such relief decreed to her. The Court is asked to decree a kind of specific performance of a reciprocal obligation which the defendant itself is not performing. It must clearly refuse to do so. Mr. Hudson states that as a general rule, it would seem that a principle of equity applicable to a request for an injunction should be applied also to a request for a declaratory judgment. Neither request should be granted where the circumstances are such that the judgment would disturb that equality which is equity. In the circumstances of this case, on the assumption that the operation of both the Neerhaeren Lock and the Bosscheveld Lock is contrary to the Treaty of 1863, the Netherlands would not be entitled to a declaratory judgment for the same reasons that it is not entitled to a mandatory judgment.

# 71. LIGHTHOUSES IN CRETE AND SAMOS

## Judgment of 8 October 1937 (Series A/B, No. 71)

**Fourteenth Annual Report of the Permanent Court of International Justice (15 June 1937—15 June 1938), Series E, No. 14, pp. 111–115**

*Application, in a particular case, of a judgment already rendered by the Court (see Series A./B., No. 62).—Period at which the islands of Crete and Samos are to be regarded as having been "detached from the Ottoman Empire." Meaning of this expression—Application of Art. 9 of Protocol XII signed at the same time as the Treaty of Lausanne of July 24th, 1923—Character of the autonomy enjoyed, prior to 1913, by the islands of Crete and Samos. Its scope determined by the international treaties and by the Cretan and Samian Constitutions*

The case concerning the lighthouses[1], which had been submitted to the Court by a Special Agreement concluded between the French and Greek Governments, had been the subject of a judgment delivered on March 17th, 1934, in which the Court decided that "the contract of April 1st/14th, 1913, between the French firm Collas & Michel, known as the *'Administration générale des Phares de L'Empire ottoman'*, and the Ottoman Government, extending from September 4th, 1924, to September 4th, 1949, concession contracts granted to the said firm, was duly entered into and is accordingly operative as regards the Greek Government in so far as concerns lighthouses situated in the territories assigned to it after the Balkan wars or subsequently". This decision was preceded by a reservation in which the Court observed that the Special Agreement only required it to decide on a question of principle, and that it was not called upon to specify which were the territories detached from Turkey and assigned to Greece after the Balkan wars or subsequently where the lighthouses in regard to which the contract of 1913 is operative were situated. The Court further pointed out that it was all the more necessary to make this reservation because the Parties had not argued before the Court the questions of fact and of law which might be raised in that connection, and which the Court had not been asked to decide.

After this judgment the Greek Government, while declaring itself prepared to execute it, observed to the French Government (see *note verbale* addressed on July 17th, 1934, to the French Legation at Athens) that, as the territories covered by the contract had not been specified, and that as that question therefore remained open, it considered that the lighthouses in Crete and in Samos remained outside the ambit of the contract of April 1st/14th, 1913. For the territories in which they were situated were detached from Turkey well before that date, and the contract was entirely inoperative in so far as concerns those islands, which were detached from Turkey before 1913, just as it now is in so far as concerns Greece, the legal successor of those islands, which were previously autonomous territories incorporated in the territory of Greece in 1913.

As the French Government was unable to accept this standpoint, the two Governments, on August 28th, 1936, concluded a Special Agreement, in which the Court was asked to decide whether "the contract concluded on April 1st/14th, 1913, was duly entered into and is accordingly operative as regards the Greek Government in so far as concerns lighthouses situated in the territories of Crete, including the adjacent islets, and of Samos, which were assigned to that Government after the Balkan Wars". The terms of the Special Agreement itself provided that it should take effect as soon as it had been signed, and that it might be transmitted to the Court by either Party: it was filed with the Registry on October 27th, 1936, by the French Minister at The Hague.

[1] Series A./B, No. 62.

A Memorial and Counter-Memorial were filed by each of the Parties within the time-limits that had been fixed. The Court heard the arguments presented orally by the Parties on June 28th and 29th, 1937.

On this occasion the Court was composed as follows:

M. Guerrero, *President*; Sir Cecil Hurst, *Vice-President*; Count Rostworowski, MM. Fromageot, de Bustamante, Altamira, Urrutia, Negulesco, Jhr van Eysinga, MM. Cheng, Hudson, de Visscher, *Judges*.

Professor S. P. Séfériadès, nominated by the Greek Government as Judge *ad hoc*, also sat in the Court for the purposes of the case.

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The Court's judgment was delivered on October 8th, 1937.

The Court states in the first place that, according to the terms of the Special Agreement, the dispute relates to the applicability in a particular case of the principle laid down in the judgment of 1934. It goes on to observe that this question is regarded by the Parties as accessory to the principal question already decided by the Court, which is now *res judicata*, and that that question is in no way reopened. The Parties simply ask the Court whether Crete and the adjacent islets and Samos are included amongst the territories to which the decision on the question of principle applies and whether, consequently, the contract of 1913 was duly entered into in so far as concerns them.

The issue thus formulated amounts to the question what special reasons or circumstances were contemplated or recognized by the Parties as a possible ground for exception to the principle adopted by the 1934 judgment, such as would warrant the exclusion of the territories of Crete and Samos from the application of that judgment. The Parties expressed themselves very clearly on this subject in the Special Agreement itself: they requested the Court to decide the question "taking into account the period at which the territories specified were detached from the Ottoman Empire".

Accordingly there is one circumstance, and one circumstance only, which will warrant an exception to the application of the Judgment of March 17th, 1934, on the question of principle, namely: the period at which detachment from the Ottoman Empire took place in the case of the territories in question. It follows that, in deciding the question submitted to it, the Court cannot, without disregarding the terms of the Special Agreement, take into account considerations which might warrant an exception to the applicability of the principle laid down by the Judgment of March 17th, 1934, for reasons other than the sole ground for an exception admitted by the Parties.

The Court therefore has to determine the period at which Crete and Samos were detached from the Ottoman Empire. In the first place, however, it has to examine Article 9 of Protocol XII, signed at the same time as the Treaty of Lausanne of July 24th, 1923: does this Article, which is binding on both Parties and formed the basis of the judgment of 1934, warrant in favour of Crete and Samos an exception to the principle laid down by that judgment? No, it does not. The text is of a general character and does not warrant any exception or reservation. It applies to all the territories which were detached from Turkey after the Balkan Wars, and lays down that a State succeeding to Turkish territory is subrogated as regards the rights and obligations of Turkey in those territories. It provides for the direct and immediate succession of Greece to the obligations contracted by Turkey, without any break in the continuity of the sovereignty over the territories to which it refers. It establishes a close correlation between the detachment and the assignment of the territories. Therefore, from the standpoint of the applicability of the principle in question, there is nothing in the text of Article 9 of Protocol XII to warrant any differentiation between the various territories which were assigned to Greece.

But the reasoning of the Greek Government seeks precisely to preclude any contention based on this absence of differentiation. The line of argument is as follows: Article 9 had no need to differentiate, because, having been framed to meet a different case from that which is now submitted to the Court, it is, *a priori*, incapable of being applied to the territories of Crete and Samos. Thus, Article 9 could not do otherwise than consider the detachment and the assignment of the territories as two aspects of a single operation, for the hypothesis envisaged by that Article was that of territories transferred from the sovereignty of Turkey to another sovereignty. But, in the case of Crete and Samos, these territories were not and could not have been detached from Turkey by a transfer of sovereignty from that State to Greece, seeing that Turkey had long since lost her sovereignty in regard to them. Therefore, in 1913, the Ottoman Government no longer had any title, competence or capacity to conclude the contract in dispute. Consequently, the issue, reduced to its essence, may be stated as follows: Had every link between the Ottoman Empire and the islands disappeared at the time of the contract?

The Court does not consider that this was the case. Examining the régime of autonomy granted to the territories in question, it arrives at the conclusion that, though the Sultan had been obliged to accept important restrictions on the exercise of his rights of sovereignty as regards Crete and Samos, that sovereignty had not ceased to belong to him. The Court finds proof of this more especially in Articles 4 and 5 of the Treaty of London (May 17th/30th, 1913), in the Treaty of Athens (November 1st/14th, 1913) and in Article 12 of the Treaty of Lausanne (July 24th, 1923).

The Court accordingly considers that the Greek Government has not proved its contention and that the lighthouses in Crete and Samos are indeed lighthouses situated in territories which not only were assigned to Greece after the Balkan wars, but also were not detached from the Ottoman Empire until that time. Article 9 of Protocol XII of Lausanne is therefore applicable to the contract of 1913, and that contract must be considered as having been duly entered into and as accordingly operative as regards Greece in respect of the said territories. The particular case therefore falls within the scope of the decision on the question of principle delivered by the Court in 1934.

This conclusion, deduced from the international instruments, is not, in the opinion of the Court, invalidated by an argument which the Greek Government had founded on the autonomous régimes granted by the Porte to Crete and Samos prior to the date of the contract. These régimes of autonomy had not abrogated the rights of the Sultan. Accordingly Crete and Samos must be regarded as having still formed part of the Ottoman Empire at the date of the contract in dispute, and that contract, being applicable to the whole of the Ottoman Empire, is therefore applicable to these islands.

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The Court's judgment was delivered by ten votes against three.

Sir Cecil Hurst and Mr. Hudson, Judges, and M. Séfériadès, Judge *ad hoc*, declared that they were unable to concur in the judgment, to which they appended their separate opinions.

Jonkheer van Eysinga, Judge, while in agreement with the operative clause of the judgment, appended a separate opinion regarding its grounds.

*Dissenting opinion of Sir Cecil Hurst*

Sir Cecil Hurst states that the question on which the Court is to adjudicate is whether or not the contract of 1913 was or was not duly entered into so as to be binding on Greece in respect of lighthouses in Crete and Samos. He explains that he is unable to concur with the line, taken by the Parties and followed by the Court, that the date at which Crete and Samos were detached from the Ottoman Empire was the only question for the Court to decide.

Sir Cecil Hurst notes that it is common ground that if Crete and Samos were detached from the Ottoman Empire after the Balkan wars the question whether the contract of 1913 is or is not operative as regards Greece as to lighthouses in Crete and Samos will depend on whether or not the said contract falls within the scope of Article 9 of Protocol XII of the same date as the Treaty of Lausanne.

According to Sir Cecil Hurst, an examination of the text of the judgment of the Court in 1934 shows that the finding that the contract was duly entered into was a finding that it was duly entered into according to Ottoman law. If the subrogation under Article 9 of Protocol XII of a succession State (Greece) to Turkey's rights and duties under the contract of 1913 depends on the contract being a valid contract, i.e., a contract duly entered into, the question whether that subrogation extends to lighthouses in Crete and Samos must depend on the validity of the contract in Crete and Samos, i.e., on whether or not the effect of the contract extended to those territories.

Sir Cecil Hurst examines first the case of Crete. He points out that at the date of the contract of 1913 Crete enjoyed a full measure of autonomy, and he finds no reason for assuming that the said contract was duly entered into as regards Crete. The judgment of the Court should have held that as regards lighthouses in Crete the contract is not operative as regards the Greek Government.

As regards Samos, Sir Cecil Hurst observes that the *Hatts* of 1832 and 1852 appear to have conferred upon the island an autonomy less far-reaching than in the case of Crete. Neither instruments are at all clear as to the extent to which the Porte retained any rights of control or administration in the island. In these circumstances, Sir Cecil Hurst finds no sufficient reason for dissenting from the conclusion reached by the Court that the contract of 1913 was operative as regards the Greek Government in so far as concerns lighthouses in Samos.

*Separate opinion by Jonkheer van Eysinga*

While agreeing with the Court's conclusions, Jhr. van Eysinga considers that the question asked to the Court cannot be decided by declaring that, since Crete and Samos were detached from the Ottoman Empire after the Balkan wars, Article 9 of Protocol XII of Lausanne of 1923 applies to these territories, and that, in consequence, Greece is subrogated as regards the rights and obligations arising for Turkey out of the concessionary contract, in so far as concerns lighthouses situated in the two islands.

In his view, the Court is called upon to decide whether the contract of April 1st/14th, 1913, was duly entered into in so far as concerns the lighthouses in the two islands. In this connection, Jhr. van Eysinga notes that the judgment of 1934 had decided that the contract was duly entered into and was accordingly operative as regards the Greek Government in so far as concerns lighthouses situated in the territories assigned to it after the Balkan wars or subsequently. In that judgment, however, the Court had not expressed its opinion as to whether the general constitutional law of the Ottoman Empire was really operative in all the territories detached from the Ottoman Empire and assigned to Greece after the Balkan wars. He considers that the Court is now called upon to declare whether the principle laid down in the judgment of 1934 is applicable to the islands of Crete and Samos, which enjoyed a special international status and which had already been the subject of the reservation preceding the operative paragraph of the judgment of 1934.

After considering the facts of the case, Jhr. van Eysinga concludes that the contract of April 1st/14th, 1913, extending the concession to September 4th, 1949, was duly entered into and is accordingly operative as regards the Greek Government in so far as concerns lighthouses situated in the territories of Crete, including the adjacent islets, and of Samos.

*Separate opinion of Mr. Hudson*

After having analysed the Court's judgment of March 17th, 1934, and the special agreement of August 28th, 1936, Mr. Hudson expresses the view that, in the present instance, the parties intended to place before the Court questions which fall within the reservation made in the 1934 judgment (namely, that the Court was not, at the time, called upon to specify which are the territories where the lighthouses in regard to which the contract of 1913 is operative are situated); that they thought of these questions as being concerned with the application with respect to particular territories, of principles already laid down by the Court in its *décision de principe* of 1934; that they wished to raise, as to these territories, "questions of fact and of law" which the Court had said "might be raised in that connection" and which the Court had not been asked to decide in 1934; that they saw one, but only one, of these "questions of fact and of law" as being that relating to the epoch of detachment of Crete and Samos from the Ottoman Empire; and that they intended that the Court should deal with the "questions of fact and of law" connected with the validity and enforceability *vis-à-vis* Greece of the contract of 1913, with respect to lighthouses in Crete and Samos, in so far as those issues had not become *res judicata* in consequence of the 1934 judgment.

Noting that, in its judgment of 1934, the Court had stated that its decision was founded on Article 9 of Protocol XII, Mr. Hudson observes that, as Crete and Samos were not "detached from Turkey under the Treaty of Peace" of Lausanne, Article 9 of Protocol XII can have no application to them unless it can be said that they were "detached from Turkey after the Balkan wars". The question arises, therefore, as to the sense in which the term "detached" (*détachés*) was employed in Article 9. Mr. Hudson notes, however, that, whatever meaning is given to the term *détachés* in the special agreement and in Article 9 of Protocol XII, it would still remain for the Court to appreciate the importance of the question for a decision of this case.

According to Mr. Hudson, another question to be answered is whether the Court can say that as to lighthouses in Crete and Samos the contract of April 1st/14th, 1913, was "duly entered into and is accordingly operative as regards the Greek Government". This cannot be said unless it can be found that, notwithstanding the autonomy possessed by Crete and Samos, the Sultan or the Ottoman Government had legal power on April 1st/14th, 1913 to enter into concessionary contracts with reference to lighthouses in these territories. This question was in no way determined by the Court's judgment of 1934.

Having considered the situation of Crete in light of these questions, Mr. Hudson concludes that it is impossible to apply Article 9 of Protocol XII as the basis for subrogating Greece to the rights and charges of Turkey under the contract of April 1st/14th, 1913 in so far as it concerns lighthouses in Crete and the adjacent islets. In his view, the Court should refuse to say that the contract of April 1st/14th, 1913, "was duly entered into and is accordingly operative as regards the Greek Government" in so far as concerns lighthouses situated in the territories of Crete, including the adjacent islets. As regards the lighthouses in Samos, on the contrary, he considers that the contract of 1913 was not *ultra vires* to the Sultan or the Ottoman Government and that Article 9 of Protocol XII subrogates Greece to the *droits et charges* of Turkey under the contract. It follows that the contract of April 1st/14th, 1913, "was duly entered into and is accordingly operative as regards the Greek Government" in so far as concerns lighthouses in the territory of Samos.

*Separate opinion of M. Séfériadès*

In M. Séfériadès's view, the intention of the signatories of the Special Agreement of 1936 is to submit to the Court a particular case, which was not submitted to it in 1934 and upon which, according to its judgment of that date, it had not adjudicated, but in regard to which it had reserved its right to adjudicate in the event of "questions of fact and of law which might be raised in that connection" being submitted to

it. M. Séfériadès considers that the only question on which the Court should give a decision is whether the concessionary contract signed by Turkey in 1913 "was duly entered into and is accordingly operative" in regard to the Greek Government, in so far as concerns the islands of Crete and Samos.

According to M. Séfériadès, the first question to be answered is at what period the territories of Crete and Samos were detached from the Ottoman Empire. He states that, under international law, a territory must be regarded as detached from a State when it is *internationally recognized* that the essential attributes of the sovereignty appertaining to that State have ceased to exist, having henceforth become vested either in the said territory or in another State. And these attributes of sovereignty, without which no sovereignty can be described as such are: the right of free political organization, the right of autonomy in the conduct of social affairs, prisons, public worship, public education, administrative machinery, systems of taxation, communications, organization of the police, the right of civil and criminal legislation, the right of jurisdiction, the obligation of military service, freedom of trade, the right of the flag, the right to conclude treaties and the right of representation.

A further question to be examined, according to M. Séfériadès, is whether for any legal reason, drawn more particularly from Ottoman law and corroborated by international law, Turkey had not ceased both in fact and in law to be able in April 1913 to grant concessions in respect of lighthouses in the islands of Crete and Samos. In his view, there can be no doubt that Ottoman law was entirely and absolutely violated in the two special cases which we are considering. Accordingly, since the concession contracts must be regarded as irregularly signed, they will be inoperative as regards the islands with which we are concerned.

M. Séfériadès thus proceeds to an examination of the international legal situation of the islands of Crete and Samos, which, in his view, definitely confirms this view. As regards the island of Crete, Mr. Séfériadès considers that it was in fact detached from Turkey when, in 1897, the Ottoman troops were compelled to leave Cretan territory, i.e. before April 1st/14th 1913, the date of the concessionary contract. As regards the island of Samos, he concludes that it was virtually detached from Turkey before the conclusion of the lighthouse contract of April 1st/14th, 1913, and that, in any event, the island was governed by special organic laws which were not respected in the conclusion of the concessionary contract.

M. Séfériadès concludes that the concessionary contract of April 1st/14th, 1913, signed between the firm of Collas & Michel and the Government of Constantinople, not having been duly entered into in respect of the islands of Crete and of Samos, Greece cannot be considered as subrogated as regards the rights and obligations of Turkey towards the French company referred to above.

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## 72. BORCHGRAVE (PRELIMINARY OBJECTIONS)

### Judgment of 6 November 1937 (Series A/B, No. 72)

**Fourteenth Annual Report of the Permanent Court of International Justice (15 June 1937—15 June 1938), Series E, No. 14, pp. 116–118**

*Interpretation of a special agreement; analysis of the notes preceding the conclusion of this special agreement—Rejection of a first preliminary objection; a second objection, having subsequently been withdrawn, cannot be joined to the merits*

On March 5th, 1937, the Belgian Minister at The Hague filed with the Permanent Court of International Justice a Special Agreement concluded on February 20th, 1937, between the Belgian and Spanish Governments. By the terms of this Special Agreement the two Governments, in view of the fact that a dispute had arisen between them *à propos* the death of Baron Jacques de Borchgrave, agreed to submit it to the Court, which was requested to say whether, having regard to the circumstances of fact and of law concerning the case, the responsibility of the Spanish Government was involved.

On April 1st, 1937, the President of the Court, taking into consideration a proposal submitted by agreement between the Parties, made an Order fixing the time-limits of the written procedure so as to provide for the successive submission of the following documents: a Memorial by the Belgian Government, a Counter-Memorial by the Spanish Government, a Reply by the Belgian Government, and a Rejoinder by the Spanish Government. Within the time-limit fixed for the filing of the Counter-Memorial, the Spanish Government submitted preliminary objections to the jurisdiction. The procedure on the merits having then been suspended, the Belgian Government filed a written statement of its observations and submissions in regard to the objections.

In the course of public sittings held on October 18th, 19th and 20th, 1937, the Court heard oral arguments by the representatives of the Parties concerning the Spanish objections. The Court was composed, on this occasion, as follows:

M. Guerrero, *President*; Sir Cecil Hurst, *Vice-President*; Count Rostworowski, MM. Fromageot, de Bustamante, Altamira, Urrutia, Negulesco, Jhr. van Eysinga, MM. Cheng, Hudson, de Visscher, *Judges*.

(M. de Visscher, who was elected as a member of the Court by the Assembly and Council of the League of Nations on May 27th, 1937, had been designated as Judge *ad hoc* by the Belgian Government at the outset of the proceedings.)

By an Order made by the Court on May 13th, 1937, the Spanish Government's Agent had, at his request, been authorized to present his oral arguments in the Spanish language, causing them to be immediately followed by an oral translation, arranged for by him, into one of the official languages of the Court.

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On November 6th, 1937, the Court delivered its judgment on the Spanish Government's preliminary objections.

The judgment first sets forth the facts as alleged: During the later months of 1936, Baron Jacques de Borchgrave, a Belgian national resident in Madrid, collaborated in the work of the Belgian Embassy in Madrid. He left the Embassy by automobile on December 20th, 1936, and never returned. On the same day, his disappearance was notified by the Embassy to the Spanish civil and military authorities. A body found on the route from Madrid to Fuencarral on December 22nd, five kilometres from Madrid, was later identified as the body of Baron Jacques de Borchgrave. Some days thereafter, the automobile in which Baron Jacques de Borchgrave had left the Embassy was retrieved in Madrid.

The judgment next analyzes the submissions of the Parties. In its Memorial, the Belgian Government submitted: (1) that the responsibility of the Spanish Government was involved on account of the crime committed; (2) that that Government was responsible for not having used sufficient diligence in the apprehension and prosecution of the guilty. In the Spanish preliminary objections it was submitted that the Court had no jurisdiction to examine the second of the Belgian Government's submissions, and, moreover, that neither submission could be entertained so long as remedies afforded by Spanish municipal law had not been exhausted. In the course of his oral argument, the Spanish representative stated that he maintained his first objection but asked that the second, which he maintained as a part of

his defence, should be joined to the merits. To sum up, according to the Spanish Government's contention, the Special Agreement refers only to responsibility by reason of the fact of the death of Borchgrave and does not refer to facts subsequent to the death; the Belgian Government holds, on the contrary, that the Special Agreement includes two different reasons for the responsibility: the death of the victim, and the lack of diligence in apprehending the guilty.

The issue thus submitted to the Court depends, therefore, on the interpretation of the Special Agreement. In the view of the Court, the terms of the Special Agreement are so unlimited, and its text is so free from qualifying expressions, that it may be said that the Special Agreement is characterized by its generality. This conclusion is not weakened by the notes which were exchanged by the Parties after the death of the victim, and which the Court proceeds to analyze: the agreement reached in the course of this correspondence related to the general question of the legal responsibility of the Spanish Government in connection both with the fact of the death and with the measures taken subsequently.

Having thus rejected the first objection of the Spanish Government, the Court observes that the representative of the Spanish Government had withdrawn the second as a preliminary objection, but had maintained it as part of his defence to be joined to the merits. The Court takes note of this withdrawal and accordingly does not adjudicate upon the Belgian submissions in regard to that objection. However, it observes that it is possible to join to the merits only objections which are before it. The withdrawal of the preliminary objection has left nothing of it to be joined to the merits. Any defence on the merits must be presented in the regular way in the course of the proceedings on the merits.

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The Court's judgment was delivered unanimously. M. Altamira, though concurring in the operative part of this judgment, was unable to agree with the reasons on which the Court based No. 1 of the operative clauses.

## 73. BORCHGRAVE (DISCONTINUANCE)

### Order of 30 April 1938 (Series A/B, No. 73)

**Fourteenth Annual Report of the Permanent Court of International Justice (15 June 1937—15 June 1938), Series E, No. 14, pp. 116–118**

*Withdrawal of the suit—Removal of the case from the list*

By an order appended to the judgment and bearing the same date, the Court had fixed the time-limits for the continuation of the written proceedings on the merits, namely, for the filing of a Counter-Memorial by the Spanish Government, of a Reply by the Belgian Government, and of a Rejoinder by the Spanish Government.

On January 4th, 1938, within the time-limit fixed for the filing of the Counter-Memorial—a time-limit which had been extended at the request of the Parties—the Registrar of the Court received from the Agents of the Parties letters, in identical terms, requesting him to inform the Court that the Belgian and Spanish Governments had agreed to discontinue proceedings in the Borchgrave case. Pending the moment when the Court was sitting and was able to take the requisite formal action upon these communications and to order the removal of the case from the list, the President of the Court made an Order the same day suspending the written proceedings. The Order by which the Court, under Article 68 of its Rules, placed on record the discontinuance of the proceedings by the Parties and ordered the case to be removed from the Court's list was made on April 30th, 1938.

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## 74. PHOSPHATES IN MOROCCO (PRELIMINARY OBJECTIONS)

### Judgment of 14 June 1938 (Series A/B, No. 74)

**Fourteenth Annual Report of the Permanent Court of International Justice (15 June 1937—15 June 1938), Series E, No. 14, pp. 119–124**

*Declaration affixed by France to the optional clause relating to the acceptance of the jurisdiction of the Court (Art. 36, para. 2, of the Statute) as compulsory. Limitation* ratione temporis*—Import of the words: "in any disputes which may arise after the ratification of the present declaration with regard to situations or facts subsequent to such ratification"—A situation prolonged beyond the crucial date; priority in date of the acts which led to this situation. Lack of jurisdiction—Allegation of an unlawful international act prior to the crucial date and resulting from a violation of vested rights placed under the protection of international conventions. Allegation of a denial of justice subsequent to that date. Absence of influence of the denial of justice upon the accomplishment of the unlawful international act and upon the responsibility ensuing from it. Lack of jurisdiction*

The General Act signed at Algeciras, on April 7th, 1906, provides (Art. 112) that the conditions for the granting of concessions and for the working of mines and quarries in Morocco will be determined by Shereefian firman. According to the provisions of the General Act and of the Franco-German Convention of November 4th, 1911, concerning Morocco, to which the Italian Government acceded, the regulations

thus made were to respect the general principle of economic liberty ("the open door"). The regulations came into force on January 19th, 1914, the date on which were promulgated two mining dahirs of which one laid down the mining régime and the other established an Arbitration Commission to adjudicate upon rights arising out of acts dating from before the new regulations. From November 3rd, 1914, to June 9th, 1918, the right to apply for mining prospecting licences was suspended. In 1918 and 1919, new dahirs and decrees laid down the conditions governing the deposit of applications for mining prospecting licences and prospecting operations, etc., with especial reference to phosphate deposits.

On January 27th, 1920, a dahir was promulgated reserving to the Maghzen the right to prospect for and to work phosphates. This dahir took account of vested rights and a special procedure was laid down for obtaining recognition of such rights. Another dahir, dated August 7th, 1920, established a State monopoly (*régie*), known as the Shereefian Phosphates Office, which was responsible for prospecting and for working phosphates in Morocco. This Office carried on the prospecting work which had been undertaken by the Moroccan Mines Department since 1917, commenced the working of deposits and, between 1933 and 1934, participated in the formation of the North African Phosphates cartel.

Between October 1918 and April 1919, thirty-three prospecting licences in reserved areas had been issued by the Mines Department of Morocco to French citizens. The rights of the latter (or certain of their rights) were ceded to an Italian citizen, M. Tassara. The latter, in October 1921—i.e., after the promulgation of the dahirs reserving to the Maghzen the right to prospect for and to work phosphates—applied to the Moroccan Mines Department for recognition of his rights. On January 8th, 1925, his application was rejected. Subsequent representations were made by him or by his successors to the Shereefian and French authorities. The Italian Embassy in Paris lent its good offices. Later, the Italian Government took up the case on behalf of its nationals and proposed to the French Government that the question should be referred to arbitrators or to the Permanent Court of International Justice.

On March 10th, 1934, the French Government gave a negative answer. After making further representations which proved fruitless, the Italian Government decided to bring the case before the Court by Application.

The Application of the Italian Government was filed with the Registry on March 30th, 1936; it relies on the declarations of Italy and France acceding to the Optional Clause of Article 36 of the Court's Statute. It asks the Court to declare that certain measures taken by the Shereefian Administration (in particular the Mines Department), by the French authorities in Morocco and by the French Government in its capacity as the State protecting Morocco, in connection with prospecting for and working phosphates in Morocco, are inconsistent with the international obligations of Morocco and of France as laid down in the Act of Algeciras and in the Franco-German Convention and should for that reason be annulled; alternatively, that the decision of the Mines Department of January 8th, 1925, and the denial of justice which followed it, are inconsistent with the international obligation incumbent on Morocco and on France to respect the rights acquired by Italian nationals.

The Italian Government's Application was notified to the French Government and the communications provided for in Article 40 of the Statute and Article 34 of the Rules were duly despatched. Furthermore, in accordance with Article 63 of the Statute and Article 66 of the Rules, the Registrar notified the United States of America, Belgium, Great Britain, the Netherlands, Portugal, Spain and Sweden, as parties to the Act of Algeciras, certain of these Powers having moreover acceded to the Franco-German Convention.

The Italian Government submitted a Memorial within the time-limit fixed. Within the time-limit for the filing of the Counter-Memorial, the French Government presented preliminary objections. The proceedings on the merits were thereupon suspended and a time-limit was fixed for the filing by the Italian Government of its observations upon the French objections. Subsequently, at the request of the

Parties, two additional written documents were filed: a French Answer to the Italian Observations, and further 1talian Observations. In the course of public sittings held between May 2nd and 16th, 1938, the Court heard oral argument by the Parties' representatives.

The Court was composed as follows for the examination of the case:

M. Guerrero, *President*; Sir Cecil Hurst, *Vice-President*; Count Rostworowski, MM. Fromageot, de Bustamante, Altamira, Anzilotti, Urrutia, Negulesco, Jhr van Eysinga, MM. Cheng, Hudson, de Visscher, *Judges*[1].

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The Court's judgment was delivered on June 14th, 1938.

In its judgment, the Court first of all observes that the facts and circumstances out of which the dispute originated are set out in the Italian Application. Without expressing any opinion upon the divergencies of view to which they gave rise, the Court, for the purposes of its judgment, which is limited to the question of its jurisdiction, confines itself to considering those the existence and date of which are not disputed.

Among the French objections is one which contests, in regard to the Application as a whole, the compulsory jurisdiction of the Court as established between France and Italy by their declarations acceding to the Optional Clause. The Court therefore must first adjudicate upon this objection in order to satisfy itself as to the grounds of its jurisdiction.

In its declaration, of which the ratification was deposited on April 25th, 1931, the French Government accepts as compulsory the jurisdiction of the Court "in any disputes which may arise after the ratification of the present declaration with regard to situations or facts subsequent to such ratification". The French Government, relying on this passage, maintains that, as the situations and facts out of which the present dispute arises date from before the crucial date, namely, the date of its acceptance of the compulsory jurisdiction, the Italian Government's Application cannot be entertained. The Italian Government, on the other hand, argues that the dispute arises from factors subsequent to the crucial date, first because certain acts, which considered separately are in themselves unlawful international acts, were actually accomplished after the crucial date; secondly, because these acts, taken in conjunction with earlier acts to which they are closely linked, constitute as a whole a single, continuing and progressive illegal act which was not fully accomplished until after the crucial date; and lastly, because certain acts, though carried out prior to the crucial date, nevertheless gave rise to a permanent situation inconsistent with international law which has continued to exist after the said date.

Interpreting the limitation contained in the French declaration, the Court observes that this limitation is twofold. It relates in the first place to the date on which the dispute arose. It is not denied that in this case the dispute arose after the crucial date; there is therefore no need to consider that point. The second limitation relates to the situations and facts with regard to which the dispute arose. The declaration is quite clear on this point: the only situations or facts falling under the compulsory jurisdiction are those which are subsequent to the crucial date and with regard to which the dispute arose, that is to say, those which must be considered as being the source of the dispute. The intention of the French Government in stipulating this limitation is also quite clear: it intended to deprive the acceptance of the compulsory jurisdiction of any retroactive effects, in order both to avoid, in general, a revival of old disputes and to preclude the possibility of the submission to the Court by application of situations or facts dating from a period when the State whose action was impugned was not in a position

[1] Mr. Manley O. Hudson sat throughout the hearings but was unable to take part in the deliberations for reasons of health.

to foresee the legal proceedings to which these facts and situations might give rise. Accordingly, the situations and facts have to be considered from the point of view both of their date in relation to the date of ratification and of their connection with the birth of the dispute. Situations or facts subsequent to the ratification could serve to found the Court's compulsory jurisdiction only if it was with regard to them that the dispute arose. The question whether a given situation or fact is prior or subsequent to a particular date is one to be decided in regard to each specific case, just as the question of the situations or facts with regard to which the dispute arose must be decided in regard to each specific case. In answering these questions, it is necessary to bear in mind the will of the State which only accepted the compulsory jurisdiction within specified limits, and consequently only intended to submit to that jurisdiction disputes having actually arisen from situations or facts subsequent to its acceptance. It would be impossible to admit the existence of such a relationship between a dispute and subsequent factors, which either presume the existence or are merely the confirmation or development of earlier situations or facts constituting the real causes of the dispute.

The Court then considers whether the dispute forming the subject of the Italian Government's Application arose with regard to situations or facts subsequent to the crucial date. The subject of the dispute has been presented by the Italian Government under two separate aspects: First, a general aspect, which is referred to as the "monopolization of the phosphates". This monopolization is described as a régime instituted by the dahirs of 1920 which, by reserving to the Maghzen the right to prospect for and to work phosphates, established a monopoly inconsistent with the international obligations of Morocco and of France; this régime, being still in force, is said to constitute a situation subsequent to the crucial date and one which therefore falls within the Court's compulsory jurisdiction. The second aspect of the dispute is more limited: it relates to the decision given in 1925 by the Moroccan Mines Department rejecting the application of the Italian citizen M. Tassara, and to the alleged denial of justice to him and his successors. These acts are also included under the general designation of the monopolization of phosphates, but are put forward here as contrary to the international obligation to respect the vested rights of the Italian nationals.

As regards the first of these aspects, the Court holds that the alleged inconsistency of the monopoly régime with the international obligations of Morocco and of France is a reproach which applies first and foremost to the dahirs of 1920 establishing the monopoly. Those dahirs are the facts which really gave rise to the dispute regarding the monopolization; but, by their date, these dahirs fall outside the Court's jurisdiction. The Italian Government, however, has presented the monopolization as a continuing and progressive action which has only been completed by certain acts subsequent to the crucial date; the denial of justice suffered by M. Tassara and his successors in 1911–1933, and the participation of the Moroccan Phosphates Administration in the North African Phosphates cartel in 1913–1934. The Court holds that the participation of the Moroccan Phosphates Administration in the Phosphates cartel did not alter the situation which had been established ever since 1920 by the monopoly. The monopoly alone could form the subject of complaint in this connection; it may have made the participation in the cartel possible, but this participation does not in any way affect the legality or illegality of the monopoly.

The Court next considers the dispute from the second aspect. The Italian Government does not deny that the alleged dispossession of M. Tassara results from the Mines Department's decision of 1925 which, by reason of its date, falls outside the Court's jurisdiction. But it contends that that decision constituted only an uncompleted violation of international law and that this violation only became definitive as a result of the final refusal of any redress—which refusal was subsequent to the crucial date.

The Court, however, holds that acts subsequent to the crucial date cannot be regarded as factors giving rise to the present dispute. The alleged denial of justice merely results in allowing the alleged unlawful act to subsist: it exercises no influence either on the accomplishment of the act or on the

responsibility ensuing from it. As regards the argument that the dispossession of M. Tassara and his successors constituted a permanent illegal situation which, although brought about by the decision of the Mines Department, was maintained in existence at a period subsequent to the crucial date, the Court considers that the complaint of a denial of justice cannot be considered separately from the decision of 1925. For the Court could not regard the denial of justice as established without first satisfying itself as to the existence of the rights of the private citizens alleged to have been refused judicial protection. And this it could not do without calling in question the decision of 1925. It follows that an examination of the justice of this complaint could not be undertaken without extending the Court's jurisdiction to a fact which, by reason of its date, is not subject thereto.

Accordingly, whatever aspect of the question is considered, it is the decision of 1925 which is always found, in this matter of the dispossession of the Italian nationals, to be the fact with regard to which the dispute arose.

In conclusion, the Court finds that the dispute submitted to it, whether regarded in its general aspect, represented by the alleged monopolization of the Moroccan phosphates, or in its more limited aspect, represented by the claim of the Italian nationals, did not arise with regard to situations or facts subsequent to the ratification of the acceptance by France of the compulsory jurisdiction, and that, in consequence, it has no jurisdiction to adjudicate on this dispute. It does not accordingly feel called upon to adjudicate on the other objections submitted by the French Government.

For these reasons, the Court decides that the Italian Government's Application cannot be entertained.

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The Court's judgment was adopted by eleven votes to one, namely that of Jonkheer van Eysinga, Judge, who declared that he was unable to concur in the judgment and appended a separate opinion thereto.

Mr. Cheng Tien-Hsi, Judge, while in agreement with the operative clause of the judgment, appended a separate opinion regarding some of the grounds on which the judgment was based.

*Separate opinion by Jonkheer van Eysinga*

Jhr. Van Eysinga dissents from the Court's finding to uphold the sixth of the French preliminary objections.

He examines the history of the Algeciras Act and of the legal relationships surrounding the Shereefian Empire. He observes that the régime of the Moroccan Protectorate is more complicated than that found where a single Colonial Power has to deal with a protected State; it is the case of a State, whose international status is in a large measure determined by collective conventions and which is under the protection of one of the States parties to these conventions.

Jhr. Van Eysinga holds that in the interpretation of the French declaration on the Court's jurisdiction, by the term "dispute" the French declaration means disputes between States, and not for instance the dispute between the Italian claimants and the Moroccan authorities. He states that the Italian-French dispute now before the Court did not arise before June 16th, 1933, the date on which Italy took up the cause of its nationals.

He notes that the declaration draws a distinction between situations, on the one hand, and facts, on the other hand, with regard to which disputes must arise in order to fall within the Court's jurisdiction. Jhr. Van Eysinga states that this continuity and permanence of an unlawful act certainly constitutes a

situation, and it is indeed with regard to that situation that the Italian-French dispute arose. It suffices to note that this situation, which Italy alleges to be inconsistent with the Act of Algeciras, existed subsequently to the ratification, in order to conclude that the Court has jurisdiction in the dispute.

*Separate opinion of Mr. Cheng Tien-Hsi*

Mr. Cheng concurs with the conclusion of the judgment to the effect that the Application of the Italian Government cannot be entertained. The objection of the French Government based on the question of compulsory jurisdiction is valid only in so far as it relates to the part of the claim stated in submission (*b*) of the Application but invalid in so far as it relates to the part of the claim stated in submission (*a*); while as regards the latter submission, the objection based on want of diplomatic negotiation should be upheld.

He declares that the injury to Italy, with the exception of the question of the monopoly, if it subsists, it subsists simply as an injury unredressed; but it does no new mischief, infringes no new right, and therefore gives rise to no new fact or situation. For the monopoly, though instituted by the dahir of 1920, is still existing today. It is an existing fact or situation. If it is wrongful, it is wrongful not merely in its creation but in its continuance to the prejudice of those whose treaty rights are alleged to have been infringed, and this prejudice does not merely continue from an old existence but assumes a new existence everyday, so long as the dahir that first created it remains in force. Consequently a situation or fact existing after the crucial date is no less a situation or fact subsequent, although it may have existed also before that date.

Mr. Cheng focuses on the Tassara claim and the discussions and *aide-mémoire* on this topic between the two governments. He states that warning is not the same thing as negotiation. It is the essence of negotiation to discuss some question with a view to settling it, whereas warning is merely the intimation of a will to do certain things (in this case to raise certain questions) on certain contingencies. In fact these conversations and *aide-mémoire* bring out clearly the point that the Tassara claim and the question of monopolization are really separate questions; for according to the conversations and *aide-mémoire*, if the Tassara claim were settled, the question of monopoly or monopolization could and would be left alone. Mr. Cheng finds that in view of the foregoing observations and of the fact that the necessity of diplomatic negotiations is admitted by the Italian Government, this condition has not been fulfilled, particularly as the subject of monopolization forms the principal claim of the Application.

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## 75. PANEVEZYS-SALDUTISKIS RAILWAY (PRELIMINARY OBJECTIONS)

### Order of 30 June 1938 (Series A/B, No. 75)

**Fifteenth Annual Report of the Permanent Court of International Justice (15 June 1938—15 June 1939), Series E, No. 15, pp. 91–97**

For the summary of No. 75, see No. 76.

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# 76. PANEVEZYS-SALDUTISKIS RAILWAY (JURISDICTION)

## Judgment of 28 February 1939 (Series A/B, No. 76)

**Fifteenth Annual Report of the Permanent Court of International Justice (15 June 1938—15 June 1939), Series E, No. 15, pp. 91–97**

*Joinder of the preliminary objections to the merits and fixing of new time-limits*

*1. Preliminary objection based on the rule that a claim must be a national claim not only at the time of its presentation, but also at the time when the injury was suffered. This objection not held to constitute a preliminary objecting within the meaning of Art. 62 of the Rules; impossibility in this case of adjudicating on this objection without adjudicating on the merits—2. Preliminary objection based on the local remedies rule. This objection held to be well-founded*

A joint stock company was formed at St. Petersburg in 1892 under the name of "The First Company of Secondary Railways in Russia". This Company had for its main object the construction and operation of secondary railways of broad and narrow gauge; it might engage in these activities throughout the whole of the Russian Empire. Amongst other things, it was authorized to construct and operate a railway between the station at Sventziany, on the St. Petersburg-Warsaw railway, and the station at Panevezys, on the Libau-Romny railway. The Company also possessed other lines, in particular in the Baltic provinces and in the Ukraine.

In December 1917, after the Bolshevist revolution, a decree of the Central Executive Committee concerning the nationalization of banks placed in the hands of the Soviet Government the shares, assets and liabilities of companies existing in Russia—including the Company here in question. And, in 1918 and 1919, the Bolshevist leaders took measures intended to establish throughout Russian territory the communist régime confiscating all private property. Commercial and industrial undertakings, including railways, were nationalized, the former Boards of Directors were replaced by a liquidation commission and the shares and foundation shares of companies were annulled.

In February 1918, however, Lithuania and subsequently Estonia had proclaimed themselves independent States; on March 3rd, 1918, the Treaty of Brest-Litovsk had confirmed the abandonment of Russian sovereignty over the Baltic provinces and Lithuania; and in September 1919 the Lithuanian Government took possession of the Panevezys-Saldutiskis railway which was situated in territory which had become Lithuanian.

In 1920 the Soviet Republic signed treaties with the new Baltic States. Amongst others it concluded with Estonia the Treaty of Tartu (February 2nd, 1920) which contained detailed provisions as to the fate of private property situated in Estonian territory, particularly as to the property of joint stock companies. Under this Treaty (of which the meaning and perhaps even the translation are disputed between the Parties), Russia renounces all rights to the movable and immovable property of individuals which previously did not belong to her, in so far as such property may be situated in Estonian territory, this property becoming the sole property of Estonia. Further the Russian Government undertook to hand over to the Estonian Government the shares of those joint stock companies which had undertakings in Estonian territory, in so far as such shares were at the disposal of the Russian Government as the result of the decree of 1917; and it agreed that the registered offices of these companies should be transferred to Reval. The Treaty points out that "the above-mentioned shares shall only confer on Estonia rights in respect of those undertakings of the joint stock companies which may be situated in Estonian territory and that in no case shall the rights of Estonia" extend to undertakings of the same companies outside

the confines of Estonia. And the Treaty expressly mentions the "First Company of Secondary Railways" as included amongst these companies.

Between 1920 and 1923, the Estonian Government promulgated decrees for the reorganization of these companies. Measures were taken in pursuance of these decrees in respect of, amongst others, the First Company of Secondary Railways. It was however at Riga, with the sanction of the Latvian Government and under Latvian law, that, in November 1922, the first general meeting of the Company, since the October revolution in 1917, was held; at this general meeting, the Board was instructed to take the necessary steps to reacquire possession of and to operate the property of the Company situated in Lithuania and Poland, while the portion of the system in Latvia was to be ceded to a Latvian Company which was to be formed.

In August 1923, the Estonian Government promulgated a law providing for the buying out by the Treasury of all railways of the Company in Estonian territory. And in November of the same year, a general meeting of the Company was held in Tallinn. This general meeting proceeded to revise and amend the statutes in accordance with Estonian law and in virtue of the powers henceforward conferred upon the Company in Estonia, and the registered offices of the Company were fixed in Tallinn. Thus, according to the Estonian Government, the "First Company of Secondary Railways in Russia" was transformed into an Estonian Company having its registered offices in Estonia, under the name of the *Esimene Juurdeveo Raudteede Selts Venemaal*—a translation into Estonian of the name of the Russian Company.

On March 10th, 1924, a general meeting of the *Esimene*, held in Tallinn, authorized the Board of Directors to sell the line situated in Lithuania and the lines in Latvia and Poland. In March 1925, a request was sent by the chairman of the Board of the *Esimene* to the Lithuanian Government, asking it "to give instructions for the necessary steps to be taken for the handing over of the Panevezys-Saldutiskis railway to its legal owners".

This petition remained unanswered. Further petitions were subsequently addressed to the Lithuanian Government. In 1931 a memorandum was transmitted to this Government in which the *Esimene* pointed out that it was the former Russian Company transformed into an Estonian Company with the same titles and rights and "in that capacity" claimed fair compensation for the Panevezys-Saldutiskis line which belonged to it and of which it had been deprived. In 1933, after the Lithuanian Council of State had declared that the *Esimene* was not justified in putting forward a claim in law in respect of this line, the Lithuanian Government, in reply to the petitions sent to it, declared that the *Esimene* was not entitled to the rights of the former Company which no longer existed. The negotiations were thenceforward continued between the Estonian Government and the Lithuanian Government, the Company proposing the purchase of its line by the Lithuanian Government. In 1936, the latter replied that the dispute was a matter of civil law and within the jurisdiction of the Lithuanian courts.

In the course of 1937, the Estonian Government renewed its representations, but the Lithuanian Government replied that it could not entertain the claim. Thereupon, on November 2nd, 1937, the Estonian Government brought the case before the Court asking it for judgment to the effect that the Lithuanian Government had wrongfully refused to recognize the rights of the *Esimene* in respect of the railway in question and that that Government was under an obligation to make good the prejudice thus sustained.

The Application of the Estonian Government, which relied upon the declarations of Estonia and Lithuania accepting the compulsory jurisdiction of the Court, was notified to the Lithuanian Government, and the communications in regard to it provided for in Article 40 of the Statute and Article 34 of the Rules were duly despatched. The time-limits for the filing of the documents of the written proceedings were fixed by an Order made on November 15th, 1937. On March 15th, 1938, the date for

the filing of the Counter-Memorial, the Lithuanian Government raised two objections, the first being based "on the non-observance by the Estonian Government of the rule of international law to the effect that a claim must be a national claim not only at the time of its presentation but also at the time when the injury was suffered", and the other "on the non-observance by the Estonian Government of the rule of international law requiring the exhaustion of the remedies afforded by municipal law". The proceedings on the merits were thereupon suspended, and a time-limit was fixed for the presentation by the Estonian Government of observations upon the Lithuanian objections.

In the course of hearings held between June 13th and 18th, 1938, the Court heard argument by the representatives of the Parties upon the objections. At these hearings the Court was composed as follows:

M. Guerrero, *President;* Sir Cecil Hurst, *Vice-President;* Count Rostworowski, MM. Fromageot, de Bustamante, Altamira, Anzilotti, Urrutia, Negulesco, Jhr. van Eysinga, MM. Nagaoka, Cheng, de Visscher, *Judges*.

MM. Strandman and Römer'is, who had been nominated as Judges *ad hoc* by the Estonian Government and by the Lithuanian Government respectively, were also on the Bench for this case.

On June 30th, 1938, the Court made an Order in regard to the objections. The Order says in the first place that the objections aim at obtaining from the Court a decision that the Estonian Government was not entitled to take up the case of the *Esimene* Company or to submit that case to the Court. The Estonian Government for its part submitted that the objections were wrongly presented as preliminary objections and, alternatively, that they were not well-founded. At that stage of the proceedings, however, no decision could be taken either as to the preliminary character of the objections or on the question whether they were well-founded, for any such decision would raise questions of fact and law in regard to which the Parties were in several respects in disagreement and which were too closely connected with the merits for the Court to adjudicate upon them. The Court must have exact information as to the respective legal contentions and the arguments on which they were based. By passing upon these objections, the Court would run the risk of adjudicating on questions appertaining to the merits, or of prejudging their solution. In these circumstances it joined the objections to the merits and fixed time-limits for the filing of the subsequent documents.

In the documents which they then filed, the Parties maintained the submissions which they had previously presented. In the course of public sittings held on January 19th, 20th, 24th, 25th, 27th and 30th, 1939, the Court heard oral argument by the representatives of the Parties. The following were on the Bench:

M. Guerrero, *President;* Sir Cecil Hurst, *Vice-President;* Count Rostworowski, MM. Fromageot, Altamira, Negulesco, Jhr. van Eysinga, MM. Nagaoka, Cheng, Hudson, de Visscher, Erich, *Judges*.

MM. Strandman and Römer'is, Judges *ad hoc*, also sat.

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The Court's judgment was delivered on February 28th, 1939.

The judgment recalls in the first place that the two objections joined to the merits had been submitted as preliminary objections, under Article 62 of the Rules which covers more than objections to the jurisdiction of the Court, because it covers any objection of which the effect will be, if the objection is upheld, to interrupt further proceedings in the case and which it will therefore be appropriate for the Court to deal with before enquiring into the merits.

Considering the first objection, the Court defines the rule on which it is based. A State's right to espouse the case of one of its nationals must be regarded as a part of the function of diplomatic protection; and this right can only be exercised on behalf of a national because, in the absence of a special agreement, it is the bond of nationality which alone confers upon a State the right of diplomatic protection. The precedents cited to discredit this rule are seen to be cases where the governments concerned had agreed to waive the strict application of the rule, and there are no grounds for holding that the Parties had this intention in the present case. It therefore rests with Estonia to prove that, at the time when the alleged injury occurred which is said to involve the international responsibility of Lithuania, the Company suffering the injury possessed Estonian nationality.

Though however it is true that an objection disputing the national character of a claim is in principle of a preliminary character, this is not so in the actual case. This is because the grounds on which Lithuania disputes Estonia's right to take up the case, viz. that the claim lacks national character, cannot be separated from those on which Lithuania disputes the Company's alleged right to the ownership of the Panevezys-Saldutiskis railway. The question whether the Company is owner or concessionaire of the railway forms part of the merits of the dispute: it involves decisions with regard to the effect of the events in Russia at the time of the Bolshevist revolution, with regard to whether or not there was in existence, at the time of the Lithuanian acts, an Estonian national whose cause the Estonian Government was entitled to espouse, and finally with regard to the interpretation of the Treaty of Tartu. If the Court were to give decisions on these points, it would also be deciding questions forming an important part of the merits. Accordingly the first Lithuanian objection which cannot be decided without passing on the merits cannot be admitted as a preliminary objection.

The Court next deals with the second objection. The existence of the rule requiring the exhaustion of the remedies afforded by municipal law which in principle subordinates the presentation of an international claim to such exhaustion is not contested by the Estonian Agent, but he contends that the case falls within one or more of the admitted exceptions to the rule. In the first place he maintains that the courts in Lithuania cannot entertain a suit brought by the *Esimene* to establish its legal claim to the Panevezys-Saldutiskis railway. The Court holds that the question whether the Lithuanian courts have jurisdiction to entertain a particular suit depends on Lithuanian law and is one on which the Lithuanian courts alone can pronounce a final decision: until it has been clearly shown that these courts have no jurisdiction to entertain a suit by the *Esimene* Company as to its title to the railway, the Court cannot say that the local remedies rule does not apply because Lithuanian law affords no means of redress. In the second place, the Estonian Agent maintains that the Supreme Court of Lithuania has already held that there is no continuity between the Russian Company and the *Esimene*, and that consequently a decision adverse to the Estonian Company has already been given on an essential point. The Court however does not consider that this conclusion emerges from the evidence submitted to it in support of this line of argument.

Neither of the reasons put forward for the non-application of the local remedies rule can therefore be regarded as holding good. In consequence, on the one hand, the second Lithuanian preliminary objection, having been submitted for the purpose of excluding an examination by the Court of the merits of the case and being one upon which the Court can give a decision without in any way adjudicating upon the merits, must be accepted as a preliminary objection within the meaning of Article 62 of the Rules. On the other hand, as regards the merits of the objection, it is common ground that the *Esimene* Company has not instituted any legal proceedings before the Lithuanian tribunals in order to establish its title to the Panevezys-Saldutiskis railway.

The objection must therefore be regarded as one that can be entertained as an objection of a preliminary character and as well-founded in substance.

For these reasons, the Court holds that the objection is well-founded and declares that the claim presented by the Estonian Government cannot be entertained.

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The Court's judgment was delivered by ten votes to four.

Count Rostworowski and M. de Visscher, Judges, declared that they were unable to concur in that part of the judgment given by the Court concerning the first objection raised by the Lithuanian Government, and, availing themselves of the right conferred upon them by Article 57 of the Statute, appended to the judgment a separate opinion.

M. Altamira, Judge, declared that he was unable to concur in the judgment in regard either to the operative clause or the grounds on which it was based.

Jonkheer van Eysinga, Mr. Hudson and M. Erich, Judges, declared that they were unable to concur in the judgment given by the Court and, availing themselves of the right conferred upon them by Article 57 of the Statute, appended to the judgment their separate opinions.

M. Römer'is, Judge *ad hoc*, while in agreement with the operative clause of the judgment, declared, with regard to the fact that the Court had refrained from adjudicating upon the first Lithuanian preliminary objection on the ground that it would be impossible to do so without entering into the merits, that he was unable to concur in the opinion of the Court on this point and was in agreement with the separate opinion delivered by M. de Visscher and Count Rostworowski, Judges.

*Separate opinion by M. de Visscher and Count Rostworowski*

M. de Visscher and Count Rostworowski are unable to concur in the decision by which the Court has declined to adjudicate on the validity of the first objection lodged by the Lithuanian Government on the ground that that objection could not "in the particular circumstances of the case be decided without passing on the merits". They consider that this objection, which is based upon the absence of Estonian nationality from the interests injured at the time when the damage was suffered, is a preliminary objection; that at the present stage of the case there was reason to adjudicate upon it and, lastly, that it is well-founded.

The joint separate opinion notes that the very purpose of joining the objections to the merits was to enable the Court, being fully informed on all aspects of the case and thoroughly acquainted with the arguments advanced in support of the objections, to determine their real character as well as to pronounce upon their justice. It goes without saying, however, that an objection lodged *in limine litis* cannot be treated as an argument on merits, simply because the Court, in order to pass upon it, is obliged to refer to some extent to facts connected with the merits, when the examination of these facts is in the first place essential to a decision about the objection and, in the second place, does not prejudge the merits.

Turning to the issue of what constitutes the merits of the dispute, the Judges observe that the Estonian Government has not intervened in the defence of any public or national interest; its intervention is solely intended to protect private interests against an act which is represented as a breach of international law. In these circumstances the relation of nationality is simply the title of a given State to submit a claim, and that title is independent of the merits of the claim itself. In principle, therefore, and *prima facie*, the dispute over the relation of nationality, in an affair of this kind, does not involve any appraisement of the justice of the claim as such. Far from involving the merits, it aims at preventing their judicial examination.

The Judges proceed to determine whether the absence of Estonian nationality from the interests alleged to have been damaged by the seizure, that is, the taking possession of the Panevezys-Saldutiskis railway that took place in 1919, can be proved without prejudging certain matters upon which the decision as to merits depends. It is noted that although the Estonian Government has tried to prove that the rule of law underlying the objection is subject to various qualifications, it has not claimed that in 1919 the interests damaged by the seizure had already acquired Estonian character. Moreover, the objection does not depend upon the continuity or lack of continuity of the First Company's legal personality. Accordingly the Judges conclude that there was in 1919 no Estonian company, and therefore the bond of nationality required by international law to have existed at the time the injury was suffered, was manifestly lacking.

M. de Visscher and Count Rostworowski therefore conclude that the arguments invoked in support of the first objection are altogether independent of the merits of the case and disagree with the Court's view that "the basis of the objection whereby Lithuania disputes the right of Estonia to intervene on the Company's behalf, that is, the claim's lack of nationality, is inseparable from that same Government's reason for disputing the Company's alleged right to the ownership of the Panevezys-Saldutiskis railway". Since a decision upon the first objection, regarded as a preliminary objection, is possible, they consider that it should have been adjudicated upon and that, by application of the rule on which it is based, it should have been declared well-founded. Lastly, it should be particularly noted that, unlike the second objection, the first is of a decisive or peremptory character: if recognized to be well-founded, its effect would have been to rule out altogether the claim by the Estonian Government on behalf of the *Esimene* Company.

*Dissenting opinion by M. Jonkheer van Eysinga*

In Jhr. van Eysinga's view, the Lithuanian Agent has not succeeded in establishing the existence of "the rule of international law according to which a claim must be a national claim not only at the time of its presentation but also at the time when the injury was suffered" on which the first preliminary objection is based.

Jhr. van Eysinga points out that the train of events underlying the present dispute falls within the branch of international law known as State succession. There exists no general statute governing the part of international law relating to State succession, and the treaties which deal with the matter, such as the Treaty of Peace of Tartu define sometimes one part, sometimes another of the law of State succession; all depends on the degree of importance attributed by the parties to the particular treaty to these sections of international law in the actual conditions which confront them. But whether or not dealt with in the Treaty, the legal life of the new State in all its aspects proceeds in succession to the legal life of the old State. Thus in all matters where the Government of the latter had jurisdiction, its place is now taken by the Government of the new State, both with respect to rights and obligations. Such a "succession" is an absolutely characteristic and even essential feature of the law of State succession. Accordingly it would be quite normal that in this case Estonia, the successor State, should have protected both diplomatically and before the Court a Company the diplomatic protection of which formerly fell to Russia alone.

According to Jhr. van Eysinga, the jurisprudence of the Claims Commissions (Mixed Commissions) that is not relevant in the present case, and the rule adduced by Lithuania, which may be binding in a certain number of cases, is by no means crystallized as a general rule. In this connection, he raises the question whether it is reasonable to describe as an unwritten rule of international law a rule which would entail that, when a change of sovereignty takes place, the new State or the State which has increased its territory would not be able to espouse any claim of any of its new nationals in regard to injury suffered before the change of nationality. It may also be questioned whether indeed it is any part

of the Court's task to contribute towards the crystallization of unwritten rules of law which would lead to such inequitable results.

Turning next to the second Lithuanian preliminary objection regarding "the rule requiring the exhaustion of local remedies", Jhr. van Eysinga states that the acceptance by the two States of the Court's compulsory jurisdiction under Article 36 of the Court's Statute, which acceptance is unreserved implies the setting aside of the rule in question in relations between the two States. He adds that although the rule is normally followed in international practice, there are also cases where it has not been followed. For instance, cases where a settlement of the claim by diplomacy has been effected notwithstanding the non-exhaustion of local remedies, and also cases where an arbitrator has been appointed who was to adjudicate in spite of the fact that all the national courts competent to deal with the claim had not rendered a decision.

Jhr. van Eysinga further observes that the local remedies rule encountered an important landmark in its history when *ad hoc* arbitrations began to be replaced by compulsory arbitration clauses or even by general arbitration conventions in which the contracting States agreed beforehand to submit disputes to arbitration. In fact, compulsory arbitration, accepted unconditionally, constitutes a "prorogation" of jurisdiction and an exception to the applicability of the local remedies rule. He adds that when at the instigation of the 1899 Peace Conference, governments began to conclude general arbitration conventions, they realized the necessity of making an explicit reservation in such conventions regarding the local remedies rule if they wished to maintain that rule.

In sum, Jhr. van Eysinga notes that, while in all cases where the jurisdiction of the Court is *conditional* upon the exhaustion of local remedies, an objection to the effect that an application presented before such remedies have been exhausted cannot be entertained must be sustained by the Court, the position is different when the Court's jurisdiction is accepted *unconditionally*. In the case, the Court's compulsory jurisdiction, if all the remedies afforded by the national courts have not been exhausted, constitutes a "prorogation" of jurisdiction; the Court is competent even before exhaustion of local remedies. This is the position in the present case; for neither Article 36, paragraph 2, of the Court's Statute nor the Lithuanian and Estonian declarations contain a reservation respecting the exhaustion of local remedies. It follows from the foregoing that the local remedies rule cannot operate in the present case. It is set aside by the unconditional acceptance of the Court's jurisdiction. The same would hold good if an objection had been lodged based, not on the non-exhaustion of the remedies afforded by the *national* courts but on the non-exhaustion of *international* remedies, that is to say the diplomatic channel. In this connection, he refers to the case concerning certain German interests in Polish Upper Silesia, in which the Court says that if a compulsory jurisdiction clause does not stipulate that diplomatic negotiations must first be tried, recourse may be had to the Court as soon as one of the parties considers that a difference of opinion exists.

*Dissenting opinion by Mr. Hudson*

Mr. Hudson begins by noting that this is the first occasion in its history upon which this Court has upheld a preliminary objection not offered as a challenge to the Court's jurisdiction. He believes that the taking of this step is a matter of importance and explains that he is unable to share the views which have led to it.

Mr. Hudson indicates that the threshold question of this case is whether the two objections presented by the Lithuanian Government have a character which requires them to be dealt with as preliminary objections. He recalls that the purpose of the joinder effected by the Court's Order of June 30th, 1938, was stated to be to enable the Court to "adjudicate in one and the same judgment upon the objections and, if need be, on the merits". If either of the objections has preliminary character, it is

now for the Court to adjudge whether it is well-founded. If either objection does not have preliminary character, it should be rejected by the Court; but as the Court recognized at least implicitly in the Borchgrave case the rejection of an objection will not prevent the same question from being raised as a defense to the merits of the case.

Mr. Hudson states that it is essentially a question of procedure whether an objection has preliminary character. However, there is no definite criteria for determining preliminary character that can be derived either from the Statute of the Court, nor from a study of the jurisprudence of the Court or of other international tribunals. If the Court is not bound by logic to give a particular solution to this procedural question, it is bound to consider the consequences which its own system of procedure would attach to a determination that an objection is preliminary. It must be admitted that the suspension of the procedure and the other consequences which attach, or may attach, to the presentation of a preliminary objection are so serious that the Court can hardly be justified in greatly enlarging the category of preliminary objections. In Mr. Hudson's view, the Court must reserve to itself some latitude in dealing with objections presented as preliminary, and in exercising the "liberty to adopt the principle which it considers best calculated to ensure the [good] administration of justice", it may hesitate to admit the preliminary character of certain types of objections which do not raise questions of jurisdiction.

Next, Mr. Hudson takes issue with the special problem of this case, whether the two objections presented by the Lithuanian Government should be said to have preliminary character in the sense that they must be considered apart from and prior to any consideration of the defenses on the merits which have been advanced by Lithuania. In this regard, he points out that neither of the Lithuanian objections can be said to relate to the jurisdiction of the Court to deal with this case.

He agrees with the conclusion reached by the Court that the first Lithuanian objection, to the effect that the Estonian Government has failed to observe a rule of international law which requires that "a claim must be a national claim not only at the time of its presentation but also at the time when the injury was suffered", is not a preliminary objection.

On the other hand, Mr. Hudson disagrees with the conclusion reached by the Court that the second Lithuanian objection, based upon the alleged "non-observance by the Estonian Government of the rule of international law requiring the exhaustion of the remedies afforded by municipal law", has a preliminary character. In his view, the objection ought to be rejected; hence the Estonian claim should be entertained, even if the principal Estonian submissions should later have to be rejected because of the non-exhaustion of local remedies. In this connection, he points out that the rule of international law requiring the exhaustion of local remedies is not a rule of thumb to be applied in automatic fashion. In each case account is to be taken of the circumstances surrounding the means of redress which a State may hold out to the nationals of other States, and the facts may justify an international tribunal in saying that international responsibility has arisen even though local remedies have not been exhausted. Hence it is sometimes said that there are exceptions to the rule; that the rule does not apply if in fact there are no local remedies to exhaust, or if it can be known in advance that the exhaustion of local remedies would yield no redress. In the present case, Mr. Hudson considers the application of the rule to be a question of substantive law which can be better dealt with as one of the defenses to the Estonian case. This solution would have the added advantage of enabling the Court to deal with the other defenses, and perhaps thus to contribute more helpfully to a settlement of the dispute between the Parties.

*Dissenting opinion by M. Erich*

M. Erich is of the opinion that the two objections lodged by the Government of Lithuania are strictly preliminary. The first one is of a peremptory character, precluding debate, while the second

may, in this case, leave open the possibility of the Court's subsequently examining the merits of the case to which its judgment refers.

M. Erich observes that the first objection, in its essence, is even more preliminary than the second since it opposes the institution by Estonia of the proceedings before the Court. The alleged absence from the claim of a certain "nationality" does not affect the claim itself. It refers to the relation between a private person and a State. The individual or legal personality concerned may also have a claim which is materially well-founded, but in order that he may be able to assert it in the international sphere and bring an action against a foreign State, the State to which he has recourse must be duly qualified to intervene on his behalf.

Accordingly, the first question that arises is whether Estonia today can grant her diplomatic protection to a national, even if the latter's claim dates from a time when he could not then possess Estonian nationality, because at that time such nationality did not exist in law. Is this legal capacity of Estonia well-founded, supposing that Estonian nationality has been required through some international event? M. Erich indicates that in replying to such a question, the Court pronounces upon Estonia's capacity, at the present time, to sue before it and does not prejudge its later attitude towards the merits of the case. On the other hand, he observes that it may admittedly be difficult to dispose of the first objection on its literal terms without touching upon certain questions of merit necessarily related thereto. However, he believes that the Court can do so without committing itself to an opinion and without prejudice to its final decision. According to an often cited formula, it is permissible and on occasions necessary to "touch upon" merits when deciding upon a preliminary objection.

In M. Erich's opinion, it was essential to decide before all else upon the fundamental point upon which the whole case rests, namely, Estonia's legal capacity. It may be argued that a decision allowing the first objection would rule out the second. But what interest could still attach to the second, in that case? None whatever for Estonia, if she were disqualified, and practically none for the private Company, if thus deprived of international protection.

With regard to the second objection, M. Erich observes that while its text speaks of the non-observance by the Estonian Government of the rule requiring exhaustion of remedies afforded by municipal law, the condition applies to the national concerned, and not to the protecting State. He adds that although the rule is generally recognized, it is subject to certain reservations and exceptions; but the terms and scope of these are not easily defined by definite formulae. The rule is intended to protect States against ill-founded or premature claims which have not been adequately considered by the competent national authorities. It is a principle of law the aim of which is eminently practical. Its essential feature is not therefore that certain things shall have been done or certain formalities observed before diplomatic protection can begin to operate on behalf of the individuals concerned. If in a particular case it appears from the attitude of the government that it waives this condition and that it is prepared to transfer the claim directly to the international plane, it cannot subsequently retreat from that position. From the nature of the rule it follows that local remedies may have been exhausted even though the interested party itself has not gone as far as the ultimate tribunal open to it. It may happen either that passage through all the courts to the final court of appeal would be of no real use or effect, or that the competent authorities may—at all events implicitly—have passed upon essential points of the case in such a way that practically speaking there remains nothing to "exhaust".

M. Erich further notes that although the Lithuanian Government assures the Court that local remedies are fully open to the *Esimene* Company, the essential point is not whether at the present time these remedies are available or not, but rather what the situation was before the proceedings now before the Court. It cannot be denied that the situation was somewhat obscure. The authorities have barely informed the *Esimene* that the courts were at their disposal; the Company has remained for years under the impression that a solution of the question could be reached by way of negotiations. M. Erich

then refers to the Jeglinas case in which the Lithuanian Supreme Court declared categorically that there was no continuity of legal personality between the First Russian Company and *Esimene*. He asserts that from the point of view of the Lithuanian courts, the judgment of the Supreme Court dealt a blow to the legal capacity of the *Esimene* Company to present a claim respecting the Panevezys-Saldutiskis railway. Moreover, M. Erich views the opinion given by the Lithuanian Council of State in 1933 as an additional factor of importance.

M. Erich thus reaches the conclusion that in this case there were reasons for allowing a departure from the general rule for the exhaustion of local remedies.

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## 77. ELECTRICITY COMPANY OF SOFIA AND BULGARIA (PRELIMINARY OBJECTION)

### Judgment of 4 April 1939 (Series A/B, No. 77)

**Fifteenth Annual Report of the Permanent Court of International Justice (15 June 1938—15 June 1939), Series E, No. 15, pp. 98–104**

*Two grounds of jurisdiction: the Treaty of conciliation, arbitration and judicial settlement of June 23rd, 1931, between Belgium and Bulgaria; the Declarations of Belgium and Bulgaria recognizing the compulsory jurisdiction of the Court. Examination of the preliminary objection with reference to each of these two grounds of jurisdiction. Objections raised to the jurisdiction of the Court under the Treaty: the argument* ratione materiae*; the local remedies rule. Objections raised to the jurisdiction of the Court under the Declarations: the limitation* ratione temporis*; the limitation* ratione materiae*—Inadmissibility of one part of the Applicant's claims, because the existence of a dispute prior to the filing of the Application has not been established*

In 1898 a concession for the distribution of electric current for light and power in the town of Sofia was granted by the Municipality of that town to a French company. In 1909, with the approval of the Municipality, this company transferred its rights to the Electricity Company of Sofia and Bulgaria, a company founded at Brussels in 1908. The concession was due to expire in 1940.

During the war of 1914–1918, the works of the Company were taken over by the Municipality. But, after the conclusion of peace, the Company, under Article 182 of the Treaty of Neuilly, was given the right to restitution of its property with an indemnity, the Belgo-Bulgarian Mixed Arbitral Tribunal, which had been set up by the above Treaty, having been entrusted with the task of fixing the indemnity and adapting the concession contract to the new economic conditions, in case of disagreement between the parties. The final judgment of the Mixed Arbitral Tribunal was delivered in 1925; it ordered the immediate restitution of the Company's property and the payment of an indemnity to the Company; further, to enable the sale price of electric current to be fixed, it laid down a formula which had been prepared by experts and took account of the following factors: price of coal, cost of transport, rate of exchange, wages and taxation; finally the concession was prolonged until 1960.

This formula does not seem to have given rise to much difficulty between the Company and the Municipality before the last quarter of 1934. At that time the Company protested against the prices fixed for coal by the Mines Administration. An agreement was finally reached, with certain reservations, but after the devaluation of the Belgian franc in 1935 a further difference arose. In December of that year, the Municipality informed the Company that the formula contained elements that were inapplicable and

led to absurd results, in that it did not take into consideration the real state of affairs and the economic conditions prevailing in Sofia and, in January 1936, the Municipality expressed its intention no longer to authorize the Company to recover from consumers the amount of the excise duty.

The Company applied to the Mixed Arbitral Tribunal which, in December 1936, declared its claim inadmissible. Meanwhile, the Municipality had instituted a suit against the Company before the Regional Court of Sofia, for the determination of the rights and obligations in respect of the sale price of electric current in Sofia. The Regional Court, whose jurisdiction had been contested by the Company, found in favour of the Municipality as regards the price of coal and the exchange, but also to a certain extent in favour of the Company as regards the factor of taxation. On appeal, the judgment was confirmed as far as concerned that part which was in favour of the Municipality, and reversed as to the rest. In 1937 the Company appealed to the Court of Cassation. Meanwhile, in February and April 1936, the Bulgarian Government had promulgated a new income-tax law, against which the Company protested.

In April 1937, the Belgian Minister in Sofia made representations to the Bulgarian Government in regard to the attitude of the Municipality; subsequently he announced that, failing an agreement for the submission of the dispute to arbitration or to the Permanent Court, the Belgian Government would bring the case before the latter by unilateral application.

In consequence, the Belgian Government on January 26th, 1938, filed with the Registry of the Court an Application praying the Court to declare that the State of Bulgaria had failed in its international obligations by reason of the tariff put into force in 1934 by the State Mines Administration, by the judgments of the Bulgarian judicial authorities and by the promulgation of the income-tax law of 1936. The Court was asked to order the requisite reparation in respect of the above acts to be made.

Notice of the Belgian Government's Application—which relied upon the declarations of Belgium and Bulgaria regarding the jurisdiction of the Court as compulsory, and the Treaty of conciliation, arbitration and judicial settlement concluded between the two countries on June 23rd, 1931—was given to the Bulgarian Government, and the communications provided for in Article 40 of the Statute and Article 34 of the Rules of Court were duly made.

By an Order made on March 28th, 1938, the time-limits were fixed for the filing of the Belgian Memorial and of the Bulgarian Counter-Memorial. On July 2nd, 1938, the Belgian Government, in view of certain measures of execution against the Electricity Company of Sofia and Bulgaria, announced by the Municipality of Sofia in default of payment by that Company of a certain sum claimed from it, requested the Court, under Article 41 of the Statute and Article 61 of the Rules, to indicate, as an interim measure of protection, that the compulsory collection by the Municipality of Sofia of the said sum must be postponed pending the delivery of judgment on the merits.

The Court held a hearing on July 13th, 1938, for the examination of this request, but a communication was received from the Agent for the Bulgarian Government stating that he could not be present as the notice given was very short. The Court however heard a statement by the Agent for the Belgian Government to the effect that his Government would make no objection to the granting of the necessary time to the Bulgarian Government. After deliberation, the Court decided the same day to adjourn the proceedings in regard to the request for the indication of interim measures of protection, in order to enable the Bulgarian Government to prepare its observations upon that request and, if need be, in regard to the jurisdiction of the Court; the Agents of the Parties would be heard by the Court at a public sitting the date of which would be subsequently fixed by the President.

Following upon a telegram sent on July 27th, 1938, by the Agent for the Bulgarian Government to the President of the Court, the text of which was duly communicated to the Agent for the Belgian Government, the latter informed the Court in a letter of August 26th, 1938, that in view of the state-

ments contained in this telegram the Belgian Government withdrew the request for the indication of an interim measure of protection presented on July 2nd, 1938.

On August 27th, 1938, the President of the Court made an Order recording the withdrawal by the Belgian Government of its request for the indication of an interim measure of protection and stating that in these circumstances there was no occasion to fix the public hearing contemplated by the Court's decision of July 13th, 1938.

On the same date, a new time-limit was fixed for the filing of the Bulgarian Counter-Memorial. Before the expiration of this time-limit, the Bulgarian Government filed a document formulating an objection. Proceedings on the merits were accordingly suspended and a time was fixed for the presentation by the Belgian Government of observations in regard to the Bulgarian objection.

The Court heard the representatives of the Parties on the objection at public sittings held on February 27th and 28th and March 1st, 1939. On this occasion the Court was composed as follows:

M. Guerrero, *President*; Sir Cecil Hurst, *Vice-President*; Count Rostworowski, MM. Fromageot, Altamira, Anzilotti, Urrutia, Jhr. van Eysinga, MM. Nagaoka, Cheng, Hudson, de Visscher, Erich, *Judges*.

M. Théohar Papazoff, appointed as Judge *ad hoc* by the Bulgarian Government, sat as a member of the Court for the present case.

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The Court's judgment on the preliminary objection was delivered on April 4th, 1939.

Before dealing with the objection itself, the Court determines the attitude of the Parties in regard to the grounds on which they base their arguments. In order to found the jurisdiction of the Court, the Belgian Government relied upon the declarations of Belgium and Bulgaria accepting the Optional Clause, and upon the Treaty of conciliation, arbitration and judicial settlement of June 23rd, 1931. The Bulgarian Government for its part also relied on both of these agreements to support its objection to the jurisdiction. In the course of the proceedings neither Party took the view that either of these agreements might have imposed some restriction on the normal operation of the other during the period for which they were both in force. The Court shares this view. In its opinion, the multiplicity of agreements concluded accepting the compulsory jurisdiction is evidence that the contracting Parties intended not to close old ways of access to the Court but rather to open up new ways. In concluding the Treaty of 1931, the object of the Parties was to institute a very complete system for the settlement of their disputes; they certainly did not intend to weaken the obligations previously entered into with a similar purpose, and especially where such obligations were more extensive. Consequently, if a dispute can be submitted to the Court under the Optional Clause but not under the Treaty, the Treaty cannot be adduced to prevent the operation of the Optional Clause. Only if the Bulgarian objections to the jurisdiction should prove well-founded under both the Treaty and the Optional Clause would the Court decline to entertain the case.

The Court then considers the Bulgarian arguments concerning the Treaty of 1931 and the Optional Clause. It examines these arguments in relation to the submissions of the Belgian Application by which the Court is asked to declare that the Bulgarian Government has failed in its international obligations:

(1) in consequence of the putting into force by the Administration of Mines, in 1934, of an artificially calculated tariff for coal with a view to distorting the application of the formula for the calculation of the selling price of current;

(2) in consequence of the judgment rendered by the Bulgarian courts depriving the Company of the benefit of the decisions of the Mixed Arbitral Tribunal;

(3) in consequence of the law promulgated in 1936 instituting a special tax.

The Bulgarian argument consists of two contentions: the first is that the Belgian Government says nothing as to the nature of the right in regard to which the Parties are in conflict. The Bulgarian Government supposes that the right in question is that of the Bulgarian authorities to decide disputes between the grantor of the concession and the concessionaire as to the application of the formula, and it protests against any claim to invoke the Treaty for the purpose of disputing this right. The Court however recalls that the Belgian written statement explains that the rights which the Belgian Government relies on are the right to the cessation of acts prejudicial to the Company and the right to obtain reparation for the damage suffered, and thus raises a point of an international character which has been contested from the outset. The argument *ratione materiæ* developed in support of the objection in reality forms a part of the merits of the dispute, and consequently the plea does possess the character of a preliminary objection.

The second contention is that the application is irregular because it was introduced before a judicial decision with final effect—namely the judgment of the Court of Cassation—had been rendered, and that this is contrary to the Treaty of 1931. The Belgian Government argues that it has not failed to observe the provisions of the Treaty which could not have contemplated the decisions of the Court of Cassation, which constitutes an extraordinary remedy, and that in any case the appeal in cassation had been lodged and this fact might be deemed to constitute a fulfilment of the required condition. The Court considers the Bulgarian contention well-founded; for the rule laid down by the Treaty of 1931 implies the exhaustion of all appeals, including appeals to the Court of Cassation, a decision of which alone renders the judgment final, either by annulling the judgment of the lower court and sending the case back for a retrial or by rejecting the appeal. It is true that the Treaty contains a clause to the effect that, notwithstanding denunciation by one of the contracting Parties, proceedings pending at the expiration of the current period of the Treaty are to be completed, but this clause does not apply here; it presupposes proceedings which have been validly instituted, and this is not the case here owing to the absence of a decision with final effect rendered by the courts prior to the filing of the Application. Moreover, the irregularity of the Belgian Application was not removed by the judgment rendered on March 16th, 1938, by the Bulgarian Court of Cassation, because, in the meantime, on February 4th, 1938, the Treaty of 1931 had expired, having been denounced by the Bulgarian Government.

Accordingly, the Belgian Government cannot found the jurisdiction of the Court on the Treaty of 1931. Can it however do so on the declarations of adherence to the Optional Clause?

The Belgian declaration covers disputes arising after ratification with regard to situations or facts subsequent to such ratification. This limitation is applicable between the Parties in consequence of the condition of reciprocity laid down in paragraph 2 of Article 36 of the Court's Statute. The Parties agree that the date when the dispute arose was after March 10th, 1926, the date of the establishment of the juridical bond between the two States under Article 36 of the Statute. But though the facts complained of by the Belgian Government all date from a period subsequent to March 10th, 1926, the Bulgarian Government argues that the situation with regard to which the dispute arose dates back to a time before that date and that consequently the dispute falls outside the jurisdiction of the Court, by reason of the limitation *ratione temporis*.

The Court, referring to its Judgment of June 14th, 1938, in the Phosphates in Morocco case, States that the only facts which must be taken into account from the standpoint of its compulsory jurisdiction are those to be considered as the source of the dispute; and in this case it is the acts with which the Bulgarian Government is reproached with regard to a particular application of the formula—which in

itself has never been disputed—which form the centre point of the argument. These acts are subsequent to the material date.

The Bulgarian Government also argues that the present dispute does not fall within any of the categories of Article 36 of the Statute. The Court cannot regard this plea as possessing the character of a preliminary objection, for it is clearly connected with the merits of the case: the reasoning aims at establishing the absence of any international element in the legal relation created between the Belgian Company and the Bulgarian authorities, and that amounts not only to encroaching on the merits, but to coming to a decision in regard to one of the fundamental factors of the case.

In these circumstances, the Court cannot accept the contention that it lacks jurisdiction under the declarations of adherence to the Optional Clause in so far as this contention is founded on the argument *ratione temporis*; and in so far as it is founded on the argument *ratione materiæ*, the Court does not regard it as preliminary in character and consequently rejects it, though the Parties remain free to take it up again in support of their case on the merits.

It has not therefore been established that the Court lacks jurisdiction under the Optional Clause, in so far as concerns the first two grounds of the Belgian Government's complaint, namely the decision regarding the price of coal and the judgments of the courts. The position however is not the same with regard to the third ground of complaint, namely the taxation law. The Bulgarian Government argues that this complaint is inadmissible because it did not form the subject of a dispute between the Governments prior to the filing of the Application. The Court considers this argument to be well-founded. Both under the Treaty and under the Optional Clause, it rested with the Bulgarian Government to prove the existence of such a dispute, and it has not done so. The Belgian application cannot therefore be entertained in so far as concerns the part of the claim relating to this law.

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The Court's judgment was rendered by nine votes to five.

M. Anzilotti, M. Urrutia, Jonkheer van Eysinga and Mr. Hudson, Judges, and M. Papazoff, Judge *ad hoc*, declared that they were unable to concur in the judgment given by the Court and, availing themselves of the right conferred by Article 57 of the Statute, appended separate opinions to the judgment.

M. de Visscher and M. Erich, Judges, while in agreement with the operative clause of the judgment, added observations regarding some of the grounds.

*Separate opinion of M. Anzilotti*

M. Anzilotti states that he dissents from the way in which the judgment views the relation between the two sources of jurisdiction relied upon by the applicant Party. He declares that when the Belgian Government's Application was filed, only the Treaty was applicable between the two States, and it is on the basis of the Treaty and of the Treaty alone that it has to be decided whether the Court can entertain the Application and adjudicate on the merits.

M. Anzilotti notes that a comparison of the Treaty and the Declarations suggests that they constitute two conventions between the Belgian Government and the Bulgarian Government which lay down different rules for the same thing, namely recourse to the Court. It is clear that, in the same legal system, there cannot at the same time exist two rules relating to the same facts and attaching to these facts contradictory consequences. In cases of this kind, either the contradiction is only apparent and the two rules are really coordinated so that each has its own sphere of application and does not encroach on the sphere of application of the other, or else one prevails over the other, i.e., is applicable to the exclusion of the other.

M. Anzilotti observes that the Treaty being of later date than the Declarations, it is in the text of the former that one must seek the intention of the Parties in regard to rules previously in force. He notes that all disputes, without exception, which may be submitted to the Court under the Declarations, may henceforward be submitted to it under the Treaty.

M. Anzilotti states that the coming into force of the Treaty did not entirely do away with the *raison d'être* of the Declarations: this *raison d'être* ceased for so long as the Treaty should be in force; but it revived as soon as the Treaty should terminate. It is not the abrogation of the Declarations, but its temporary suspension which is the effect of the coming into force of the Treaty. At the moment when the Belgian Government's Application was submitted (January 26th, 1938), only the Treaty was applicable.

M. Anzilotti sets out the claims of the Belgian Government, and then examines the preliminary objections of the Bulgarian Government. He finds Bulgaria's first objection, that the legal dispute should have been brought within the exclusive jurisdiction of Bulgaria's courts, is a defence on the merits and is not a preliminary objection.

M. Anzilotti then examines Bulgaria's second complaint, related to Article 3 of the Treaty, against the first and second claims of the Belgian Government separately. With respect to Belgium's first claim, M. Anzilotti finds none of the Belgium Government's responses to Article 3 are valid. First, the judgment by the Court of Appeal, from which appeal is lodged with the Court of Cassation, is a judgment which may be cancelled and replaced by another quite different judgment; that is exactly the contrary of what the Parties desired when they required a "decision with final effect". Second, if the Bulgarian Government had the right to denounce the Treaty, it was perfectly natural that the Belgian Government should be rendered incapable of benefiting by it. It is impossible to describe as *force majeure* what was really only a consequence of the exercise by the Bulgarian Government of its right of denunciation. Third, there is no abuse of right by Bulgaria. Fourth, the local redress rule in this instance is not a rule of common international law; it is a specific and formal provision, and the condition has to be fulfilled at the time when the Court is applied to. The objection by the Bulgarian Government is therefore well-founded in respect of the first claim of the Application.

M. Anzilotti however finds Bulgaria's complaint ill-founded in respect of the second claim in the Application.

He holds that the Belgian Government's second claim had not formed the subject of diplomatic negotiations, and therefore does not fulfil the condition required by Article 1 of the Treaty as per Bulgaria's third complaint.

*Dissenting opinion of M. Urrutia*

M. Urrutia dissents from the Court's Judgment with respect to its interpretation of the relationship between the Treaty and the Declarations as it relates to the Court's jurisdiction.

He notes that it is out of the question to apply simultaneously, in the same dispute and by the same court, one treaty stipulation excluding certain disputes from judicial settlement, and another stipulation providing for them. One stipulation or the other must prevail. In the present case it is the Treaty, which is a later law between the Parties, a special law, the text of which is so perfectly clear that there can be no choice of construction, still less any confusion. Article 3 is the Article which must govern the jurisdiction of the Court in the case of an application filed by one of the High Contracting Parties. The Treaty cannot be said to have cancelled, abrogated or suspended the legal effects of the declarations, but it made them subject to such conditions that, during the term of the Treaty, the Court's jurisdiction may only be exercised in accordance with those conditions.

M. Urrutia sets out the conditions required in Article 3 of the Treaty, and finds that they were not fulfilled in this case, the present dispute falling within the competence of the Bulgarian judicial authorities, as the judgment by the Court of Cassation might have quashed the judgment of the Court of Appeal and have referred the case for re-examination by two new courts.

He concludes that the preliminary objection to the Court's jurisdiction lodged by the Bulgarian Government and based on the Treaty of conciliation, arbitration and judicial settlement, concluded between Belgium and Bulgaria on June 23rd, 1931, is well-founded.

*Dissenting opinion by Jonkheer van Eysinga*

Jhr. van Eysinga rejects all of the preliminary objections to the Court's jurisdiction presented by Bulgaria.

He notes that the adduction of these two sources of jurisdiction confronts the Court with the problem of concurrent sources of jurisdiction, a problem which became of practical importance more especially when the jurisdiction of the Court under Article 36 of the Statute was added to that of other tribunals provided for in already existing treaties. Jhr. van Eysinga finds that the jurisdiction of the Court in this case, which began when the Treaty of 1931 was in force, must be envisaged solely in the light of that Treaty.

Jhr. van Eysinga rejects the Bulgaria's objection based on *ratione temporis*, as it emanates from the declaration and not the Treaty of 1931.

Jhr. van Eysinga examines the objection based on the non-exhaustion of local remedies. He observes that the final decision of the Bulgarian municipal courts had not been given when the Belgian Application was filed. What would now be the situation if the Court had upheld the Bulgarian objection as to admissibility? The Belgian Government might then at once re-submit its Application on the basis of the declarations under Article 36 of the Statute, since by then the remedies of Bulgarian municipal law would have been exhausted more than a year previously. In these circumstances it seems that it would be a pure formality to uphold the objection based on the local remedies rule, at a moment when these remedies have long been exhausted, and on the ground that at an earlier moment they had not yet been exhausted.

Jhr. van Eysinga examines and rejects the two objections by the Bulgarian Government with respect to the promulgation of the law of February 3rd, 1936. First, he finds that it is difficult to draw any conclusion detrimental to Belgium from the non-presentation of the proof offered by Belgium on the question of whether there were efforts to reach a settlement through diplomatic channels as provided in Article 1 of the Treaty. Second, on the question of the requirement to utilize local means of redress before jurisdiction is founded at the Court, Jhr. van Eysinga observes that it has not been established that there exist any judicial or administrative authorities, within the meaning of Article 3 of the Treaty of 1931, to which the Belgian Company could have had recourse with a view to securing the modification of the law of 1936. Apart from this however the dispute in this case is not one in which Belgium has taken up the claim of its national against the Bulgarian authorities, but a dispute in which Belgium directly impugns a legislative act of the State of Bulgaria.

Finally, Jhr. van Eysinga addresses the fundamental preliminary objection to the jurisdiction raised by Bulgaria: namely, that the impugned actions of the administrative, judicial and legislative authorities all fall within the exclusive jurisdiction of Bulgaria. He states that an examination of Bulgaria's fundamental preliminary objection to the jurisdiction would entail an examination of the merits and that, consequently, this objection does not possess the nature of a preliminary objection and must be rejected, though Bulgaria could take it up again as a plea in defence.

*Dissenting opinion of Mr. Hudson*

Mr. Hudson dissents from the Court's judgment that did not support the Bulgarian preliminary objection to the Court's jurisdiction. He examines the sources of jurisdiction as they existed on January 26th, 1938, the date when the Belgian Application was filed.

Mr. Hudson states that, first of all the reciprocal declarations are not applicable in this case because it is a case for which, to employ the concluding phrase of the Belgian declaration, the Parties have agreed "to have recourse to another method of pacific settlement", the method of the Treaty of 1931. Even if this view be rejected, however, as the text of the Treaty is inconsistent with the texts of the reciprocal declarations and as it is later in point of time, the Treaty must prevail over the declarations during the period when the Treaty is in force. The history of the Treaty shows that the Parties intended for a period to free themselves of the reserve in the Belgian declaration, and to include in the jurisdiction conferred on the Court disputes with regard to anterior situations or facts. This is borne out, also, by the policy followed both by Bulgaria and by Belgium in concluding treaties with other States. Two essential differences existing between the Treaty of 1931 and "Convention *a*" of 1928 make it impossible to attribute to the former the subsidiary character which may be attributed to the latter. The conclusion to be drawn is that on January 26th, 1938, while the Treaty of 1931 was in force, the relations between Belgium and Bulgaria with respect to the jurisdiction of the Court were governed by the Treaty of 1931 and not by the reciprocal declarations made under Article 36, paragraph 2, of the Statute. Hence, the Treaty of 1931 is the sole possible source of the Court's jurisdiction to deal with this case.

Mr. Hudson observes that this conclusion makes it necessary, however, to enquire as to the fulfilment in this case of the two conditions set by the Treaty of 1931, (1) the requirement of Article I that the dispute must be one "which it may not have been possible to settle by diplomacy", and (2) the requirement that on the hypotheses set out in Article 3 a definitive decision must have been pronounced by a competent local authority.

He finds that the first and second claims of the Belgian Application were the subject of diplomatic negotiations; however, no proof was furnished of any diplomatic negotiations relating to the law of 1936 which may have taken place prior to the filing of the Belgian Application. Hence the Court lacks jurisdiction to deal with this part of the Belgian claim.

With respect to the claims concerning the action taken by the State Administration of Mines in 1934 and the judgments of the Bulgarian courts in connection with the application of the price formula fixed by the Mixed Arbitral Tribunal in 1925, Mr. Hudson states that the facts seem to show quite clearly that when the Belgian Application was filed on January 26th, 1938, the *décision définitive* required by Article 3 had not yet been pronounced by the competent authority.

For these reasons, Mr. Hudson declares that the preliminary objection advanced by the Bulgarian Government ought to be upheld.

*Separate opinion by M. de Visscher*

M. de Visscher concurs in the operative part of the judgment, but disagrees with some of its reasoning.

He states that the Treaty and the declarations are coordinated instruments; their respective provisions settle different questions; they are on that account fully consistent one with the other and should be applied not as alternatives, but concurrently. He agrees with the judgment in finding that the declarations accepting the compulsory jurisdiction of the Court remained in force during the current period of the 1931 Treaty, because when they signed that Treaty, the two States did not intend to establish a new source of jurisdiction.

M. de Visscher avers that Articles 1 and 3 of the Treaty do not strictly concern the jurisdiction of the Court. These provisions appear in Chapter I of the Treaty, entitled: "Pacific Settlement in general". They lay down two conditions which the Treaty regards as preliminary to any international procedure falling within the methods in question, namely, conciliation, arbitration and judicial settlement. The reference is no longer to the Court's jurisdiction, but to conditions upon which the Parties have agreed to allow recourse to that jurisdiction to depend. He states that it is impossible to imagine that the two Parties intended to make them more binding in their effects than they are under ordinary international law. Understood in this sense, the combined application of the declarations accepting the Court's compulsory jurisdiction and of the 1931 Treaty cannot involve any contradiction, the jurisdiction of the Court continuing to be based upon the declarations, and the two conditions governing admissibility contained in Articles 1 and 3 of the Treaty being therein fixed in accordance with ordinary international law.

M. de Visscher states that the judgment appears to have interpreted Article 3 of the 1931 Treaty relating to the need of exhausting local remedies with a strictness which seems to be in keeping neither with ordinary international law, nor with the general spirit of the Treaty. The circumstances and the general spirit of the Treaty justified a less formal attitude towards a procedure whose only fault lay in its having been precipitated by the denunciation of the Treaty, while that denunciation, taking effect on February 4th following, deprived the Belgian Government, in advance, of the benefit of the appeal lodged by its national with the Court of Cassation and which alone, according to the argument of the Court's judgment, could lead to the "decision with final effect" required by Article 3 of the Treaty of June 23rd, 1931.

*Separate opinion of M. Erich*

M. Erich concurs with the operative part of the Court's judgment, but disagrees on certain points.

He examines the objection based upon Article 3 of the 1931 Treaty and disputing the admissibility of the Application. A party who argues that an application cannot be entertained is not maintaining thereby that the subject of the dispute does not fall within the competence of the court in question; it is adducing a certain circumstance which in its opinion constitutes an obstacle to proceedings. The same is true when the party invokes the non-exhaustion of local remedies or the absence of diplomatic negotiations, both cases creating a gap which does not affect the jurisdiction of the Court as recognized by the parties in question. An objection to jurisdiction and an objection to admissibility are not therefore mutually exclusive. They may co-exist and should be examined separately, even when the same party has impugned both jurisdiction and admissibility. The fact that the party raising the objections has apparently confused them is of no importance, provided that the distinction emerges in fact from its claims. The objection to jurisdiction is obviously a preliminary objection in relation to the objection to admissibility. If the Court finds that it has no jurisdiction, the objection to admissibility lapses, having lost its *raison d'être*; if, on the other hand, the Court declares in favour of its jurisdiction, it has not thereby affirmed that the application can be entertained. M. Erich adds that once the objection based on alleged non-exhaustion is found to be just, it is impossible to cancel the effects of that finding by admitting also that the jurisdiction of the Court is established. The establishment of jurisdiction does not of itself suffice to rule out the objection to the application being entertained.

M. Erich observes that the argument *ratione materiae* was rightly denied to be a preliminary objection and was reserved for examination with the merits. He also discusses the question of the Court's jurisdiction *ratione temporis*, noting that the distinction according to whether the dispute is prior or subsequent to a certain date does not apply in so far as concerns the 1931 Treaty.

On the question of exhaustion of internal remedies, M. Erich states that the conditions required under Article 3 of the 1931 Treaty were not fulfilled at the time when the Belgian Government applied to the Court. At the same time, the local redress rule, even if established in a treaty clause, is not incompatible with certain departures from it, although these, unlike the rule itself, are not laid down in a written text. There are reasons for weighing the merits of an alleged departure from the rule and for taking account of what appears reasonable in a particular case. He holds that a departure from the local redress rule was in this case justified. On this account, M. Erich was able to concur in the operative part of the judgment.

*Dissenting opinion by M. Papazoff*

M. Papazoff is unable to concur in the judgment affirming the jurisdiction of the Court under the declarations of Belgium and Bulgaria accepting the compulsory jurisdiction of the Court.

M. Papazoff states that the objection to the jurisdiction *ratione temporis* is fully established by the particulars in the written proceedings, given the interpretation of the terms of Belgium's declaration. He states that what is laid down is that the dispute must arise, that is to say must be born, after the ratification of the declaration. Furthermore, in order to prevent the declaration from having any retrospective effect, the dispute must have no connection with earlier situations or facts. This condition is contained in the words "with regard to". The essential point is that the past must not be called in question in any way, since the declaration of adherence is only to operate for the future.

M. Papazoff concludes that the present dispute, although it arose after the material date of March 10th, 1926, arose with regard to a prior situation created by the awards of the Mixed Arbitral Tribunal given in 1923 and 1925, and does not fall within the jurisdiction of the Court.

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## 78. THE "SOCIÉTÉ COMMERCIALE DE BELGIQUE"

### Judgment of 15 June 1939 (Series A/B, No. 78)

**Fifteenth Annual Report of the Permanent Court of International Justice (15 June 1938—15 June 1939), Series E, No. 15, pp. 105–110**

*Change in the nature of a dispute owing to changes in the Parties' submissions—Unless authorized by the Parties, the Court will not confirm or invalidate arbitral awards that are "final and without appeal"—Agreement by the Parties to recognize these awards as* res judicata*—The Court places this agreement on record—Consequences and effects of such agreement on certain of the Parties' submissions*

On August 27th, 1925, an agreement was concluded between the Greek Government and the *Société commerciale de Belgique* for the construction in Greece of certain railway lines and for the supply of the equipment necessary for their operation. The contract also provided that the financing of the works was to be covered by a loan to the Greek Government by the Belgian Company, the former in return issuing bonds to the Company which were to constitute a debt of the Greek State and were to form part of its external debt. Any disputes which might arise were to be referred to arbitration.

In 1932 the Greek Government was obliged, on account of the general financial crisis, to abandon the gold standard and to default in the service of its debt. The Company could not continue to pay the sub-contractors, and the work came to an end; it then decided to resort to arbitration. A first award was

given on January 3rd, 1936, providing for the cancellation of the contract and for the appointment of a body of experts to fix the amount of such sum as should be found to be payable by either party to the other. Under a second award given on July 25th, 1936, the amount of the Greek Government's debt to the Company was fixed at 6,771,868 gold dollars.

An examination of the terms of these awards shows that the Parties had in the course of the arbitration proceedings debated many questions which were also the subject of debate before the Court. Thus the question whether any liability on the part of the Greek Government arising from the cancellation of the contract of 1925 could be regarded as part of the external debt of Greece and subjected to the same conditions of payment as applied to that debt was brought before the arbitrators.

The provisions in the awards, other than that relating to the payment of the debt, were carried out by the Greek Government. The Company thereupon proposed a compromise regarding conditions of payment. The Greek Government replied that it could not depart from its views as to the character of the debt which formed part of the Greek external debt and consequently must be paid on the same basis; and it made counter-proposals the object of which was to arrange a long term settlement, with a reduced rate of interest. The Company urged that the contents of the Greek Government's reply, if insisted on, would amount to a refusal to recognize the terms of the arbitral awards. As the negotiations led to nothing, the Belgian Government took up the case on behalf of the Belgian Company. The Greek Government however maintained its position; it also pointed out that it was owing to the financial position of the country and to the difficulties of obtaining foreign currency that it had been obliged to make its counter-proposa1 to the Company for a long term settlement.

In these circumstances, the Greek Government having declined to refer the case to the Court by a special agreement, the Belgian Government instituted proceedings by application.

The Application of the Belgian Government, which invoked the Treaty of conciliation, arbitration and judicial settlement of June 25th, 1929, between Belgium and Greece, was filed with the Registry of the Court on May 4th, 1938. The communications provided for in Article 40 of the Statute and Article 34 of the Rules were duly despatched. The documents of the written proceedings were filed within the prescribed time-limits. In the course of public sittings held from May 15th to 19th, 1939, the Court heard oral arguments by the Parties' representatives.

The Court was composed as follows for the examination of the case:

M. Guerrero, *President*; Sir Cecil Hurst, *Vice-President*; Count Rostworowski, MM. Fromageot, Altamira, Anzilotti, Urrutia, Negulesco, Jhr. van Eysinga, MM. Nagaoka, Cheng, Hudson, de Visscher, Erich, *Judges*.

M. C. G. Ténékidès, nominated by the Greek Government as Judge *ad hoc*, also sat in the Court for the purposes of the case.

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The Court's judgment was delivered on June 15th, 1939.

After analyzing the facts, the judgment proceeds to examine the submissions presented by the Parties.

In the Application, the Belgian Government asked the Court to declare that the Greek Government, by refusing to execute the arbitral awards, had violated its international obligations, and to fix the amount of reparation due for this violation. The Greek Government, however, in its Counter-Memorial, declared that it did not dispute the validity of the arbitral awards and had not refused to execute them; whereupon the Belgian Government, holding that the character of the dispute was changed by this

declaration, asked the Court to take note of the declaration by the Greek Government that it acknowledged without reserve the obligatory character of the arbitral awards and to say that in consequence the conditions for the payment of the Greek external debt had nothing to do with the execution of the arbitral awards. Finally, in the course of the oral proceedings, the Belgian Government, observing that the Greek Government had declared that it acknowledged the definitive and obligatory character of the arbitral awards, but with reservations which destroyed the effect of that acknowledgment, asked the Court to say that the provisions of the awards were obligatory without reserve and added certain subsidiary demands which, in its view, resulted from the Greek Government's acknowledgment.

The Court observes that, by its successive submissions, the Belgian Government has thus profoundly transformed the character of the case. Examining the question whether the Statute and Rules of Court authorize such a transformation, it says that the liberty accorded to the parties to amend their submissions up to the end of the oral proceedings must be construed reasonably and without interfering with the obligation that the subject of the dispute must be indicated in the Application. It is clear that the Court cannot, in principle, allow a dispute brought before it by application to be transformed by amendments in the submissions into another dispute which is different in character. A practice of this kind would be calculated to prejudice the interests of third States to which all applications must be communicated in order that they may be in a position to examine their right to intervene; similarly, a complete change in the basis of a case might affect the Court's jurisdiction. Nevertheless, the Court considers that the special circumstances of this case and more especially the absence of any objection on the part of the Greek Government's Agent render it advisable that it should take a broad view and not regard the present proceedings as irregular.

The submissions before the Court are therefore those finally presented at the hearings. With regard to its jurisdiction to adjudicate on these submissions, the Court observes that the Greek Government has raised no objection. On the contrary, it has submitted arguments on the merits and has asked for a decision on the merits: in regard to this point therefore, the Parties are in agreement. It should be added however that, since the arbitral awards to which these submissions relate are, according to the arbitration clause under which they were made, "final and without appeal", and since the Court has received no mandate from the Parties in regard to them, it can neither confirm nor annul them either wholly or in part.

The Court then proceeds to consider each submission.

The Belgian Government first of all prays the Court to declare that the arbitral awards are without reserve definitive and obligatory for the Greek Government. If regard be had to the origin of this submission, it will be seen that it is founded on the fact that the Greek Government had acknowledged that the arbitral awards have the force of *res judicata*. For in the Counter-Memorial the Greek Government had declared that it never at any time intended to throw doubt on the validity of the awards, and that financial conditions alone had prevented it from executing them. The Belgian Government does not ask the Court either to examine the awards or to confirm them, but simply to place on record the agreement thus arrived at regarding their validity and to exclude any reservation in connection with the Greek Government's recognition of *res judicata*. The Court will consider later whether any reservation on the part of the Greek Government is implied; for the moment it will suffice to note that the two Parties are in agreement: the Belgian Government asks the Court to say that the arbitral awards have the force of *res judicata*, and the Greek Government asks the Court to record that it recognizes that they possess this force.

In its second submission, the Belgian Government prays the Court consequently to adjudge that the Greek Government is bound in law to execute the awards, that the conditions for the settlement of the Greek external debt are foreign to the execution of these awards, and that it is without right or title that the Greek Government has sought to impose on the Company or on the Belgian Government

conditions precedent to payment. It is clear that the foregoing follows logically from the definitive and obligatory character of the awards. Since the Greek Government recognizes that the awards possess this character, it cannot contest this submission without contradicting itself and it does not in fact contest it and its submissions regarding the execution of the arbitral awards proceed from another standpoint, as will presently be seen. The Court may therefore say that the second submission of the Belgian Government is neither necessary nor disputed.

The Greek Government's obligation is qualified in the second Belgian submission by the words "in law". In the opinion of the Court these words mean that the Belgian Government here adopts the strictly legal standpoint regarding the effects of *res judicata*, a standpoint which, in fact, does not preclude the possibility of arrangements which, without affecting the authority of *res judicata*, would take into account the debtor's capacity to pay. It is precisely the standpoint of fact which the Greek Government adopts when, in its submissions, after acknowledging that the awards possess the force of *res judicata*, it asks the Court to say that, by reason of its budgetary and monetary situation however, it is materially impossible for the Greek Government to execute them, that the Greek Government and the Company should be left to come to an arrangement for the execution of the awards which corresponds with this situation and that, in principle, the fair and equitable basis for such an arrangement is to be found in the agreements concluded or to be concluded between the Greek Government and the bondholders of its external public debt.

What is the precise import of these three Greek submissions? Do they constitute reservations affecting the Greek Government's recognition of *res judicata*? It must above all be borne in mind that the question of Greece's capacity to pay is outside the scope of the proceedings. It is not therefore likely that the Greek Government's intention was to ask the Court for a decision as to its budgetary and monetary situation. The question of Greece's capacity to pay is only raised in connection with the contemplated arrangement. The first of these three submissions therefore implies no reservation regarding the recognition of *res judicata*; it proceeds from a standpoint other than that of the rights acknowledged by the awards. But the Court could entertain it only if it also entertained the second submission concerning the arrangements.

The Court however cannot do this. It is certain that the Court is not entitled to oblige the Belgian Government—and still less the Company which is not before it—to enter into negotiations with the Greek Government with a view to a friendly arrangement regarding the execution of the awards which that Government recognizes as binding: negotiations of this kind depend entirely upon the will of the Parties concerned. Still less can the Court indicate the bases for such an arrangement. Nor can the submission referring to the budgetary position be regarded as a plea in defence to the effect that the Greek Government is justified, owing to *force majeure*, in not executing the awards as they stand. For the Court could not pass upon such a plea without having itself verified that the alleged position really existed and without having ascertained the effect which the execution of the awards would have upon that position; but the Parties are in agreement that this question is outside the scope of the proceedings.

Nevertheless, though the Court cannot entertain the Greek claims, it can place on record a declaration made by the Agent for the Belgian Government at the end of the oral proceedings. This declaration was as follows: "If, after the legal situation has been determined, the Belgian Government should have to deal with the question of payments, it would have regard to the legitimate interests of the Company, to the ability of Greece to pay and to the traditional friendship between the two countries." This declaration enables the Court to record that the two Governments are, in principle, agreed in contemplating the possibility of negotiations with a view to a friendly settlement in which regard would be had, amongst other things, to Greece's capacity to pay. Such a settlement is highly desirable.

The Court concludes by admitting the submissions of the Parties respecting the definitive and obligatory character of the arbitral awards and dismissing the other submissions.

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The Court's judgment was rendered by thirteen votes to two.

Jonkheer van Eysinga and Mr. Hudson, Judges, were unable to concur in the judgment and appended their separate opinions to it.

*Dissenting opinion by Jonkheer van Eysinga*

Jhr. van Eysinga declares that it is not enough for the Court to accept the submissions of the two Parties and "declare" that the awards of 1936 are definitive and obligatory. For on the one hand the Belgian submissions B 1, B 2 and E 3, which pray the Court to adjudge and declare that certain consequences of the awards of 1936, which the Greek Government had sought to evade, are essential. He agrees with the view of the judgment that these submissions are correct, but considers that Belgium is entitled to have this recorded in the operative part of the judgment. On the other hand, although the Greek Government acknowledges that the awards of 1936 have the force of *res judicata*, it also asks the Court to say that it is materially impossible for it to execute the awards as formulated (submission No. 4), that negotiations should be begun for an arrangement corresponding with the budgetary and monetary capacity of Greece (submission No. 5) and that, in principle, the fair and equitable basis for such an arrangement is to be found in the agreements concluded or to be concluded by the Greek Government with the bondholders of its external public debt (submission No. 6). Therefore, according to Jhr. van Eysinga, Greece is also entitled to have the Court adjudicate on these submissions.

Moreover, Jhr. van Eysinga sustains that the Court has jurisdiction to entertain submission No. 4. It is a question of ascertaining a fact: the budgetary and monetary situation of Greece. The ascertainment of this fact in its turn requires an expert report in accordance with the provisions of Article 50 of the Statute, for the Court cannot adjudicate simply on the basis of what the two Parties—notwithstanding their statements that this question should remain outside the scope of these proceedings—have put before it regarding the financial and monetary capacity of Greece. Only after such an expert report could the Court adjudicate on Greek submissions Nos. 4 to 7 and upon Belgian submission C.

*Separate opinion by Mr. Hudson*

Mr. Hudson explains that, while the result he would reach in this case does not differ greatly from that reached by the Court, the reasoning which he should adopt for reaching it differs on some important points.

In his view, the principal object of the Belgian submissions in their final form was to obtain from the Court a pronouncement as to the juridical nature and effect of the arbitral awards of 1936. In other words, the Belgian Government does not confine itself to asking the Court to declare that certain matters dealt with in the arbitral awards are now *res judicata* and recognized to be such by the Greek Government; it goes further and seeks a judgment establishing with the Court's authority the obligatory character of the awards.

Mr. Hudson considers, however, that even on this interpretation of their principal object the Belgian submissions ought to be dismissed. He makes reference to the *Serbian Loans Case* and to the *Brazilian Loans Case* in order to explain that the contract of 1925 and the arbitral awards of 1936 are governed not by international law but by national law, and the national law applicable to them is that of Greece. This being true, it would seem that if the Court undertook to pronounce upon the legal character and effect of the two arbitral awards, it would have to apply Greek law. However, the Court is not called upon to undertake a research to find the Greek law applicable. Where international law is

to be applied, the Court should not hesitate to go beyond the presentation by the parties before it, and it must conduct whatever research may be necessary for finding the applicable law. Where municipal law is to be applied, a party which asks for relief should furnish to the Court the materials necessary for its finding the applicable law; and where as in this case no such materials are furnished to the Court, it would seem that the Court is not obliged to institute the research necessary for that purpose, that on the contrary it is free to deny the relief sought without instituting such a research.

On the Greek side, Mr. Hudson finds that submissions (5) and (6) should be dismissed on the ground that no legal basis exists for the invitation to which submission (5) refers. The Court may have power in some circumstances to invite two States represented before it to engage in negotiations with a view to the settlement of their dispute. In this case, it would not be justified in requiring such negotiations to be undertaken by the Belgian and Greek Governments, nor in laying down the basis for such negotiations as desired by the Greek Government.

Similarly, Mr. Hudson considers that submission (4) should be dismissed since it would raise a question as to the legal effect of the budgetary and monetary situation of Greece, and thus would call for an examination of the municipal law applicable. Alternatively, Mr. Hudson believes that submission (4) could have the effect of raising the question of Greece's capacity to pay, and should therefore be dismissed for want of proof of the alleged impossibility. He further observes that in view of the declarations of the Parties, it would seem to be unnecessary to enquire into the Greek Government's capacity to make a single payment in full of the sum due; to this extent, submission (4), viewed as a request for a finding of fact, ceased to have any object after the Belgian declaration.

Finally, as to submission (3) of the Greek Government, Mr. Hudson agrees that the Court may take note of the Greek Government's recognition of the principle of *res judicata* as applied to the two arbitral awards of 1936, but thinks that in admitting submission (3) the operative part of the judgment should not go further than this.

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## 79. ELECTRICITY COMPANY OF SOFIA AND BULGARIA (PROVISIONAL MEASURES)

### Order of 5 December 1939 (Series A/B, No. 79)

**Sixteenth Annual Report of the Permanent Court of International Justice (15 June 1939—31 December 1945), Series E, No. 16, pp. 149–153**

*Extension of time-limit—Indication of interim measures of protection*

*Written proceedings regarded as terminated—Fixing of date for commencement of oral proceedings*

This case was brought before the Court on January 26th, 1938, by an application filed by the Belgian Government praying the Court to declare that the State of Bulgaria had failed in its international obligations by putting into force a coal tariff in 1934, by decisions rendered in 1936 and 1937 by the Bulgarian judicial authorities and by the institution of a special tax in 1936. The Court was asked to order the requisite reparation to be made in respect of these acts.

On November 25th, 1938, the Bulgarian Government filed a preliminary objection; the Court accordingly suspended the proceedings on the merits and, on April 4th, 1939, gave judgment on this objection. The decision reached by the Court was that it had jurisdiction in so far as concerned the first

two grounds of complaint, but that the Belgian Government's application could not be entertained in respect of the third grant of complaint, namely, the taxation law.

By an Order dated the same day (April 4th, 1939) concerning the resumption of the proceedings on the merits, the Court fixed July 4th, August 19th and October 4th respectively as the dates for the filing of the Counter-Memorial, the Reply and the Rejoinder on the merits. The first two of these were filed by the dates thus fixed. With regard to the third, the Agent of the Bulgarian Government informed the Registrar of the Court, on October 2nd, 1939, that recent events had prevented him from collaborating with Counsel for the Bulgarian defence and that, owing to circumstances of *force majeure* resulting from the war, he was unable to file the Rejoinder.

As the Belgian Government made no objection to a reasonable extension of the time-limit in question, the President of the Court (since the latter was not sitting) made the following Order on October 4th, 1939:

"The President of the Permanent Court of International Justice,

Having regard to Article 48 of the Statute of the Court,

Having regard to Articles 37, 38 and 41 of the Rules of Court,

*Makes the following Order*:

Having regard to the Application filed with the Registry of the Court on January 26th, 1938, whereby the Belgian Government instituted proceedings before the Court against the Bulgarian Government concerning the Electricity Company of Sofia and Bulgaria;

Having regard to the preliminary objection raised by the Bulgarian Government on November 25th, 1938;

Having regard to the judgment of April 4th, 1939, whereby the Court adjudicated upon this objection;

Having regard to the Order of the same date, whereby the Court fixed July 4th, August 19th and October 4th, 1939, as the respective dates for the filing of the Counter-Memorial, Reply and Rejoinder on the merits;

Having regard to the Counter-Memorial of the Bulgarian Government and the Reply of the Belgian Government, which were filed by the dates thus fixed;

Whereas, on October 2nd, 1939, the Agent for the Bulgarian Government sent to the Registrar of the Court the following telegram:

'Have honour inform Court that recent events have prevented my collaboration with advocate for Bulgarian defence, the French Professor Gilbert Gidel, and that owing to circumstances of *force majeure* resulting from the war am unable file Bulgarian Rejoinder.'

Whereas the Agent for the Belgian Government, to whom the terms of this telegram were communicated, stated that his Government would have no objection to a reasonable extension of the time-limit for the filing of the Rejoinder;

Whereas the circumstances alleged by the Agent for the Bulgarian Government should be taken into account;

The President of the Court, as the Court is not sitting,

extends until Thursday, January 4th, 1940, the time-limit for the filing of the Bulgarian Rejoinder which had been fixed to expire on October 4th, 1939.

Done in French and English, the French text being authoritative, at the Peace Palace, The Hague, this fourth day of October, one thousand nine hundred and thirty-nine, in three copies, of which one will be placed in the archives of the Court and the others will be transmitted to the Belgian and Bulgarian Governments respectively.

(*Signed*) J. G. Guerrero
President

(*Signed*) J. López Oliván
Registrar"

On October 17th, 1939, however, the Belgian Agent filed with the Registry of the Court a "Second incidental Request of the Belgian Government for the indication of interim measures of protection", dated October 14th, 1939. The reason given for this request was the fact that the Municipality of Sofia, on August 1st, 1939, had brought a "petitory action" against the Electricity Company "based on the previous decisions of the Bulgarian courts", and that the measures of execution with which the Company was threatened were "such as would not only seriously prejudice the Company's position, but also impede the restoration of its rights by the Municipality, if the Court were to uphold the Belgian Government's claim". This request was communicated to the Agent for the Bulgarian Government, who was at the same time requested to let the Registry of the Court have any written observations which he might desire to present by November 24th, 1939. By a telegram dated November 18th, 1939, the Bulgarian Agent informed the Court that, owing to the war, it was impossible for him to collaborate with foreign counsel on the preparation of the Bulgarian defence and that his Government forbade the departure for The Hague of himself and of the national judge, in view of the serious risks to their persona1 safety involved by the journey, and did not consider it incumbent upon it to submit the observations asked for upon the request which, however, it declared should be rejected. On November 24th, 1939, the President of the Court, in accordance with Article 61, paragraph 8, of the Rules of Court, fixed December 4th, 1939, as the date of a public sitting for the hearing of the Parties.

At this sitting, the Court heard M. J. G. de Ruelle, Agent for the Belgian Government, and Maître Henri Rolin, Counsel, the Bulgarian Government not being represented before the Court. For this sitting the Court was composed as follows:

M. Guerrero, *President*; Sir Cecil Hurst, *Vice-President*; MM. Fromageot, Anzilotti, Negulesco, Jhr. van Eysinga, MM. Cheng, de Visscher, Erich, *Judges*.

The judge *ad hoc* nominated by the Bulgarian Government had been duly summoned to attend, but announced in a telegram dated November 25th, 1939, that it was impossible for him, owing to circumstances of *force majeure*, to come to The Hague. The Court held that the action brought as demandant by the Municipality of Sofia against the Belgian Company constituted, according to the statement made on July 27th, 1938, by the Bulgarian Agent himself, the precise course to be adopted in order to obtain payment of the sums claimed by the Municipality from the Company and thus to enable the former to resort to measures of compulsion. Furthermore, Article 41, paragraph 1, of the Statute simply applied the principle universally accepted by international tribunals and laid down in many conventions to which Bulgaria had been a party—to the effect that the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given and, in general, not allow any steps to be taken which might aggravate or extend the dispute. In this case, the existing conditions and the successive postponements and resulting delays justified in the view of the Court the indication of interim measures calculated to prevent, for the duration of the proceedings, the performance of acts likely to prejudice, for either of the Parties, the respective rights which might result from the impending judgment. By an Order made on December 5th, 1939, the Court accordingly indicated as an interim measure, in accordance with Article 41, paragraph 1, of

the Statute and Article 61, paragraph 4, of the Rules of Court, "that, pending the final judgment of the Court in the suit . . . , the State of Bulgaria should ensure that no step of any kind is taken capable of prejudicing the rights claimed by the Belgian Government or of aggravating or extending the dispute submitted to the Court".

In a telegram addressed to the Court on January 2nd, 1940, the Bulgarian Agent once more invoked the existence of circumstances of *force majeure*, in consequence of which his Government did not consider itself bound to present its Rejoinder by the date fixed. In his reply, dated January 24th, 1940, to the communication informing him of this telegram, the Belgian Agent opposed the suspension of the proceedings, holding that the argument of *force majeure* was unreasonable and could not be invoked. The Court held that it was for the Bulgarian Government to select some advocate, whose collaboration could in the circumstances be effectively secured, and that in actual fact there was nothing to impede travelling and communications between Bulgaria and the seat of the Court. The facts alleged did not therefore constitute a situation of *force majeure*. By abstaining from presenting its Rejoinder by the date fixed, the Bulgarian Government could not, of its own volition, prevent the continuation of the proceedings instituted and the due exercise of the powers of the Court. Having regard to the contents of the Belgian Memorial and the Bulgarian Counter-Memorial, the Court held that the written proceedings must be regarded as terminated and the case ready for hearing. Accordingly, by an Order made on February 26th, 1940, the Court, under Article 47, paragraph 1, of the Rules, fixed May 16th, 1940, as the date for the commencement of the oral proceedings. On this occasion it was composed as follows:

M. Guerrero, *President*; Sir Cecil Hurst, *Vice-President*; MM. Fromageot, Altamira, Anzilotti, Negulesco, Jhr. van Eysinga, MM. Cheng, Hudson, de Visscher, Erich, *Judges*.

The judge *ad hoc* nominated by the Bulgarian Government had been duly convoked for February 19th, 1940. In consequence of the invasion of the Netherlands, it was impossible for oral proceedings to take place.

In prospect of the meeting of the Court in October 1945, the Registrar, on September 3rd, 1945, wrote to the Belgian Government, referring to the succession of events since May 10th, 1940, which had rendered communications with that Government impossible, and asking what course it proposed to adopt with regard to the proceedings which it had instituted. The Belgian Minister for Foreign Affairs, in a letter dated October 24th, 1945, replied as follows: "As present circumstances warrant the hope that there will no longer be any occasion for the Belgian Government to exercise its right to protect the Belgian Company . . . the Belgian Government does not intend to go on with the proceedings instituted before the Court . . . and asks that the case should be struck out of the Court's list". This notice of discontinuance was notified to the Respondent Party by a communication dated November 2nd, 1945. The Registrar informed the latter at the same time that the President of the Court, in accordance with Article 69, paragraph 2, of the Rules, fixed December 1st, 1945, as the date by which it might enter an objection to the discontinuance of the proceedings. No objection on the part of the Respondent Party was received by the Registry.

## 80. ELECTRICITY COMPANY OF SOFIA AND BULGARIA (FIXING OF COMMENCEMENT OF ORAL PROCEEDINGS)

**Order of 26 February 1940 (Series A/B, No. 80)**

**Sixteenth Annual Report of the Permanent Court of International Justice (15 June 1939—31 December 1945), Series E, No. 16, pp. 149–153**

For the summary of No. 80, see No. 79.

# ANNEX I

## COVENANT OF THE LEAGUE OF NATIONS, 1919

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The Covenant of the League of Nations was adopted at the Paris Peace Conference on 28 April 1919, and it entered into force on 10 January 1920. Amendments were made to the Covenant on three occasions. These amendments entered into force as follows: amendment to Article 6 on 13 August 1924; amendments to Articles 12, 13 and 15 on 26 September 1924; and amendment to Article 4 on 19 July 1926. In the reproduced text below the amended sections are indicated with an asterisk.

# COVENANT OF THE LEAGUE OF NATIONS, 1919

The High Contracting Parties,

In order to promote international co-operation and to achieve international peace and security

by the acceptance of obligations not to resort to war,
by the prescription of open, just and honourable relations between nations,
by the firm establishment of the understandings of international law as the actual rule of conduct among Governments, and
by the maintenance of justice and a scrupulous respect for all treaty obligations in the deal ings of organised peoples with one another,

Agree to this Covenant of the League of Nations.

*Article 1*

The original Members of the League of Nations shall be those of the Signatories which are named in the Annex to this Covenant and also such of those other States named in the Annex as shall accede without reservation to this Covenant. Such accession shall be effected by a Declaration deposited with the Secretariat within two months of the coming into force of the Covenant. Notice thereof shall be sent to all other Members of the League.

Any fully self-governing State, Dominion or Colony not named in the Annex may become a Member of the League if its admission is agreed to by two-thirds of the Assembly, provided that it shall give effective guarantees of its sincere intention to observe its international obligations, and shall accept such regulations as may be prescribed by the League in regard to its military, naval and air forces and armaments.

Any Member of the League may, after two years' notice of its intention so to do, withdraw from the League, provided that all its international obligations and all its obligations under this Covenant shall have been fulfilled at the time of its withdrawal.

*Article 2*

The action of the League under this Covenant shall be effected through the instrumentality of an Assembly and of a Council, with a permanent Secretariat.

*Article 3*

The Assembly shall consist of Representatives of the Members of the League.

The Assembly shall meet at stated intervals and from time to time as occasion may require at the Seat of the League or at such other place as may be decided upon.

The Assembly may deal at its meetings with any matter within the sphere of action of the League or affecting the peace of the world. At meetings of the Assembly each Member of the League shall have one vote, and may have not more than three Representatives.

*Article 4*

The Council shall consist of Representatives of the Principal Allied and Associated Powers, together with Representatives of four other Members of the League. These four Members of the League shall be selected by the Assembly from time to time in its discretion. Until the appointment of the Repre-

sentatives of the four Members of the League first selected by the Assembly, Representatives of Belgium, Brazil, Spain and Greece shall be members of the Council.

With the approval of the majority of the Assembly, the Council may name additional Members of the League whose Representatives shall always be members of the Council; the Council, with like approval may increase the number of Members of the League to be selected by the Assembly for representation on the Council.

The Assembly shall fix by a two-thirds' majority the rules dealing with the election of the non-permanent Members of the Council, and particularly such regulations as relate to their term of office and the conditions of re-eligibility.*

The Council shall meet from time to time as occasion may require, and at least once a year, at the Seat of the League, or at such other place as may be decided upon.

The Council may deal at its meetings with any matter within the sphere of action of the League or affecting the peace of the world.

Any Member of the League not represented on the Council shall be invited to send a Representative to sit as a member at any meeting of the Council during the consideration of matters specially affecting the interests of that Member of the League.

At meetings of the Council, each Member of the League represented on the Council shall have one vote, and may have not more than one Representative.

*Article 5*

Except where otherwise expressly provided in this Covenant or by the terms of the present Treaty, decisions at any meeting of the Assembly or of the Council shall require the agreement of all the Members of the League represented at the meeting.

All matters of procedure at meetings of the Assembly or of the Council, including the appointment of Committees to investigate particular matters, shall be regulated by the Assembly or by the Council and may be decided by a majority of the Members of the League represented at the meeting.

The first meeting of the Assembly and the first meeting of the Council shall be summoned by the President of the United States of America.

*Article 6*

The permanent Secretariat shall be established at the Seat of the League. The Secretariat shall comprise a Secretary General and such secretaries and staff as may be required.

The first Secretary General shall be the person named in the Annex; thereafter the Secretary General shall be appointed by the Council with the approval of the majority of the Assembly.

The secretaries and staff of the Secretariat shall be appointed by the Secretary General with the approval of the Council.

The Secretary General shall act in that capacity at all meetings of the Assembly and of the Council.

The expenses of the League shall be borne by the Members of the League in the proportion decided by the Assembly.*

*Article 7*

The Seat of the League is established at Geneva.

The Council may at any time decide that the Seat of the League shall be established elsewhere.

All positions under or in connection with the League, including the Secretariat, shall be open equally to men and women.

Representatives of the Members of the League and officials of the League when engaged on the business of the League shall enjoy diplomatic privileges and immunities.

The buildings and other property occupied by the League or its officials or by Representatives attending its meetings shall be inviolable.

*Article 8*

The Members of the League recognise that the maintenance of peace requires the reduction of national armaments to the lowest point consistent with national safety and the enforcement by common action of international obligations.

The Council, taking account of the geographical situation and circumstances of each State, shall formulate plans for such reduction for the consideration and action of the several Governments. Such plans shall be subject to reconsideration and revision at least every ten years.

After these plans shall have been adopted by the several Governments, the limits of armaments therein fixed shall not be exceeded without the concurrence of the Council.

The Members of the League agree that the manufacture by private enterprise of munitions and implements of war is open to grave objections. The Council shall advise how the evil effects attendant upon such manufacture can be prevented, due regard being had to the necessities of those Members of the League which are not able to manufacture the munitions and implements of war necessary for their safety.

The Members of the League undertake to interchange full and frank information as to the scale of their armaments, their military, naval and air programmes and the condition of such of their industries as are adaptable to war-like purposes.

*Article 9*

A permanent Commission shall be constituted to advise the Council on the execution of the provisions of Articles 1 and 8 and on military, naval and air questions generally.

*Article 10*

The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League. In case of any such aggression or in case of any threat or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled.

*Article 11*

Any war or threat of war, whether immediately affecting any of the Members of the League or not, is hereby declared a matter of concern to the whole League, and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations. In case any such emergency should arise the Secretary General shall on the request of any Member of the League forthwith summon a meeting of the Council.

It is also declared to be the friendly right of each Member of the League to bring to the attention of the Assembly or of the Council any circumstance whatever affecting international relations which

threatens to disturb international peace or the good understanding between nations upon which peace depends.

*Article 12*

The Members of the League agree that, if there should arise between them any dispute likely to lead to a rupture they will submit the matter either to arbitration or judicial settlement or to enquiry by the Council, and they agree in no case to resort to war until three months after the award by the arbitrators or the judicial decision, or the report by the Council. In any case under this Article the award of the arbitrators or the judicial decision shall be made within a reasonable time, and the report of the Council shall be made within six months after the submission of the dispute.*

*Article 13*

The Members of the League agree that whenever any dispute shall arise between them which they recognise to be suitable for submission to arbitration or judicial settlement and which cannot be satisfactorily settled by diplomacy, they will submit the whole subject-matter to arbitration or judicial settlement.*

Disputes as to the interpretation of a treaty, as to any question of international law, as to the existence of any fact which if established would constitute a breach of any international obligation, or as to the extent and nature of the reparation to be made for any such breach, are declared to be among those which are generally suitable for submission to arbitration or judicial settlement.

For the consideration of any such dispute, the court to which the case is referred shall be the Permanent Court of International Justice, established in accordance with Article 14, or any tribunal agreed on by the parties to the dispute or stipulated in any convention existing between them.*

The Members of the League agree that they will carry out in full good faith any award or decision that may be rendered, and that they will not resort to war against a Member of the League which complies therewith. In the event of any failure to carry out such an award or decision, the Council shall propose what steps should be taken to give effect thereto.*

*Article 14*

The Council shall formulate and submit to the Members of the League for adoption plans for the establishment of a Permanent Court of International Justice. The Court shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it. The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly.

*Article 15*

If there should arise between Members of the League any dispute likely to lead to a rupture, which is not submitted to arbitration or judicial settlement in accordance with Article 13, the Members of the League agree that they will submit the matter to the Council. Any party to the dispute may effect such submission by giving notice of the existence of the dispute to the Secretary General, who will make all necessary arrangements for a full investigation and consideration thereof.*

For this purpose the parties to the dispute will communicate to the Secretary General, as promptly as possible, statements of their case with all the relevant facts and papers, and the Council may forthwith direct the publication thereof.

The Council shall endeavour to effect a settlement of the dispute, and if such efforts are successful, a statement shall be made public giving such facts and explanations regarding the dispute and the terms of settlement thereof as the Council may deem appropriate.

If the dispute is not thus settled, the Council either unanimously or by a majority vote shall make and publish a report containing a statement of the facts of the dispute and the recommendations which are deemed just and proper in regard thereto.

Any Member of the League represented on the Council may make public a statement of the facts of the dispute and of its conclusions regarding the same.

If a report by the Council is unanimously agreed to by the members thereof other than the Representatives of one or more of the parties to the dispute, the Members of the League agree that they will not go to war with any party to the dispute which complies with the recommendations of the report.

If the Council fails to reach a report which is unanimously agreed to by the members thereof, other than the Representatives of one or more of the parties to the dispute, the Members of the League reserve to themselves the right to take such action as they shall consider necessary for the maintenance of right and justice.

If the dispute between the parties is claimed by one of them, and is found by the Council, to arise out of a matter which by international law is solely within the domestic jurisdiction of that party, the Council shall so report, and shall make no recommendation as to its settlement.

The Council may in any case under this Article refer the dispute to the Assembly. The dispute shall be so referred at the request of either party to the dispute, provided that such request be made within fourteen days after the submission of the dispute to the Council.

In any case referred to the Assembly, all the provisions of this Article and of Article 12 relating to the action and powers of the Council shall apply to the action and powers of the Assembly, provided that a report made by the Assembly, if concurred in by the Representatives of those Members of the League represented on the Council and of a majority of the other Members of the League, exclusive in each case of the Representatives of the parties to the dispute, shall have the same force as a report by the Council concurred in by all the members thereof other than the Representatives of one or more of the parties to the dispute.

*Article 16*

Should any Member of the League resort to war in disregard of its covenants under Articles 12, 13 or 15, it shall ipso facto be deemed to have committed an act of war against all other Members of the League, which hereby undertake immediately to subject it to the severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of the covenant-breaking State, and the prevention of all financial, commercial or personal intercourse between the nationals of the covenant-breaking State and the nationals of any other State, whether a Member of the League or not.

It shall be the duty of the Council in such case to recommend to the several Governments concerned what effective military, naval or air force the Members of the League shall severally contribute to the armed forces to be used to protect the covenants of the League.

The Members of the League agree, further, that they will mutually support one another in the financial and economic measures which are taken under this Article, in order to minimise the loss and inconvenience resulting from the above measures, and that they will mutually support one another in resisting any special measures aimed at one of their number by the covenant-breaking State, and that

they will take the necessary steps to afford passage through their territory to the forces of any of the Members of the League which are co-operating to protect the covenants of the League.

Any Member of the League which has violated any covenant of the League may be declared to be no longer a Member of the League by a vote of the Council concurred in by the Representatives of all the other Members of the League represented thereon.

*Article 17*

In the event of a dispute between a Member of the League and a State which is not a Member of the League, or between States not Members of the League, the State or States not Members of the League shall be invited to accept the obligations of membership in the League for the purposes of such dispute, upon such conditions as the Council may deem just. If such invitation is accepted, the provisions of Articles 12 to 16 inclusive shall be applied with such modifications as may be deemed necessary by the Council.

Upon such invitation being given the Council shall immediately institute an inquiry into the circumstances of the dispute and recommend such action as may seem best and most effectual in the circumstances.

If a State so invited shall refuse to accept the obligations of membership in the League for the purposes of such dispute, and shall resort to war against a Member of the League, the provisions of Article 16 shall be applicable as against the State taking such action.

If both parties to the dispute when so invited refuse to accept the obligations of membership in the League for the purposes of such dispute, the Council may take such measures and make such recommendations as will prevent hostilities and will result in the settlement of the dispute.

*Article 18*

Every treaty or international engagement entered into hereafter by any Member of the League shall be forthwith registered with the Secretariat and shall as soon as possible be published by it. No such treaty or international engagement shall be binding until so registered.

*Article 19*

The Assembly may from time to time advise the reconsideration by Members of the League of treaties which have become inapplicable and the consideration of international conditions whose continuance might endanger the peace of the world.

*Article 20*

The Members of the League severally agree that this Covenant is accepted as abrogating all obligations or understandings inter se which are inconsistent with the terms thereof, and solemnly undertake that they will not hereafter enter into any engagements inconsistent with the terms thereof.

In case any Member of the League shall, before becoming a Member of the League, have undertaken any obligations inconsistent with the terms of this Covenant, it shall be the duty of such Member to take immediate steps to procure its release from such obligations.

*Article 21*

Nothing in this Covenant shall be deemed to affect the validity of international engagements, such as treaties of arbitration or regional understandings like the Monroe doctrine, for securing the maintenance of peace.

*Article 22*

To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilisation and that securities for the performance of this trust should be embodied in this Covenant.

The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League.

The character of the mandate must differ according to the stage of the development of the people, the geographical situation of the territory, its economic conditions and other similar circumstances.

Certain communities formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone. The wishes of these communities must be a principal consideration in the selection of the Mandatory.

Other peoples, especially those of Central Africa, are at such a stage that the Mandatory must be responsible for the administration of the territory under conditions which will guarantee freedom of conscience and religion, subject only to the maintenance of public order and morals, the prohibition of abuses such as the slave trade, the arms traffic and the liquor traffic, and the prevention of the establishment of fortifications or military and naval bases and of military training of the natives for other than police purposes and the defence of territory, and will also secure equal opportunities for the trade and commerce of other Members of the League.

There are territories, such as South-West Africa and certain of the South Pacific Islands, which, owing to the sparseness of their population, or their small size, or their remoteness from the centres of civilisation, or their geographical contiguity to the territory of the Mandatory, and other circumstances, can be best administered under the laws of the Mandatory as integral portions of its territory, subject to the safeguards above mentioned in the interests of the indigenous population.

In every case of mandate, the Mandatory shall render to the Council an annual report in reference to the territory committed to its charge.

The degree of authority, control, or administration to be exercised by the Mandatory shall, if not previously agreed upon by the Members of the League, be explicitly defined in each case by the Council.

A permanent Commission shall be constituted to receive and examine the annual reports of the Mandatories and to advise the Council on all matters relating to the observance of the mandates.

*Article 23*

Subject to and in accordance with the provisions of international conventions existing or hereafter to be agreed upon, the Members of the League:

(a) will endeavour to secure and maintain fair and humane conditions of labour for men, women, and children, both in their own countries and in all countries to which their commercial and industrial relations extend, and for that purpose will establish and maintain the necessary international organisations;

(b) undertake to secure just treatment of the native inhabitants of territories under their control;

(c) will entrust the League with the general supervision over the execution of agreements with regard to the traffic in women and children, and the traffic in opium and other dangerous drugs;

(d) will entrust the League with the general supervision of the trade in arms and ammunition with the countries in which the control of this traffic is necessary in the common interest;

(e) will make provision to secure and maintain freedom of communications and of transit and equitable treatment for the commerce of all Members of the League. In this connection, the special necessities of the regions devastated during the war of 1914–1918 shall be borne in mind;

(f) will endeavour to take steps in matters of international concern for the prevention and control of disease.

*Article 24*

There shall be placed under the direction of the League all international bureaux already established by general treaties if the parties to such treaties consent. All such international bureaux and all commissions for the regulation of matters of international interest hereafter constituted shall be placed under the direction of the League.

In all matters of international interest which are regulated by general convention but which are not placed under the control of international bureaux or commissions, the Secretariat of the League shall, subject to the consent of the Council and if desired by the parties, collect and distribute all relevant information and shall render any other assistance which may be necessary or desirable.

The Council may include as part of the expenses of the Secretariat the expenses of any bureau or commission which is placed under the direction of the League.

*Article 25*

The Members of the League agree to encourage and promote the establishment and co-operation of duly authorised voluntary national Red Cross organisations having as purposes the improvement of health, the prevention of disease and the mitigation of suffering throughout the world.

*Article 26*

Amendments to this Covenant will take effect when ratified by the Members of the League whose Representatives compose the Council and by a majority of the Members of the League whose Representatives compose the Assembly.

No such amendments shall bind any Member of the League which signifies its dissent therefrom, but in that case it shall cease to be a Member of the League.

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## ANNEX II

## STATUTE OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE

The Statute of the Permanent Court of International Justice entered into force following the ratification, by a majority of the Members of the League of Nations, of the Protocol of 16 December 1920 concerning adoption of the Statute (League of Nations, Treaty Series, vol. 6, p. 379 and p. 390 (Statute)). The Statute was amended once, by a Revision Protocol adopted by the Assembly on 14 September 1929, which entered into force on 1 February 1936 (League of Nations, Treaty Series, vol. 165, p. 353).

The Statute reproduced hereinafter is the one as amended in 1929. Those articles of the original Statute that were amended are indicated with an asterisk, and the original text of the respective provisions is reproduced in a footnote to the corresponding article. Articles that were added to the Statute in 1929 are indicated with an asterisk.

# STATUTE OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE

**Provided for by Article 14 of the Covenant of the League of Nations**
**As amended in accordance with the Protocol of September 14th, 1929**

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*Article 1*

A Permanent Court of International Justice is hereby established, in accordance with Article 14 of the Covenant of the League of Nations. This Court shall be in addition to the Court of Arbitration organized by the Conventions of The Hague of 1899 and 1907, and to the special Tribunals of Arbitration to which States are always at liberty to submit their disputes for settlement.

## Chapter I. Organization of the Court

*Article 2*

The Permanent Court of International Justice shall be composed of a body of independent judges, elected regardless of their nationality from amongst persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law.

*Article 3**

The Court shall consist of fifteen members.[1]

*Article 4**

The members of the Court shall be elected by the Assembly and by the Council from a list of persons nominated by the national groups in the Court of Arbitration, in accordance with the following provisions. In the case of Members of the League of Nations not represented in the Permanent Court of Arbitration, the lists of candidates shall be drawn up by national groups appointed for this purpose by their governments under the same conditions as those prescribed for members of the Permanent Court of Arbitration by Article 44 of the Convention of The Hague of 1907 for the pacific settlement of international disputes. The conditions under which a State which has accepted the Statute of the Court but is not a Member of the League of Nations, may participate in electing the members of the Court shall, in the absence of a special agreement, be laid down by the Assembly on the proposal of the Council.[2]

*Article 5*

At least three months before the date of the election, the Secretary-General of the League of Nations shall address a written request to the members of the Court of Arbitration belonging to the States mentioned in the Annex to the Covenant or to the States which join the League subsequently,

[1] The Court shall consist of fifteen members: eleven judges and four deputy-judges. The number of judges and deputy-judges may hereafter be increased by the Assembly, upon the proposal of the Council of the League of Nations, to a total of fifteen judges and six deputy-judges.

[2] The members of the Court shall be elected by the Assembly and by the Council from a list of persons nominated by the national groups in the Court of Arbitration, in accordance with the following provisions.

In the case of Members of the League of Nations not represented in the Permanent Court of Arbitration, the lists of candidates shall be drawn up by national groups appointed for this purpose by their Governments under the same conditions as those prescribed for members of the Permanent Court of Arbitration by Article 44 of the Convention of The Hague of 1907 for the pacific settlement of international disputes.

and to the persons appointed under paragraph 2 of Article 4, inviting them to undertake, within a given time, by national groups, the nomination of persons in a position to accept the duties of a member of the Court. No group may nominate more than four persons, not more than two of whom shall be of their own nationality. In no case must the number of candidates nominated be more than double the number of seats to be filled.

*Article 6*

Before making these nominations, each national group is recommended to consult its Highest Court of Justice, its Legal Faculties and Schools of Law, and its National Academies and national sections of International Academies devoted to the study of Law.

*Article 7*

The Secretary-General of the League of Nations shall prepare a list in alphabetical order of all the persons thus nominated. Save as provided in Article 12, paragraph 2, these shall be the only persons eligible for appointment. The Secretary-General shall submit this list to the Assembly and to the Council.

*Article 8**

The Assembly and the Council shall proceed independently of one another to elect the members of the Court.[3]

*Article 9*

At every election, the electors shall bear in mind that not only should all the persons appointed as members of the Court possess the qualifications required, but the whole body also should represent the main forms of civilization and the principal legal systems of the world.

*Article 10*

Those candidates who obtain an absolute majority of votes in the Assembly and in the Council shall be considered as elected. In the event of more than one national of the same Member of the League being elected by the votes of both the Assembly and the Council, the eldest of these only shall be considered as elected.

*Article 11*

If, after the first meeting held for the purpose of the election, one or more seats remain to be filled, a second and, if necessary, a third meeting shall take place.

*Article 12*

If, after the third meeting, one or more seats still remain unfilled, a joint conference consisting of six members, three appointed by the Assembly and three by the Council, may be formed, at any time, at the request of either the Assembly or the Council, for the purpose of choosing one name for each seat still vacant, to submit to the Assembly and the Council for their respective acceptance. If the Conference is unanimously agreed upon any person who fulfills the required conditions, he may be included in its list, even though he was not included in the list of nominations referred to in Articles 4 and 5. If the joint conference is satisfied that it will not be successful in procuring an election, those members of the Court who have already been appointed shall, within a period to be fixed by the Council, proceed

[3] The Assembly and the Council shall proceed independently of one another to elect, firstly the judges, then the deputy-judges.

to fill the vacant seats by selection from amongst those candidates who have obtained votes either in the Assembly or in the Council. In the event of an equality of votes amongst the judges, the eldest judge shall have a casting vote.

*Article 13**

The members of the Court shall be elected for nine years; They may be re-elected. They shall continue to discharge their duties until their places have been filled. Though replaced, they shall finish any cases which they may have begun. In the case of the resignation of a member of the Court, the resignation will be addressed to the President of the Court for transmission to the Secretary-General of the League of Nations. This last notification makes the place vacant.[4]

*Article 14**

Vacancies which may occur shall be filled by the same method as that laid down for the first election, subject to the following provision: the Secretary-General of the League of Nations shall, within one month of the occurrence of the vacancy, proceed to issue the invitations provided for in Article 5, and the date of the election shall be fixed by the Council at its next session.[5]

*Article 15**

A member of the Court elected to replace a member whose period of appointment has not expired, will hold the appointment for the remainder of his predecessor's term.[6]

*Article 16**

The members of the Court may not exercise any political or administrative function, nor engage in any other occupation of a professional nature. Any doubt on this point is settled by the decision of the Court.[7]

*Article 17**

No member of the Court may act as agent, counsel or advocate in any case. No member may participate in the decision of any case in which he has previously taken an active part as agent, counsel or advocate for one of the contesting parties, or as a member of a national or international Court, or of a commission of enquiry, or in any other capacity. Any doubt on this point is settled by the decision of the Court.[8]

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[4] The members of the Court shall be elected for nine years.

They may be re-elected.

They shall continue to discharge their duties until their places have been filled. Though replaced, they shall finish any cases which they may have begun.

[5] Vacancies which may occur shall be filled by the same method as that laid down for the fist election. A member of the Court elected to replace a member whose period of appointment had not expired will hold the appointment for the remainder of his predecessor's term.

[6] Deputy-judges shall be called upon to sit in the order laid down in a list.

This list shall be prepared by the Court and shall have regard firstly to priority of election and secondly to age.

[7] The ordinary members of the Court may not exercise any political or administrative function. This provision does not apply to the deputy-judges except when performing their duties on the Court.

Any doubt on this point is settled by the decision of the Court.

[8] No member of the Court can act as agent, counsel or advocate in any case of an international nature. This provision only applies to the deputy-judges as regards cases in which they arc called upon to exercise their functions on the Court.

No member may participate in the decision of any case in which he has previously taken an active part, as agent, counsel or advocate for one of the contesting parties, or as a member of a national or international Court, or of a commission of enquiry, or in any other capacity.

Any doubt on this point is settled by the decision of the Court.

*Article 18*

A member of the Court cannot be dismissed unless, in the unanimous opinion of the other members, he has ceased to fulfil the required conditions. Formal notification thereof shall be made to the Secretary-General of the League of Nations, by the Registrar. This notification makes the place vacant.

*Article 19*

The members of the Court, when engaged on the business of the Court, shall enjoy diplomatic privileges and immunities.

*Article 20*

Every member of the Court shall, before taking up his duties, make a solemn declaration in open Court that he will exercise his powers impartially and conscientiously.

*Article 21*

The Court shall elect its President and Vice-President for three years; they may be re-elected. It shall appoint its Registrar. The duties of Registrar of the Court shall not be deemed incompatible with those of Secretary-General of the Permanent Court of Arbitration.

*Article 22*

The seat of the Court shall be established at The Hague. The President and Registrar shall reside at the seat of the Court.

*Article 23**

The Court shall remain permanently in session except during the judicial vacations, the dates and duration of which shall be fixed by the Court. Members of the Court whose homes are situated at more than five days' normal journey from The Hague shall be entitled, apart from the judicial vacations, to six months' leave every three years, not including the time spent in travelling. Members of the Court shall be bound, unless they are on regular leave or prevented from attending by illness or other serious reason duly explained to the President, to hold themselves permanently at the disposal of the Court.[9]

*Article 24*

If, for some special reason, a member of the Court considers that he should not take part in the decision of a particular case, he shall so inform the President. If the President considers that for some special reason one of the members of the Court should not sit on a particular case, he shall give him notice accordingly. If in any such case the member of the Court and the President disagree, the matter shall be settled by the decision of the Court.

*Article 25**

The full Court shall sit except when it is expressly provided otherwise. Subject to the condition that the number of judges available to constitute the Court is not thereby reduced below eleven, the Rules of Court may provide for allowing one or more judges, according to circumstances and in rotation, to

[9] A session of the Court shall be held every year.

Unless otherwise provided by Rules of Court, this session shall begin on the 15th of June, and shall continue for so long as may be deemed necessary to finish the cases on the list.

The President may summon an extraordinary session of the Court whenever necessary.

be dispensed from sitting. Provided always that a quorum of nine judges shall suffice to constitute the Court.[10]

*Article 26**

Labour cases, particularly cases referred to in Part XIII (Labour) of the Treaty of Versailles and the corresponding portions of the other treaties of peace, shall be heard and determined by the Court under the following conditions: The Court will appoint every three years a special Chamber of five judges, selected so far as possible with due regard to the provisions of Article 9.

In addition, two judges shall be selected for the purpose of replacing a judge who finds it impossible to sit. If the parties so demand, cases will be heard and determined by this Chamber. In the absence of any such demand, the full Court will sit. In both cases, the judges will be assisted by four technical assessors sitting with them, but without the right to vote, and chosen with a view to ensuring a just representation of the competing interests. The technical assessors shall be chosen for each particular case in accordance with rules of procedure under Article 30 from a list of "Assessors for Labour Cases" composed of two persons nominated by each Member of the League of Nations and an equivalent number nominated by the Governing Body of the Labour Office.

The Governing Body will nominate, as to one-half, representatives of the workers, and, as to one-half, representatives of employers from the list referred to in Article 412 of the Treaty of Versailles and the corresponding articles of the other treaties of peace. Recourse may always be had to the summary procedure provided for in Article 29, in the cases referred to in the first paragraph of the present Article, if the parties so request.

In Labour cases, the International Office shall be at liberty to furnish the Court with all relevant information, and for this purpose the Director of that Office shall receive copies of all the written proceedings.[11]

*Article 27**

Cases relating to transit and communications, particularly cases referred to in Part XII (Ports, Waterways and Railways) of the Treaty of Versailles and the corresponding portions of the other treaties of peace, shall be heard and determined by the Court under the following conditions: The Court

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[10] The full Court shall sit except when it is expressly provided otherwise.

If eleven judges cannot be present, the number shall be made up by calling on deputy-judges to sit.

If, however, eleven judges are not available, a quorum of nine judges shall suffice to constitute the Court.

[11] Labour cases, particularly cases referred to in Part XIII (Labour) of the Treaty of Versailles and the corresponding portions of the other Treaties of Peace, shall be heard and determined by the Court under the following conditions:

The Court will appoint every three years a special chamber of five judges, selected so far as possible with due regard to the provisions of Article 9. In addition, two judges shall be selected for the purpose of replacing a judge who finds it impossible to sit. If the parties so demand, cases will be heard and determined by this Chamber. In the absence of any such demand, the Court will sit with the number of judges provided for in Article 25. On all occasions the judges will be assisted by four technical assessors sitting with them, but without the right to vote, and chosen with a view to ensuring a just representation of the competing interests.

If there is a national of one only of the parties sitting as a judge in the Chamber referred to in the preceding paragraph, the President will invite one of the other judges to retire in favour of a judge chosen by the other party in accordance with Article 31.

The technical assessors shall be chosen for each particular case in accordance with rules of procedure under Article 30 from a list of "Assessors for Labour cases" composed of two persons nominated by each Member of the League of Nations and an equivalent number nominated by the Governing Body of the Labour Office. The Governing Body will nominate, as to one-half, representatives of the workers, and as to one-half, representatives of employers from the list referred to in Article 412 of the Treaty of Versailles and the corresponding articles of the other Treaties of Peace.

In Labour cases the International Labour Office shall be at liberty to furnish the Court with all relevant information, and for this purpose the Director of that Office shall receive copies of all the written proceedings.

will appoint every three years a special Chamber of five judges, selected so far as possible with due regard to the provisions of Article 9. In addition, two judges shall be selected for the purpose of replacing a judge who finds it impossible to sit. If the parties so demand, cases will be heard and determined by this Chamber. In the absence of any such demand, the full Court will sit. When desired by the parties or decided by the Court, the judges will be assisted by four technical assessors sitting with them, but without the right to vote. The technical assessors shall be chosen for each particular case in accordance with rules of procedure under Article 30 from a list of "Assessors for Transit and Communications Cases" composed of two persons nominated by each Member of the League of Nations. Recourse may always be had to the summary procedure provided for in Article 29, in the cases referred to in the first paragraph of the present Article, if the parties so request.[12]

*Article 28*

The special chambers provided for in Articles 26 and 27 may, with the consent of the parties to the dispute, sit elsewhere than at The Hague.

*Article 29**

With a view to the speedy despatch of business, the Court shall form annually a Chamber composed of five judges who, at the request of the contesting parties, may hear and determine cases by summary procedure. In addition, two judges shall be selected for the purpose of replacing a judge who finds it impossible to sit.[13]

*Article 30*

The Court shall frame rules for regulating its procedure. In particular, it shall lay down rules for summary procedure.

*Article 31**

Judges of the nationality of each of the contesting parties shall retain their right to sit in the case before the Court. If the Court includes upon the Bench a judge of the nationality of one of the parties, the other party may choose a person to sit as judge. Such person shall be chosen preferably from among those persons who have been nominated as candidates as provided in Articles 4 and 5. If the Court includes upon the Bench no judge of the nationality of the contesting parties, each of these parties may proceed to select a judge as provided in the preceding paragraph.

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[12] Cases relating to transit and communications, particularly cases referred to in Part XII (Ports, Waterways and Railways) of the Treaty of Versailles and the corresponding portions of the other Treaties of Peace shall be heard and determined by the Court under the following conditions :

The Court will appoint every three years a special chamber of five judges, selected so far as possible with due regard to the provisions of Article 9. In addition, two judges shall be selected for the purpose of replacing a judge who finds it impossible to sit. If the parties so demand, cases will be heard and determined by this chamber. In the absence of any such demand, the Court will sit with the number of judges provided for in Article 25. When desired by the parties or decided by the Court, the judges wil1 be assisted by four technical assessors sitting with them, but without the right to vote.

If there is a national of one only of the parties sitting as a judge in the chamber referred to in the preceding paragraph, the President will invite one of the other judges to retire in favour of a judge chosen by the other party in accordance with Article 31.

The technical assessors shall be chosen for each particular case in accordance with rules of procedure under Article 30 from a list of "Assessors for Transit and Communications cases" composed of two persons nominated by each Member of the League of Nations.

[13] With a view to the speedy despatch of business, the Court shall form annually a chamber composed of three judges who, at the request of the contesting parties, may hear and determine cases by summary procedure.

The present provision shall apply to the case of Articles 26, 27 and 29. In such cases, the President shall request one or, if necessary, two of the members of the Court forming the Chamber to give place to the members of the Court of the nationality of the parties concerned, and, failing such or if they are unable to be present, to the judges specially appointed by the parties. Should there be several parties in the same interest, they shall, for the purpose of the preceding provisions, be reckoned as one party only. Any doubt upon this point is settled by the decision of the Court.

Judges selected as laid down in paragraphs 2, 3 and 4 of this Article shall fulfil the conditions required by Articles 2, 17 (paragraph 2), 20 and 24 of this Statute. They shall take part in the decision on terms of complete equality with their colleagues.[14]

*Article 32**

The members of the Court shall receive an annual salary. The President shall receive a special annual allowance. The Vice-President shall receive a special allowance for every day on which he acts as President. The judges appointed under Article 31, other than members of the Court, shall receive an indemnity for each day on which they sit. These salaries, allowances and indemnities shall be fixed by the Assembly of the League of Nations on the proposal of the Council. They may not be decreased during the term of office. The salary of the Registrar shall be fixed by the Assembly on the proposal of the Court.

Regulations made by the Assembly shall fix the conditions under which retiring pensions may be given to members of the Court and to the Registrar, and the conditions under which members of the Court and the Registrar shall have their travelling expenses refunded. The above salaries, indemnities and allowances shall be free of all taxation.[15]

*Article 33*

The expenses of the Court shall be borne by the League of Nations, in such a manner as shall be decided by the Assembly upon the proposal of the Council.

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[14] Judges of the nationality of each contesting party shall retain their right to sit in the case before the Court.

If the Court includes upon the Bench a judge of the nationality of one of the parties only, the other party may select from among the deputy-judges a judge of its nationality, if there be one. If there should not be one, the party may choose a judge, preferably from among those persons who have been nominated as candidates as provided in Articles 4 and 5.

If the Court includes upon the Bench no judge of the nationality of the contesting parties, each of these may proceed to select or choose a judge as provided in the preceding paragraph.

Should there be several parties in the same interest, they shall, for the purpose of the preceding provisions, be reckoned as one party only. Any doubt upon this point is settled by the decision of the Court.

Judges selected or chosen as laid down in paragraphs 2 and 3 of this article shall fulfil the conditions required by Articles 2, 16, 17, 20, 24 of this Statute. They shall take part in the decision on an equal footing with their colleagues.

[15] The judges shall receive an annual indemnity to be determined by the Assembly of the League of Nations upon the proposal of the Council. This indemnity must not be decreased during the period of a judge's appointment.

The President shall receive a special grant for his period of office, to be fixed in the same way.

The Vice-President, judges and deputy-judges, shall receive a grant for the actual performance of their duties, to be fixed in the same way.

Travelling expenses incurred in the performance of their duties shall be refunded to judges and deputy-judges who do not reside at the seat of the Court.

Grants due to judges selected or chosen as provided in Article 31 shall be determined in the same way.

The salary of the Registrar shall be decided by the Council upon the proposal of the Court.

The Assembly of the the League of Nations shall lay down, on the proposa1 of the Council, a special regulation fixing the conditions under which retiring pensions may be given to the personnel of the Court.

## Chapter II. Competence of the Court

*Article 34*

Only States or Members of the League of Nations can be parties in cases before the Court.

*Article 35**

The Court shall be open to the Members of the League and also to States mentioned in the Annex to the Covenant. The conditions under which the Court shall be open to other States shall, subject to the special provisions contained in treaties in force, be laid down by the Council, but in no case shall such provisions place the parties in a position of inequality before the Court. When a State which is not a Member of the League of Nations is a party to a dispute, the Court will fix the amount which that party is to contribute towards the expenses of the Court. This provision shall not apply if such State is bearing a share of the expenses of the Court.[16]

*Article 36*

The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in treaties and conventions in force. The Members of the League of Nations and the States mentioned in the Annex to the Covenant may, either when signing or ratifying the Protocol to which the present Statute is adjoined, or at a later moment, declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other Member or State accepting the same obligation, the jurisdiction of the Court in all or any of the classes of legal disputes concerning:

(a) the interpretation of a treaty;

(b) any question of international law;

(c) the existence of any fact which, if established, would constitute a breach of an international obligation;

(d) the nature or extent of the reparation to be made for the breach of an international obligation.

The declaration referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain Members or States, or for a certain time. In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.

*Article 37*

When a treaty or convention in force provides for the reference of a matter to a tribunal to be instituted by the League of Nations, the Court will be such tribunal.

*Article 38*

The Court shall apply:

1. International conventions, whether general or particular, establishing rules expressly recognized by the contesting States;

[16] The Court shall be open to the Members of the League and also to States mentioned in the Annex to the Covenant.

The conditions under which the Court shall be open to other States shall, subject to the special provisions contained in treaties in force, be laid down by the Council, but in no case shall such provisions place the parties in a position of inequality before the Court.

When a State which is not a Member of the League of Nations is a party to a dispute, the Court will fix the amount which that party is to contribute towards the expenses of the Court.

2. International custom, as evidence of a general practice accepted as law;
3. The general principles of law recognized by civilized nations;
4. Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

## Chapter III. Procedure

### *Article 39**

The official languages of the Court shall be French and English. If the parties agree that the case shall be conducted in French, the judgment will be delivered in French. If the parties agree that the case shall be conducted in English, the judgment will be delivered in English. In the absence of an agreement as to which language shall be employed, each party may, in the pleadings, use the language which it prefers; the decision of the Court will be given in French and English. In this case the Court will at the same time determine which of the two texts shall be considered as authoritative. The Court may, at the request of any party, authorize a language other than French or English to be used.[17]

### *Article 40**

Cases are brought before the Court, as the case may be, either by the notification of the special agreement or by a written application addressed to the Registrar. In either case the subject of the dispute and the contesting parties must be indicated. The Registrar shall forthwith communicate the application to all concerned. He shall also notify the Members of the League of Nations through the Secretary-General, and also any States entitled to appear before the Court.[18]

### *Article 41*

The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to reserve the respective rights of either party. Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and the Council.

### *Article 42*

The parties shall be represented by agents. They may have the assistance of counsel or advocates before the Court.

### *Article 43*

The procedure shall consist of two parts: written and oral.

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[17] The officia1 languages of the Court shall be French and English. If the parties agree that the case shall be conducted in French, the judgment will be delivered in French. If the parties agree that the case shall be conducted in English, the judgment will be delivered in English.

In the absence of an agreement as to which language shall be employed, each party may, in the pleadings, use the language which it prefers; the decision of the Court will be given in French and English. In this case the will at the same time determine which of the two texts shall be considered as authoritative.

The Court may, at the request of the parties, authorize a language other than French or English to be used.

[18] Cases are brought before the Court, as the case may be, either by the notification of the special agreement, or by a written application addressed to the Registrar. In either case the subject of the dispute and the contesting parties must be indicated.

The Registrar shall forthwith communicate the application to all concerned.

He shall also notify the Members of the League of Nations through the Secretary-General.

The written proceedings shall consist of the communication to the judges and to the parties of Cases, Counter-Cases and, if necessary, Replies; also all papers and documents in support. These communications shall be made through the Registrar, in the order and within the time fixed by the Court. A certified copy of every document produced by one party shall be communicated to the other party. The oral proceedings shall consist of the hearing by the Court of witnesses, experts, agents, counsel and advocates.

*Article 44*

For the service of all notices upon persons other than the agents, counsel and advocates, the Court shall apply direct to the government of the State upon whose territory the notice has to be served. The same provision shall apply whenever steps are to be taken to procure evidence on the spot.

*Article 45**

The hearing shall be under the control of the President or, if he is unable to preside, of the Vice-President; if neither is able to preside, the senior judge present shall preside.[19]

*Article 46*

The hearing in Court shall be public, unless the Court shall decide otherwise, or unless the parties demand that the public be not admitted.

*Article 47*

Minutes shall be made at each hearing, and signed by the Registrar and the President. These minutes shall be the only authentic record.

*Article 48*

The Court shall make orders for the conduct of the case, shall decide the form and time in which each party must conclude its arguments, and make all arrangements connected with the taking of evidence.

*Article 49*

The Court may, even before the hearing begins, call upon the agents to produce any document, or to supply any explanations. Formal note shall be taken of any refusal.

*Article 50*

The Court may, at any time, entrust any individual, body, bureau, commission or other organization that it may select, with the task of carrying out an enquiry or giving an expert opinion.

*Article 51*

During the hearing any relevant questions are to be put to the witnesses and experts under the conditions laid down by the Court in the rules of procedure referred to in Article 30.

[19] The hearing shall be under the control of the President or, in his absence, of the Vice-President; if both are absent, the senior judge shall preside.

*Article 52*

After the Court has received the proofs and evidence within the time specified for the purpose, it may refuse to accept any further oral or written evidence that one party may desire to present unless the other side consents.

*Article 53*

Whenever one of the parties shall not appear before the Court, or shall fail to defend his case, the other party may call upon the Court to decide in favour of his claim. The Court must, before doing so, satisfy itself, not only that it has jurisdiction in accordance with Articles 36 and 37, but also that the claim is well founded in fact and law.

*Article 54*

When, subject to the control of the Court, the agents, advocates and counsel have completed their presentation of the case, the President shall declare the hearing closed. The Court shall withdraw to consider the judgment. The deliberations of the Court shall take place in private and remain secret.

*Article 55*

All questions shall be decided by a majority of the judges present at the hearing. In the event of an equality of votes, the President or his deputy shall have a casting vote.

*Article 56*

The judgment shall state the reasons on which it is based. It shall contain the names of the judges who have taken part in the decision.

*Article 57*

If the judgment does not represent in whole or in part the unanimous opinion of the judges, dissenting judges are entitled to deliver a separate opinion.

*Article 58*

The judgment shall be signed by the President and by the Registrar. It shall be read in open Court, due notice having been given to the agents.

*Article 59*

The decision of the Court has no binding force except between the parties and in respect of that particular case.

*Article 60*

The judgment is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party.

*Article 61*

An application for revision of a judgment can be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision, always provided that such ignorance was not due to negligence. The proceedings for revision will be opened by a judgment of the Court

expressly recording the existence of the new fact, recognizing that it has such a character as to lay the case open to revision, and declaring the application admissible on this ground.

The Court may require previous compliance with the terms of the judgment before it admits proceedings in revision. The application for revision must be made at latest within six months of the discovery of the new fact. No application for revision may be made after the lapse of ten years from the date of the sentence.

*Article 62*

Should a State consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene as a third party. It will be for the Court to decide upon this request.

*Article 63*

Whenever the construction of a convention to which States other than those concerned in the case are parties is in question the Registrar shall notify all such States forthwith. Every State so notified has the right to intervene in the proceedings: but if it uses this right, the construction given by the judgment will be equally binding upon it.

*Article 64*

Unless otherwise decided by the Court, each party shall bear its own costs.

## Chapter IV. Advisory Opinions

*Article 65**

Questions upon which the advisory opinion of the Court is asked shall be laid before the Court by means of a written request, signed either by the President of the Assembly or the President of the Council of the League of Nations, or by the Secretary-General of the League under instructions from the Assembly or the Council. The request shall contain an exact statement of the question upon which an opinion is required, and shall be accompanied by all documents likely to throw light upon the question.

*Article 66**

1. The Registrar shall forthwith give notice of the request for an advisory opinion to the Members of the League of Nations, through the Secretary-General of the League, and to any States entitled to appear before the Court. The Registrar shall also, by means of a special and direct communication, notify any Member of the League or State admitted to appear before the Court or international organization considered by the Court (or, should it not be sitting, by the President) as likely to be able to furnish information on the question, that the Court will be prepared to receive, within a time-limit to be fixed by the President, written statements, or to hear, at a public sitting to be held for the purpose, oral statements relating to the question. Should any Member or State referred to in the first paragraph have failed to receive the communication specified above, such Member or State may express a desire to submit a written statement, or to be heard; and the Court will decide.

2. Members, States, and organizations having presented written or oral statements or both shall be admitted to comment on the statements made by other Members, States, or organizations in the form, to the extent and within the time-limits which the Court, or, should it not be sitting, the President, shall decide in each particular case. Accordingly, the Registrar shall in due time communicate any such written statements to Members, States, and organizations having submitted similar statements.

*Article 67**

The Court shall deliver its advisory opinions in open Court, notice having been given to the Secretary-General of the League of Nations and to the representatives of Members of the League, of States and of international organizations immediately concerned.

*Article 68**

In the exercise of its advisory functions, the Court shall further be guided by the provisions of the Statute which apply in contentious cases to the extent to which it recognizes them to be applicable.

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# ANNEX III

# RULES OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE

The Rules of the Permanent Court of International Justice were subject to several revisions and/or amendments throughout the life of the Permanent Court. The original Rules of Court were adopted by the Permanent Court on 24 March 1922. They were subsequently revised on 31 July 1926, and then amended on 7 September 1927, 1 February 1931 and 11 March 1936.

The Rules of Court reproduced hereinafter are those as amended in 1936. Given their number and complexity, the various revisions and amendments to the Rules and the prior text of the amended Rules are not indicated. The text of all revisions and amendments to the Rules and further information on the modification process can be found in Series D of the Permanent Court's publications, available on the website of the International Court of Justice at http://www.icj-cij.org/pcij/series-d.php?p1=9&p2=5.

# RULES OF COURT
# ADOPTED ON MARCH 11th, 1936

## Table

*Preamble*

The Court,

Having regard to the Statute annexed to the Protocol of December 16th, 1920, and the amendments to this Statute annexed to the Protocol of September 14th, 1929, in force as from February 1st, 1936;

Having regard to Article 30 of this Statute;

Adopts the present Rules:

## Heading I. Constitution and Working of the Court

### Section I. Constitution of the Court

#### Judges and technical Assessors

*Article 1*

The term of office of members of the Court shall begin to run on January 1st of the year following their election, except in the case of an election under Article 14 of the Statute, in which case the term of office shall begin on the date of election.

*Article 2*

Members of the Court elected at an earlier session of the Assembly and of the Council of the League of Nations shall take precedence over members elected at a subsequent session. Members elected during the same session shall take precedence according to age Judges nominated under Article 31 of the Statute of the Court from outside the Court shall take precedence after the other judges in order of age.

The Vice-President shall take his seat on the right of the President. The other judges shall take their seats on the left and right of the President in the order laid down above.

*Article 3*

Any State which considers that it possesses and which intends to exercise the right to nominate a judge under Article 31 of the Statute of the Court shall so notify the Court by the date fixed for the filing of the Memorial The name of the person chosen to sit as judge shall be indicated, either with the notification above mentioned, or within a period to be fixed by the President. These notifications shall be communicated to the other parties and they may submit their views to the Court within a period to be fixed by the President. If any doubt or objection should arise, the decision shall rest with the Court, if necessary after hearing the parties.

If, on receipt of one or more notifications under the terms of the preceding paragraph, the Court finds that there are several parties in the same interest and that none of them has a judge of its nationality upon the Bench, it shall fix a period within which these parties, acting in concert, may nominate a judge under Article 31 of the Statute. If, at the expiration of this time-limit, no notification of a nomination by them has been made, they shall be regarded as having renounced the right conferred upon them by Article 31 of the Statute.

*Article 4*

Where one or more parties are entitled to nominate a judge under Article 31 of the Statute, the full Court may sit with a number of judges exceeding the number of members of the Court fixed by the Statute.

*Article 5*

1. The declaration to be made by every judge in accordance with Article 20 of the Statute of the Court shall be worded as follows:

"I solemnly declare that I will exercise all my powers and duties as a judge honourably and faithfully, impartially and conscientiously."

2. This declaration shall be made at the first public sitting of the Court at which the judge is present after his election or nomination. A special public sitting of the Court may be held for this purpose.

3. At the public inaugural sitting held after a new election of the whole Court the required declaration shall be made first by the President, next by the Vice-President, and then by the remaining judges in the order laid down in Article 2 of the present Rules.

*Article 6*

For the purpose of applying Article 18 of the Statute of the Court the President, or if necessary the Vice-President, shall convene the members of the Court. The member affected shall be allowed to furnish explanations. When he has done so the question shall be discussed and a vote shall be taken, the member in question not being present. If the members present are unanimous, the Registrar shall issue the notification prescribed in the above-mentioned Article.

*Article 7*

1. The President shall take steps to obtain all relevant information with a view to the selection of the technical assessors to be appointed in a case. For cases falling under Article 26 of the Statute of the Court, he shall consult the Governing Body of the International Labour Office.

2. Assessors shall be appointed by an absolute majority of votes by the full Court or by the Chamber which has to deal with the case in question, as the case may be.

3. A request for assessors to be attached to the Court under Article 27, paragraph 2, of the Statute must at latest be submitted with the first document of the written proceedings. Such a request shall be complied with if the parties are in agreement. If the parties are not in agreement, the decision rests with the full Court or with the Chamber, as the case may be.

*Article 8*

Before taking up their duties, assessors shall make the following solemn declaration at a public sitting:

"I solemnly declare that I will exercise my duties and powers as an assessor honourably and faithfully, impartially and conscientiously, and that I will scrupulously observe all the provisions of the Statute and of the Rules of Court."

## The Presidency

*Article 9*

1. The President and the Vice-President shall be elected in the last quarter of the last year of office of the retiring President and Vice-President. They shall take up their duties on the following January 1st.

2. After a new election of the whole Court, the election of the President and of the Vice-President shall take place at the commencement of the following year. The President and Vice-President elected in these circumstances shall take up their duties on the date of their election. They shall remain in office until the end of the second year after the year of their election.

3. Should the President or the Vice-President cease to belong to the Court before the expiration of his normal term of office, an election shall be held for the purpose of appointing a successor for the unexpired portion of his term of office.

4. The elections referred to in the present Article shall take place by secret ballot. The candidate obtaining an absolute majority of votes shall be declared elected.

*Article 10*

The President shall direct the work and administration of the Court; he shall preside at the meetings of the full Court.

*Article 11*

The Vice-President shall take the place of the President, if the latter is unable to fulfil his duties. In the event of the President ceasing to hold office, the same rule shall apply until his successor has been appointed by the Court.

*Article 12*

1. The discharge of the duties of the President shall always be assured at the seat of the Court, either by the President himself or by the Vice-President.

2. If at the same time both the President and the Vice-President are unable to fulfil their duties, or if both appointments are vacant at the same time, the duties of President shall be discharged by the oldest among the members of the Court who have been longest on the Bench.

3. After a new election of the whole Court, and until the election of the President and the Vice-President, the duties of President shall be discharged by the oldest member of the Court.

*Article 13*

1. If the President is a national of one of the parties to a case brought before the Court, he will hand over his functions as President in respect of that case. The same rule applies to the Vice-President or to any member of the Court who might be called on to act as President.

2. If, after a new election of the whole Court, the newly elected President sits, under Article 13 of the Statute of the Court, in order to finish a case which he had begun during his preceding term of office as judge, the duties of President, in respect of such case, shall be discharged by the member of the Court who presided when the case was last under examination, unless the latter is unable to sit, in which case the former Vice-President or the oldest among the members of the Court who have been longest on the Bench shall discharge the duties of President.

3. If, owing to the expiry of a President's period of office, a new President is elected, and if the Court sits after the end of the said period in order to finish a case which it had begun to examine during that period, the former President shall retain the functions of President in respect of that case. Should he be unable to fulfil his duties, his place shall be taken by the newly elected President.

## The Registry

*Article 14*

1. The Court shall select its Registrar from amongst candidates proposed by members of the Court. The latter shall receive adequate notice of the date on which the list of candidates will be closed

so as to enable nominations and information concerning the nationals of distant countries to be received in sufficient time.

2. Nominations must give the necessary particulars regarding age, nationality, university degrees and linguistic attainments of candidates, as also regarding their judicial and diplomatic qualifications, their experience in connection with the work of the League of Nations and their present profession.

3. The election shall be by secret ballot and by an absolute majority of votes.

4. The Registrar shall be elected for a term of seven years reckoned from January 1st of the year following that in which the election takes place. He may be re-elected.

5. Should the Registrar cease to hold his office before the expiration of the term above mentioned, an election shall be held for the purpose of appointing a successor. Such election shall be for a term of seven years.

6. The Court shall appoint a Deputy-Registrar to assist the Registrar, to act as Registrar in his absence and, in the event of his ceasing to hold the office, to perform the duties until a new Registrar shall have been appointed. The Deputy-Registrar shall be appointed under the same conditions and in the same way as the Registrar.

*Article 15*

1. Before taking up his duties, the Registrar shall make the following declaration at a meeting of the full Court:

"I solemnly declare that I will perform the duties conferred upon me as Registrar of the Permanent Court of International Justice in all loyalty, discretion and good conscience."

2. The Deputy-Registrar shall make a similar declaration in the same conditions.

*Article 16*

The Registrar is entitled to two months' holiday in each year.

*Article 17*

1. The officials of the Registry, other than the Deputy-Registrar, shall be appointed by the Court on proposals submitted by the Registrar.

2. On taking up their duties, such officials shall make the following declaration before the President, the Registrar being present:

"I solemnly declare that I will perform the duties conferred upon me as an official of the Permanent Court of International Justice in all loyalty, discretion and good conscience."

*Article 18*

1. The Court shall determine or modify the organization of the Registry upon proposals submitted by the Registrar.

2. The Regulations for the staff of the Registry shall be drawn up having regard to the organization decided upon by the Court and to the provisions of the Regulations for the staff of the Secretariat of the League of Nations, to which they shall, as far as possible, conform. They shall be adopted by the President on the proposal of the Registrar, subject to subsequent approval by the Court.

*Article 19*

In case both the Registrar and the Deputy-Registrar are unable to be present, or in case both appointments are vacant at the same time, the President, on the proposal of the Registrar or the Deputy-Registrar, as the case may be, shall appoint the official of the Registry who is to act as substitute for the Registrar until a successor to the Registrar has been appointed.

*Article 20*

1. The General List of cases submitted to the Court for decision or for advisory opinion shall be prepared and kept up to date by the Registrar on the instructions and subject to the authority of the President. Cases shall be entered in the list and numbered successively according to the date of the receipt of the document bringing the case before the Court.

2. The General List shall contain the following headings:

I. Number in list

II. Short title

III. Date of registration

IV. Registration number

V. File number in the archives

VI. Nature of case

VII. Parties

VIII. Interventions

IX. Method of submission

X. Date of document instituting proceedings

XI. Time-limits for filing documents in the written proceedings

XII. Prolongation, if any, of time-limits

XIII. Date of termination of the written proceedings

XIV. Postponements

XV. Date of the beginning of the hearing (date of the first public sitting)

XVI. Observations

XVII. References to earlier or subsequent cases

XVIII. Result (nature and date)

XIX. Removal from the list (nature and date)

XX. References to publications of the Court relating to the case

3. The General List shall also contain a space for notes, if any, and spaces for the inscription, above the initials of the President and of the Registrar, of the dates of the entry of the case, of its result, or of its removal from the list, as the case may be.

*Article 21*

1. The Registrar shall be the channel for all communications to and from the Court.

2. The Registrar shall ensure that the date of despatch and receipt of all communications and notifications may readily be verified. Communications and notifications sent by post shall be registered. Communications addressed to the agents of the parties shall be considered as having been addressed to the parties themselves. The date of receipt shall be noted on all documents received by the Registrar, and a receipt bearing this date and the number under which the document has been registered shall be given to the sender.

3. The Registrar shall, subject to the obligations of secrecy attaching to his official duties, reply to all enquiries concerning the work of the Court, including enquiries from the Press.

4. The Registrar shall publish in the Press all necessary information as to the date and hour fixed for public sittings.

*Article 22*

A collection of the judgments and advisory opinions of the Court, as also of such orders as the Court may decide to include therein, shall be printed and published under the responsibility of the Registrar.

*Article 23*

1. The Registrar shall be responsible for the archives, the accounts and all administrative work. He shall have the custody of the seals and stamps of the Court. The Registrar or the Deputy-Registrar shall be present at all sittings of the full Court and at sittings of the Special Chambers and of the Chamber for Summary Procedure. The Registrar shall be responsible for drawing up the minutes of the meetings.

2. He shall undertake, in addition, all duties which may be laid upon him by the present Rules.

3. The duties of the Registry shall be set forth in detail in a list of instructions submitted by the Registrar to the President and approved by him.

4. The Special Chambers and the Chamber for Summary Procedure.

*Article 24*

1. The members of the Chambers constituted by virtue of Articles 26, 27 and 29 of the Statute of the Court and also the substitute members shall be appointed at a meeting of the full Court by secret ballot and by an absolute majority of votes.

2. The election shall take place in the last quarter of the year and the period of appointment of the persons elected shall commence on January 1st of the following year.

3. Nevertheless, after a new election of the whole Court, the election shall take place at the beginning of the following year. The period of appointment shall commence on the date of election and shall terminate, in the case of the Chamber referred to in Article 29 of the Statute, at the end of the same year and, in the case of the Chambers referred to in Articles 26 and 27 of the Statute, at the end of the second year after the year of election.

4. The Presidents of the Chambers shall be appointed at a sitting of the full Court. Nevertheless, the President of the Court shall preside *ex officio* over any Chamber of which he may be elected a

member; similarly, the Vice-President of the Court shall preside *ex officio* over any Chamber of which he may be elected a member and of which the President of the Court is not a member.

5. The Chambers referred to in Articles 26, 27 and 29 of the Statute of the Court may not sit with a greater number than five judges.

## Section 2. Working of the Court

### *Article 25*

1. The judicial year shall begin on January 1st in each year.

2. In the absence of a special resolution by the Court, the dates and duration of the judicial vacations are fixed as follows: *(a)* from December 18th to January 7th; *(b)* from the Sunday before Easter to the second Sunday after Easter; *(c)* from July 15th to September 15th.

3. In case of urgency, the President can always convene the members of the Court during the periods mentioned in the preceding paragraph.

4. The public holidays which are customary at the place where the Court is sitting will be observed by the Court.

### *Article 26*

1. The order in which the leaves provided for in Article 23, paragraph 2, of the Statute of the Court are to be taken shall be laid down in a list drawn up by the Court for each period of three years. This order can only be departed from for serious reasons duly admitted by the Court.

2. The number of members of the Court on leave at any one time must not exceed two. The President and the Vice-President must not take their leave at the same time.

### *Article 27*

Members of the Court who are prevented by illness or other serious reasons from attending a sitting of the Court to which they have been summoned by the President, shall notify the President who will inform the Court.

### *Article 28*

1. The date and hour of sittings of the full Court shall be fixed by the President of the Court.

2. The date and hour of sittings of the Chambers referred to in Articles 26, 27 and 29 of the Statute of the Court shall be fixed by the Presidents of the Chambers respectively. The first sitting, however, of a Chamber in any particular case is fixed by the President of the Court.

### *Article 29*

If a sitting of the full Court has been convened and it is found that there is no quorum, the President shall adjourn the sitting until a quorum has been obtained. Judges nominated under Article 31 of the Statute shall not be taken into account for the calculation of the quorum.

### *Article 30*

1. The Court shall sit in private to deliberate upon disputes which are submitted to it and upon advisory opinions which it is asked to give.

2. During the deliberations referred to in the preceding paragraph, only persons authorized to take part therein and the Registrar or his substitute shall be present. No other person shall be admitted except by virtue of a special decision taken by the Court.

3. Every judge who is present at the deliberations shall state his opinion together with the reasons on which it is based.

4. Any judge may request that a question which is to be voted upon shall be drawn up in precise terms in both the official languages and distributed to the Court. Effect shall be given to any such request.

5. The decision of the Court shall be based upon the conclusions adopted after final discussion by a majority of the judges voting in an order inverse to the order laid down by Article 2 of the present Rules.

6. No detailed minutes shall be prepared of the private meetings of the Court for deliberation upon judgments or advisory opinions; the minutes of these meetings are to be considered as confidential and shall record only the subject of the debates, the votes taken, the names of those voting for and against a motion and statements expressly made for insertion in the minutes.

7. After the final vote taken on a judgment or advisory opinion, any judge who desires to set forth his individual opinion must do so in accordance with Article 57 of the Statute.

8. Unless otherwise decided by the Court, paragraphs 2, 4 and 5 of this Article shall apply to deliberations by the Court in private upon any administrative matter.

## Heading II. Contentious procedure

### *Article 31*

The rules contained in Sections 1, 2 and 4 of this Heading shall not preclude the adoption by the Court of particular modifications or additions proposed jointly by the parties and considered by the Court to be appropriate to the case and in the circumstances.

## Section I. Procedure before the full Court

### I. General rules

#### Institution of Proceedings.

### *Article 32*

1. When a case is brought before the Court by means of a special agreement, Article 40, paragraph 1, of the Statute of the Court shall apply.

2. When a case is brought before the Court by means of an application, the application must, as laid down in Article 40, paragraph 1, of the Statute, indicate the party making it, the party against whom the claim is brought and the subject of the dispute. It must also, as far as possible, specify the provision on which the applicant founds the jurisdiction of the Court, state the precise nature of the claim and give a succinct statement of the facts and grounds on which the claim is based, these facts and grounds being developed in the Memorial, to which the evidence will be annexed.

3. The original of an application shall be signed either by the agent of the party submitting it, or by the diplomatic representative of that party at The Hague, or by a duly authorized person. If the document bears the signature of a person other than the diplomatic representative of that party at The

Hague, the signature must be legalized by this diplomatic representative or by the competent authority of the government concerned.

*Article 33*

1. When a case is brought before the Court by means of an application, the Registrar shall transmit forthwith to the party against whom the claim is brought a copy of the application certified by him to be correct.

2. When a case is brought before the Court by means of a special agreement filed by one only of the parties, the Registrar shall notify forthwith the other party that it has been so filed.

*Article 34*

1. The Registrar shall transmit forthwith to all the members of the Court copies of special agreements or applications submitting a case to the Court.

2. He shall also transmit through the channels indicated in the Statute of the Court or in a special arrangement, as the case may be, copies to Members of the League of Nations and to States entitled to appear before the Court.

*Article 35*

1. When a case is brought before the Court by means of a special agreement, the appointment of the agent or agents of the party or parties lodging the special agreement shall be notified at the same time as the special agreement is filed. If the special agreement is filed by one only of the parties, the other party shall, when acknowledging receipt of the communication announcing the filing of the special agreement, or failing this, as soon as possible, inform the Court of the name of its agent.

2. When a case is brought before the Court by means of an application, the application, or the covering letter, shall state the name of the agent of the applicant government.

3. The party against whom the application is directed and to whom it is communicated shall, when acknowledging receipt of the communication, or failing this, as soon as possible, inform the Court of the name of its agent.

4. Applications to intervene under Article 64 of the present Rules, interventions under Article 66 and requests under Article 78 for the revision, or under Article 79 for the interpretation, of a judgment, shall similarly be accompanied by the appointment of an agent.

5. The appointment of an agent must be accompanied by a mention of his permanent address at the seat of the Court to which all communications as to the case are to be sent.

*Article 36*

The declaration provided for in the Resolution of the Council of the League of Nations dated May 17th, 1922[1], shall be filed with the Registry at the same time as the notification of the appointment of the agent.

## Preliminary measures

*Article 37*

1. In every case submitted to the Court, the President ascertains the views of the parties with regard to questions connected with the procedure; for this purpose he may summon the agents to a meeting as soon as they have been appointed.

2. In the light of the information obtained by the President, the Court will make the necessary orders to determine *inter alia* the number and order of the documents of the written proceedings and the time-limits within which they must be presented.

3. In the making of an order under the foregoing paragraph, any agreement between the parties is to be taken into account so far as possible.

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[1] Annex to Article 35

Resolution

Adopted by the Council on May 17th, 1922

The Council of the League of Nations, in virtue of the powers conferred upon it by Article 35, paragraph 2, of the Statute of the Permanent Court of International Justice, and subject to the provisions of that Article,

RESOLVES:

1. The Permanent Court of International Justice shall be open to a State which is not a Member of the League of Nations or mentioned in the Annex to the Covenant of the League, upon the following condition, namely: that such State shall previously have deposited with the Registrar of the Court a declaration by which it accepts the Jurisdiction of the Court, in accordance with the Covenant of the League of Nations and with the terms and subject to the conditions of the Statute and Rules of the Court, and undertakes to carry out in full good faith the decision or decisions of the Court and not to resort to war against a State complying therewith.

2. Such declaration may be either particular or general.

A particular declaration is one accepting the jurisdiction of the Court in respect only of a particular dispute or disputes which have already arisen.

A general declaration is one accepting the jurisdiction generally in respect of all disputes or of a particular class or classes of disputes which have already arisen or which may arise in the future.

A State in making such a general declaration may accept the jurisdiction of the Court as compulsory, *ipso facto,* and without special convention, in conformity with Article 36 of the Statute of the Court; but such acceptance may not, without special convention, be relied upon vis-à-vis Members of the League or States mentioned in the Annex to the Covenant which have signed or may hereafter sign the "optional clause" provided for by the additional protocol of December 16th, 1920.

3. The original declarations made under the terms of this Resolution shall be kept in the custody of the Registrar of the Court, in accordance with the practice of the Court. Certified true copies thereof shall be transmitted, in accordance with the practice of the Court, to all Members of the League of Nations, and States mentioned in the Annex to the Covenant, and to such other States as the Court may determine, and to the Secretary-General of the League of Nations.

4. The Council of the League of Nations reserves the right to rescind or amend this Resolution by a Resolution which shall be communicated to the Court; and on the receipt of such communication and to the extent determined by the new Resolution, existing declarations shall cease to be effective except in regard to disputes which are already before the Court.

5. All questions as to the validity or the effect of a declaration made under the terms of this Resolution shall be decided by the Court.

4. The Court may extend time-limits which have been fixed. It may also, in special circumstances and after giving the agent of the opposing party an opportunity of submitting his views, decide that a proceeding taken after the expiration of a time-limit shall be considered as valid.

5. If the Court is not sitting and without prejudice to any subsequent decision of the Court, its powers under this Article shall be exercised by the President.

*Article 38*

Time-limits shall be fixed by assigning a definite date for the completion of the various acts of procedure.

### Written proceedings

*Article 39*

1. Should the parties agree that the proceedings shall be conducted wholly in French, or wholly in English, the documents of the written proceedings shall be submitted only in the language adopted by the parties.

2. In the absence of an agreement with regard to the language to be employed, the documents shall be submitted in French or in English.

3. Should the use of a language other than French or English be authorized, a translation into French or into English shall be attached to the original of each document submitted.

4. The Registrar shall not be bound to make translations of the documents of the written proceedings.

*Article 40*

1. The original of every document of the written proceedings shall be signed by the agent and filed with the Court accompanied by fifty printed copies bearing the signature of the agent in print.

2. When a copy of a document of the written proceedings is communicated to the other party under Article 43, paragraph 4, of the Statute of the Court, the Registrar shall certify that it is a correct copy of the original filed with the Court.

3. All documents of the written proceedings shall be dated. When a document has to be filed by a certain date, it is the date of the receipt of the document by the Registry which will be regarded by the Court as the material date.

4. If the Registrar at the request of the agent of a party arranges for the printing, at the cost of the government which this agent represents, of a document which it is intended to file with the Court, the text must be transmitted to the Registry in sufficient time to enable the printed document to be filed before the expiry of any time-limit which may apply to it.

5. When, under this Article, a document has to be filed in a number of copies fixed in advance, the President may require additional copies to be supplied.

6. The correction of a slip or error in a document which has been filed is permissible at any time with the consent of the other party, or by leave of the President.

*Article 41*

1. If proceedings are instituted by means of a special agreement, the following documents may, subject to Article 37, paragraphs 2 and 3, of the present Rules, be presented in the order stated below:

a Memorial, by each party within the same time-limit;
a Counter-Memorial, by each party within the same time-limit;
a Reply, by each party within the same time-limit.

2. If proceedings are instituted by means of an application, the documents shall, subject to Article 37, paragraphs 2 and 3, of the present Rules, be presented in the order stated below:

the Memorial by the applicant;
the Counter-Memorial by the respondent;
the Reply by the applicant;
the Rejoinder by the respondent.

*Article 42*

1. A Memorial shall contain: a statement of the facts on which the claim is based, a statement of law, and the submissions.

2. A Counter-Memorial shall contain: the admission or denial of the facts stated in the Memorial; any additional facts, if necessary; observations concerning the statement of law in the Memorial, a statement of law in answer thereto, and the submissions.

*Article 43*

1. A copy of every document in support of the arguments set forth therein must be attached to the Memorial or Counter-Memorial; a list of such documents shall be given after the submissions. If, on account of the length of a document, extracts only are attached, the document itself or a complete copy of it must, if possible, and unless the document has been published and is of a public character, be communicated to the Registrar for the use of the Court and of the other party.

2. Any document filed as an annex which is in a language other than French or English, must be accompanied by a translation into one of the official languages of the Court. Nevertheless, in the case of lengthy documents, translations of extracts may be submitted, subject, however, to any subsequent decision by the Court, or, if it is not sitting, by the President.

3. Paragraphs 1 and 2 of the present Article shall apply also to the other documents of the written proceedings.

*Article 44*

1. The Registrar shall forward to the judges and to the parties copies of all the documents in the case, as and when he receives them.

2. The Court, or the President if the Court is not sitting, may, after obtaining the views of the parties, decide that the Registrar shall hold the documents of the written proceedings in a particular case at the disposal of the government of any Member of the League of Nations or State which is entitled to appear before the Court.

3. The Court, or the President, if the Court is not sitting, may, with the consent of the parties, authorize the documents of the written proceedings in regard to a particular case to be made accessible to the public before the termination of the case.

*Article 45*

Upon the termination of the written proceedings, the case is ready for hearing.

*Article 46*

1. Subject to the priority resulting from Article 61 of the present Rules, cases submitted to the Court will be taken in the order in which they become ready for hearing. When several cases are ready for hearing, the order in which they will be taken is determined by the position which they occupy in the General List.

2. Nevertheless, the Court may, in special circumstances, decide to take a case in priority to other cases which are ready for hearing and which precede it in the General List.

3. If the parties to a case which is ready for hearing are agreed in asking for the case to be put after other cases which are ready for hearing and which follow it in the General List, the President may grant such an adjournment: if the parties are not in agreement, the President decides whether or not to submit the question to the Court.

## Oral proceedings

*Article 47*

1. When a case is ready for hearing, the date for the commencement of the oral proceedings shall be fixed by the Court, or by the President if the Court is not sitting.

2. If occasion should arise, the Court or the President, if the Court is not sitting, may decide that the commencement or continuance of the hearings shall be postponed.

*Article 48*

1. Except as provided in the following paragraph, no new document may be submitted to the Court after the termination of the written proceedings save with the consent of the other party. The party desiring to produce the new document shall file the original or a certified copy thereof with the Registry, which will be responsible for communicating it to the other party and will inform the Court. The other party shall be held to have given its consent if it does not lodge an objection to the production of the document.

2. If this consent is not given, the Court, after hearing the parties, may either refuse to allow the production or may sanction the production of the new document. If the Court sanctions the production of the new document, an opportunity shall be given to the other party of commenting upon it.

*Article 49*

1. In sufficient time before the opening of the oral proceedings, each party shall inform the Court and, through the Registry, the other parties, of the names, Christian names, description and residence of witnesses and experts whom it desires to be heard. It shall further give a general indication of the point or points to which the evidence is to refer.

2. Similarly, and subject to Article 48 of these Rules and to the preceding paragraph of this Article, each party shall indicate all other evidence which it intends to produce or which it intends to request the Court to take, including any request for the holding of an expert enquiry.

*Article 50*

The Court shall determine whether the parties shall address the Court before or after the production of the evidence; the parties shall, however, retain the right to comment on the evidence given.

*Article 51*

The order in which the agents, counsel or advocates shall be called upon to speak shall be determined by the Court, unless there is an agreement between the parties on the subject.

*Article 52*

1. During the hearing, which is under the control of the President, the latter, either in the name of the Court or on his own behalf, may put questions to the parties or may ask them for explanations.

2. Similarly, each of the judges may put questions to the parties or ask for explanations; nevertheless, he shall first apprise the President.

3. The parties shall be free to answer at once or at a later date.

*Article 53*

1. Witnesses and experts shall be examined by the agents, counsel or advocates of the parties under the control of the President. Questions may be put to them by the President and by the judges.

2. Each witness shall make the following solemn declaration before giving his evidence in Court:

"I solemnly declare upon my honour and conscience that I will speak the truth, the whole truth and nothing but the truth."

3. Each expert shall make the following solemn declaration before making his statement in Court:

"I solemnly declare upon my honour and conscience that my statement will be in accordance with my sincere belief."

*Article 54*

The Court may invite the parties to call witnesses or experts, or may call for the production of any other evidence on points of fact in regard to which the parties are not in agreement. If need be, the Court shall apply the provisions of Article 44 of the Statute of the Court.

*Article 55*

The indemnities of witnesses or experts who appear at the instance of the Court shall be paid out of the funds of the Court.

*Article 56*

The Court, or the President should the Court not be sitting, shall, at the request of one of the parties or on its own initiative, take the necessary steps for the examination of witnesses or experts otherwise than before the Court itself.

*Article 57*

1. If the Court considers it necessary to arrange for an enquiry or an expert report, it shall issue an order to this effect, after duly hearing the parties, stating the subject of the enquiry or expert report, and setting out the number and appointment of the persons to hold the enquiry or of the experts and the formalities to be observed.

2. Any report or record of an enquiry and any expert report shall be communicated to the parties.

*Article 58*

1. In the absence of any decision to the contrary by the Court, or by the President if the Court is not sitting at the time when the decision has to be made, speeches or statements made before the Court in one of the official languages shall be translated into the other official language; the same rule shall apply in regard to questions and answers. The Registrar shall make the necessary arrangements for this purpose.

2. Whenever a language other than French or English is employed with the authorization of the Court, the necessary arrangements for a translation into one of the two official languages shall be made by the party concerned; the evidence of witnesses and the statements of experts shall, however, be translated under the supervision of the Court. In the case of witnesses or experts who appear at the instance of the Court, arrangements for translation shall be made by the Registry.

3. The persons making the translations referred to in the preceding paragraph shall make the following solemn declaration in Court:

"I solemnly declare upon my honour and conscience that my translation will be a complete and faithful rendering of what I am called upon to translate."

*Article 59*

1. The minutes mentioned in Article 47 of the Statute of the Court shall include:

the names of the judges present;
the names of the agents, counsel or advocates present;
the names, Christian names, description and residence of witnesses and experts heard;
a statement of the evidence produced at the hearing; declarations made on behalf of the parties;
a brief mention of questions put to the parties by the President or by the judges;
any decisions delivered or announced by the Court during the hearing.

2. The minutes of public sittings shall be printed and published.

*Article 60*

1. In respect of each hearing held by the Court, a shorthand note shall be made under the supervision of the Registrar of the oral proceedings, including the evidence taken, and shall be appended to the minutes referred to in Article 59 of the present Rules. This note, unless otherwise decided by the Court, shall contain any interpretations from one official language to the other made in Court by the interpreters.

2. The report of the evidence of each witness or expert shall be read to him in order that, under the supervision of the Court, any mistakes may be corrected.

3. Reports of speeches or declarations made by agents, counsel or advocates shall be communicated to them for correction or revision, under the supervision of the Court.

## II. Occasional rules

### Interim protection

*Article 61*

1. A request for the indication of interim measures of protection may be filed at any time during the proceedings in the case in connection with which it is made. The request shall specify the case to which it relates, the rights to be protected and the interim measures of which the indication is proposed.

1. A request for the indication of interim measures of protection shall have priority over all other cases. The decision thereon shall be treated as a matter of urgency.

2. If the Court is not sitting, the members shall be convened by the President forthwith. Pending the meeting of the Court and a decision by it, the President shall, if need be, take such measures as may appear to him necessary in order to enable the Court to give an effective decision.

3. The Court may indicate interim measures of protection other than those proposed in the request.

4. The rejection of a request for the indication of interim measures of protection shall not prevent the party which has made it from making a fresh request in the same case based on new facts.

5. The Court may indicate interim measures of protection *proprio motu*. If the Court is not sitting, the President may convene the members in order to submit to the Court the question whether it is expedient to indicate such measures.

6. The Court may at any time by reason of a change in the situation revoke or modify its decision indicating interim measures of protection.

7. The Court shall only indicate interim measures of protection after giving the parties an opportunity of presenting their observations on the subject. The same rule applies when the Court revokes or modifies a decision indicating such measures.

8. When the President has occasion to convene the members of the Court, judges who have been appointed under Article 31 of the Statute of the Court shall be convened if their presence can be assured at the date fixed by the President for hearing the parties.

### Preliminary objections

*Article 62*

1. A preliminary objection must be filed at the latest before the expiry of the time-limit fixed for the filing by the party submitting the objection of the first document of the written proceedings to be filed by that party.

2. The preliminary objection shall set out the facts and the law on which the objection is based, the submissions and a list of the documents in support; these documents shall be attached; it shall mention any evidence which the party may desire to produce.

3. Upon receipt by the Registrar of the objection, the proceedings on the merits shall be suspended and the Court, or the President if the Court is not sitting, shall fix the time within which the party against whom the objection is directed may present a written statement of its observations and submissions; documents in support shall be attached and evidence which it is proposed to produce shall be mentioned.

4. Unless otherwise decided by the Court, the further proceedings shall be oral.

5. After hearing the parties the Court shall give its decision on the objection or shall join the objection to the merits. If the Court overrules the objection or joins it to the merits, it shall once more fix time-limits for the further proceedings.

## Counter-claims

*Article 63*

When proceedings have been instituted by means of an application, a counter-claim may be presented in the submissions of the Counter-Memorial, provided that such counter-claim is directly connected with the subject of the application and that it comes within the jurisdiction of the Court. Any claim which is not directly connected with the subject of the original application must be put forward by means of a separate application and may form the subject of distinct proceedings or be joined by the Court to the original proceedings.

## Intervention

*Article 64*

1. An application for permission to intervene under the terms of Article 62 of the Statute of the Court shall be filed with the Registry at latest before the commencement of the oral proceedings.

2. The application shall contain:

a specification of the case;
a statement of law and of fact justifying intervention;
a list of the documents in support of the application; these documents shall be attached.

3. The application shall be communicated to the parties, who shall send to the Registry their observations in writing within a period to be fixed by the Court, or by the President, if the Court is not sitting.

4. The application to intervene shall be placed on the agenda for a hearing, the date and hour of which shall be notified to all concerned. Nevertheless, if the parties have not, in their written observations, opposed the application to intervene, the Court may decide that there shall be no oral argument.

5. The Court will give its decision on the application in the form of a judgment.

*Article 65*

1. If the Court admits the intervention and if the party intervening expresses a desire to file a Memorial on the merits, the Court shall fix the time-limits within which the Memorial shall be filed and within which the other parties may reply by Counter-Memorials; the same course shall be followed in regard to the Reply and the Rejoinder. If the Court is not sitting, the time-limits shall be fixed by the President.

2. If the Court has not yet given its decision upon the intervention and the application to intervene is not opposed, the President, if the Court is not sitting, may, without prejudice to the decision of the Court on the question whether the application should be granted, fix the time-limits within which the intervening party may file a Memorial on the merits and the other parties may reply by Counter-Memorials.

3. In the cases referred to in the two preceding paragraphs, the time-limits shall, so far as possible, coincide with those already fixed in the case.

*Article 66*

1. The notification provided for in Article 63 of the Statute of the Court shall be sent to every Member of the League of Nations or State which is a party to a convention invoked in the special agreement or in the application as governing the case referred to the Court. A Member or State desiring to

avail itself of the right conferred by the above-mentioned Article shall file a declaration to that effect with the Registry.

2. Any Member of the League of Nations or State, which is a party to the convention in question and to which the notification referred to has not been sent, may in the same way file with the Registry a declaration of intention to intervene under Article 63 of the Statute.

3. Such declarations shall be communicated to the parties. If any objection or doubt should arise as to whether the intervention is admissible under Article 63 of the Statute, the decision shall rest with the Court.

4. The Registrar shall take the necessary steps to enable the intervening party to inspect the documents in the case in so far as they relate to the interpretation of the convention in question, and to submit its written observations thereon to the Court within a time-limit to be fixed by the Court or by the President if the Court is not sitting.

5. These observations shall be communicated to the other parties and may be discussed by them in the course of the oral proceedings; in these proceedings the intervening party shall take part.

### Appeals to the Court

*Article 67*

1. When an appeal is made to the Court against a decision given by some other tribunal, the proceedings before the Court shall be governed by the provisions of the Statute of the Court and of the present Rules.

2. If the document instituting the appeal must be filed within a certain limit of time, the date of the receipt of this document in the Registry will be taken by the Court as the material date.

3. The document instituting the appeal shall contain a precise statement of the grounds of the objections to the decision complained of, and these constitute the subject of the dispute referred to the Court.

4. An authenticated copy of the decision complained of shall be attached to the document instituting the appeal.

5. It lies upon the parties to produce before the Court any useful and relevant material upon which the decision complained of was rendered.

### Settlement and discontinuance

*Article 68*

If at any time before judgment has been delivered, the parties conclude an agreement as to the settlement of the dispute and so inform the Court in writing, or by mutual agreement inform the Court in writing that they are not going on with the proceedings, the Court will make an order officially recording the conclusion of the settlement or the discontinuance of the proceedings; in either case the order will prescribe the removal of the case from the list.

*Article 69*

1. If in the course of proceedings instituted by means of an application, the applicant informs the Court in writing that it is not going on with the proceedings, and if, at the date on which this communication is received by the Registry, the respondent has not yet taken any step in the proceedings, the

Court will make an order officially recording the discontinuance of the proceedings and directing the removal of the case from the list. A copy of this order shall be sent by the Registrar to the respondent.

2. If, at the time when the notice of discontinuance is received, the respondent has already taken some step in the proceedings, the Court, or the President if the Court is not sitting, shall fix a time-limit within which the respondent must state whether it opposes the discontinuance of the proceedings. If no objection is made to the discontinuance before the expiration of the time-limit, acquiescence will be presumed and the Court will make an order officially recording the discontinuance of the proceedings and directing the removal of the case from the list. If objection is made, the proceedings shall continue.

## Section 2 Procedure before the Special Chambers and the Chamber for Summary Procedure

*Article 70*

Procedure before the Chambers mentioned in Articles 26, 27 and 29 of the Statute of the Court shall, subject to the provisions of the Statute and of these Rules relating to the Chambers, be governed by the provisions as to procedure before the full Court.

*Article 71*

1. A request that a case should be referred to one of the Chambers mentioned in Articles 26, 27 and 29 of the Statute of the Court, must be made in the document instituting proceedings or must accompany that document. Effect will be given to the request if the parties are in agreement.

2. Upon receipt by the Registry of the document instituting proceedings in a case brought before one of the Chambers mentioned in Articles 26, 27 and 29 of the Statute, the President of the Court shall communicate the document to the members of the Chamber concerned. He shall also take such steps as may be necessary to assure the application of Article 31, paragraph 4, of the Statute.

3. The President of the Court shall convene the Chamber at the earliest date compatible with the requirements of the procedure.

4. As soon as the Chamber has met in order to go into the case submitted to it, the powers of the President of the Court in respect of the case shall be exercised by the President of the Chamber.

*Article 72*

1. The procedure before the Chamber for Summary Procedure shall consist of two parts: written and oral.

2. The written proceedings shall consist of the presentation of a single written statement by each party in the order indicated in Article 41 of the present Rules; to it must be attached the documents in support. The Chamber may however, if the parties so request or in view of the circumstances and after hearing the parties, call for the presentation of such other written statement as may appear fitting.

3. The written statements shall be communicated by the Registrar to the members of the Chamber and to opposing parties. They shall mention all evidence, other than the documents referred to in the preceding paragraph, which the parties desire to produce.

4. When the case is ready for hearing, the President of the Chamber shall fix a date for the opening of the oral proceedings, unless the parties agree to dispense with them; even if there are no oral proceedings, the Chamber always retains the right to call upon the parties to supply verbal explanations.

5. Witnesses or experts whose names are mentioned in the written proceedings must be available so as to appear before the Chamber when their presence is required.

*Article 73*

Judgments given by the Special Chambers or by the Chamber for Summary Procedure are judgments rendered by the Court. They will be read, however, at a public sitting of the Chamber.

## Section 3. Judgments

*Article 74*

1. The judgment shall contain:

the date on which it is pronounced;
the names of the judges participating;
a statement of who are the parties;
the names of the agents of the parties;
a summary of the proceedings;
the submissions of the parties;
a statement of the facts;
the reasons in point of law;
the operative provisions of the judgment;
the decision, if any, in regard to costs;
the number of the judges constituting the majority.

2. Dissenting judges may, if they so desire, attach to the judgment either an exposition of their individual opinion or a statement of their dissent.

*Article 75*

1. When the judgment has been read in public, one original copy, duly signed and sealed, shall be placed in the Archives of the Court and another shall be forwarded to each of the parties.

2. A copy of the judgment shall be sent by the Registrar to Members of the League of Nations and to States entitled to appear before the Court.

*Article 76*

The judgment shall be regarded as taking effect on the day on which it is read in open Court.

*Article 77*

The party in whose favour an order for the payment of the costs has been made may present his bill of costs after judgment has been delivered.

## Section 4. Requests for the revision or interpretation of a judgment

*Article 78*

1. A request for the revision of a judgment shall be made by an application.

The application shall contain:

a specification of the judgment of which the revision is desired;
the particulars necessary to show that the conditions laid down by Article 61 of the Statute of the Court are fulfilled;
a list of the documents in support; these documents shall be attached to the application.

2. The request for revision shall be communicated by the Registrar to the other parties. The latter may submit observations within a time-limit to be fixed by the Court, or by the President if the Court is not sitting.

3. If the Court makes the admission of the application conditional upon previous compliance with the judgment to be revised, this condition shall be communicated forthwith to the applicant by the Registrar and proceedings in revision shall be stayed pending receipt by the Court of proof of compliance with the judgment.

*Article 79*

1. A request to the Court to interpret a judgment which it has given may be made either by the notification of a special agreement between the parties or by an application by one or more of the parties.

2. The special agreement or application shall contain:

a specification of the judgment of which the interpretation is requested;
mention of the precise point or points in dispute.

3. If the request for interpretation is made by means of an application, the Registrar shall communicate the application to the other parties, and the latter may submit observations within a time-limit to be fixed by the Court, or by the President if the Court is not sitting.

4. Whether the request be made by special agreement or by application, the Court may invite the parties to furnish further written or oral explanations.

*Article 80*

If the judgment to be revised or to be interpreted was rendered by the full Court, the request for its revision or for its interpretation shall be dealt with by the full Court. If the judgment was pronounced by one of the Chambers mentioned in Articles 26, 27 or 29 of the Statute of the Court, the request for revision or for interpretation shall be dealt with by the same Chamber.

*Article 81*

The decision of the Court on requests for revision or interpretation shall be given in the form of a judgment.

## Heading III. Advisory opinions

*Article 82*

In proceedings in regard to advisory opinions, the Court shall, in addition to the provisions of Chapter IV of the Statute of the Court, apply the provisions of the articles hereinafter set out. It shall also be guided by the provisions of the present Rules which apply in contentious cases to the extent to which it recognizes them to be applicable, according as the advisory opinion for which the Court is asked relates, in the terms of Article 14 of the Covenant of the League of Nations, to a "dispute" or to a "question".

*Article 83*

If the question upon which an advisory opinion is requested relates to an existing dispute between two or more Members of the League of Nations or States, Article 31 of the Statute of the Court shall apply, as also the provisions of the present Rules concerning the application of that Article.

*Article 84*

1. Advisory opinions shall be given after deliberation by the full Court. They shall mention the number of judges constituting the majority.

2. Dissenting judges may, if they so desire, attach to the opinion of the Court either an exposition of their individual opinion or the statement of their dissent.

*Article 85*

1. The Registrar shall take the necessary steps in order to ensure that the text of the advisory opinion is in the hands of the Secretary-General at the seat of the League of Nations at the date and hour fixed for the sitting to be held for the reading of the opinion.

2. One original copy, duly signed and sealed, of every advisory opinion shall be placed in the archives of the Court and another in those of the Secretariat of the League of Nations. Certified copies thereof shall be transmitted by the Registrar to Members of the League of Nations, to States and to international organizations directly concerned.

Final provision

*Article 86*

The present Rules of Court which are adopted this eleventh day of March, 1936, repeal, as from this date, the Rules adopted on March 24th, 1922, as revised on July 31st, 1926, and amended on September 7th, 1927, and February 21st, 1931.

Done at The Hague, this eleventh day of March nineteen hundred and thirty-six.

*(Signed)* Cecil J. B. Hurst, President.

*(Signed)* A. Hammarskjöld, Registrar

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# ANNEX IV
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## (in alphabetical order)

# ANNEX V

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