COUR INTERNATIONALE DE JUSTICE

MÉMOIRES, PLAIDOIRIES ET DOCUMENTS

INTERPRÉTATION DES TRAITÉS DE PAIX CONCLUS AVEC LA BULGARIE, LA HONGRIE ET LA ROUMANIE

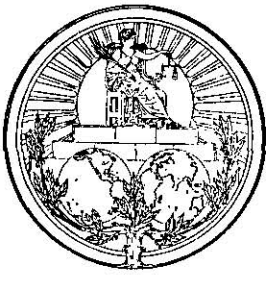
AVIS CONSULTATIFS DES 30 MARS ET 18 JUILLET 1950

INTERNATIONAL COURT OF JUSTICE

PLEADINGS, ORAL ARGUMENTS, DOCUMENTS

INTERPRETATION OF PEACE TREATIES WITH BULGARIA, HUNGARY AND ROMANIA

ADVISORY OPINIONS OF MARCH 30th AND JULY 18th, 1950



DEUXIÈME PHASE[1]
SECOND PHASE[2]

WRITTEN STATEMENT OF THE UNITED STATES OF AMERICA ON QUESTIONS III AND IV SUBMITTED TO THE INTERNATIONAL COURT OF JUSTICE BY THE UNITED NATIONS GENERAL ASSEMBLY IN RESOLUTION 294 (IV), DATED OCTOBER 22, 1949

Introductory

The General Assembly of the United Nations on October 22, 1949, adopted Resolution 294 (IV), in which the Assembly decided to submit certain questions to the International Court of Justice with a request for an advisory opinion. The first two questions were :

> " 'I. Do the diplomatic exchanges between Bulgaria, Hungary and Romania, on the one hand, and certain Allied and Associated Powers signatories to the Treaties of Peace, on the other, concerning the implementation of Article 2 of the Treaties with Bulgaria and Hungary and Article 3 of the Treaty with Romania, disclose disputes subject to the provisions for the settlement of disputes contained in Article 36 of the Treaty of Peace with Bulgaria, Article 40 of the Treaty of Peace with Hungary, and Article 38 of the Treaty of Peace with Romania ?'
>
> In the event of an affirmative reply to question I :
>
> 'II. Are the Governments of Bulgaria, Hungary and Romania obligated to carry out the provisions of the Articles referred to in question I, including the provisions for the appointment of their representatives to the Treaty Commissions ?' "

Pursuant to Article 66 of the Statute of the Court and pursuant to orders of the Court, written statements and communications were transmitted to the Court and oral statements submitted. On March 30, 1950, the Court rendered its opinion on these two questions. The Court concluded, with respect to Question I, "that the diplomatic exchanges between Bulgaria, Hungary and Romania on the one hand and certain Allied and Associated

[1] Le Gouvernement du Royaume-Uni avait déjà fait connaître ses vues sur les questions III et IV dans son exposé écrit déposé au cours de la première phase de cette affaire.

[2] The United Kingdom Government had previously stated its views on Questions III and IV in the written statement submitted during the first phase of this case.

Powers signatories to the Treaties of Peace on the other, concerning the implementation of Article 2 of the Treaties with Bulgaria and Hungary and Article 3 of the Treaty with Romania, disclose disputes subject to the provisions for the settlement of disputes contained in Article 36 of the Treaty of Peace with Bulgaria, Article 40 of the Treaty of Peace with Hungary, and Article 38 of the Treaty of Peace with Romania"; with respect to Question II, "that the Governments of Bulgaria, Hungary and Romania are obligated to carry out the provisions of those articles referred to in Question I, which relate to the settlement of disputes, including the provisions for the appointment of their representatives to the Treaty Commissions".

Resolution 294 (IV) of the General Assembly decided upon the submission to the International Court of Justice of two further questions "in the event of an affirmative reply to Question II and if within thirty days from the date when the Court delivers its opinion, the Governments concerned have not notified the Secretary-General that they have appointed their representatives to the Treaty Commissions, and the Secretary-General has so advised the International Court of Justice". The Court's advisory opinion concerning Questions I and II was rendered on March 30, 1950. Thirty days later, on April 30, the Governments of Bulgaria, Hungary, and Rumania had not notified the Secretary-General that they had appointed their representatives to the treaty commissions. In a communication dated May 2, 1950, the Secretary-General so advised the Court.

The further questions contained in the General Assembly resolution are :

> " 'III. If one party fails to appoint a representative to a Treaty Commission under the Treaties of Peace with Bulgaria, Hungary and Romania where that party is obligated to appoint a representative to the Treaty Commission, is the Secretary-General of the United Nations authorized to appoint the third member of the Commission upon the request of the other party to a dispute according to the provisions of the respective Treaties ?'
>
> In the event of an affirmative reply to question III :
>
> 'IV. Would a Treaty Commission composed of a representative of one party and a third member appointed by the Secretary-General of the United Nations constitute a Commission, within the meaning of the relevant Treaty articles, competent to make a definitive and binding decision in settlement of a dispute ?' "

Questions III and IV, while stated separately and while presenting technically separate questions, in substance raise a single basic issue. That is : whether one party to a treaty containing obligatory procedures for the settlement of disputes has the legal power, by repudiating its obligation to be bound by those procedures, to prevent the other parties from having the rights of the

parties under the treaty determined in accordance with those treaty procedures.

The issue is one of first importance in international law and in the working of the United Nations Organization. The Assembly is deeply interested in the steps that may be taken to promote and encourage universal respect for and observance of human rights and fundamental freedoms. The Assembly is also very much interested in what may be done to make possible the effective application of peaceful settlement procedures previously agreed upon by the parties. The future of the United Nations may well depend upon its ability to extend human rights and to bring about the use of effective procedures of peaceful settlement.

It is important to the General Assembly to know, for its further consideration of the question of the observance of human rights and fundamental freedoms in Bulgaria, Hungary, and Rumania, whether the Governments of those three countries have been able to frustrate the provisions of the peace treaties for the settlement of disputes by continuing to refuse to carry out their legal obligation to appoint representatives to the disputes commissions. If the Court advises that further proceedings may now be had pursuant to the disputes articles of the treaties, appropriate steps may then be taken accordingly to settle the disputes which the Court found to exist in its advisory opinion of March 30, 1950. If on the other hand the Court advises, in answering Questions III and IV, that the remedies provided by the peace treaties for settling disputes have been exhausted and are now unavailing, the General Assembly may wish to explore other avenues to facilitate a just settlement.

The Assembly is further much interested in the proper interpretation and application of the disputes provisions of these treaties because of the role assigned to the Secretary-General of the United Nations under the treaty provisions. Similar provisions may be included in proposed conventions coming before the Assembly for approval. Neither the Assembly nor individual States would favour the use of such provisions if they were held inadequate and ineffective to achieve their obvious purpose.

Because of the very large number of existing treaties and other international agreements which contain arbitration clauses similar or analogous to the disputes provisions of the Bulgarian, Hungarian, and Rumanian peace treaties, the basic issue raised by Questions III and IV in the present advisory case is one of general and wide significance. Decision on this issue can affect deeply the negotiation of future treaties and agreements, and influence strongly the attitude of States toward resort to legal processes in the field of international relations.

It is the view of the Government of the United States that the peace treaties, fairly and reasonably construed, give the Governments of Bulgaria, Hungary, and Rumania neither the

legal right nor the legal power to frustrate the operation of the mandatory provisions for the settlement of disputes by refusing to appoint their representatives to the treaty commissions in accordance with their treaty obligations. The present Written Statement sets forth the considerations on which this view is based.

QUESTION III.—IF ONE PARTY TO A DISPUTE FAILS TO APPOINT A REPRESENTATIVE TO A TREATY COMMISSION WHERE THAT PARTY IS OBLIGATED TO DO SO, THE SECRETARY-GENERAL OF THE UNITED NATIONS IS AUTHORIZED TO APPOINT THE THIRD MEMBER OF THE COMMISSION UPON THE REQUEST OF THE OTHER PARTY

The applicable provisions of the Treaties of Peace with Bulgaria, Hungary, and Rumania show that appointment by the Secretary-General of the third member of a commission does not depend upon the prior appointment of representatives to the commission by the parties to a dispute. Article 36 of the Bulgarian Treaty (Hungarian Treaty, Article 40; Rumanian Treaty, Article 38) provides, in part:

> "Any such dispute not resolved by them [the Three Heads of Mission] within a period of two months shall, unless the parties to the dispute mutually agree upon another means of settlement, be referred at the request of either party to the dispute to a Commission composed of one representative of each party and a third member selected by mutual agreement of the two parties from nationals of a third country. Should the two parties fail to agree within a period of one month upon the appointment of the third member, the Secretary-General of the United Nations may be requested by either party to make the appointment."

Selection of the third member is to be sought in the first instance through "mutual agreement of the *two parties* from nationals of a third country". Thus the *representatives* of the parties on the commissions have no function under these peace treaties in regard to selection of the third member. Arbitration clauses not infrequently provide for selection of a third arbitrator through agreement of the two arbitrators appointed by the parties. But this is not the case here. It is the parties themselves and not their appointed representatives who have the function of selecting the third member.

In fact, under the treaty provisions quoted above, the parties might prefer to have the third member of a disputes commission selected before appointing their own national representatives. The parties might want to have knowledge of the neutral member of the commission as a guide in making their own appointments. The parties might wisely wish to appoint representatives who could converse with the third member without an interpreter. Confidence in the wisdom and objectivity of the third member

could encourage the parties themselves to designate judicially-minded and unpartisan national representatives to the disputes commission. If the parties could not mutually agree upon selection of the third member within the prescribed period of one month, they could then apply to the Secretary-General of the United Nations to make an appointment. In a difficult situation where the parties were deeply concerned to safeguard their interests in a disputed matter, an appointment by the Secretary-General could prove to be just the catalyst necessary for encouraging the parties to name their representatives and move forward with the treaty procedures for settlement of disputes. Indeed, in the present case, designation of the third member by the Secretary-General might serve this constructive and useful purpose.

But whether or not the designation should have such an effect in the present case, the treaty clause should not be construed to deprive the Secretary-General of the authority which that clause clearly confers upon him. Certainly it was never intended that one of the parties should have the right, by repudiating its obligation, to deprive the Secretary-General of this authority.

In the situation dealt with by Question III the opposing parties have not joined in applying to the Secretary-General for an appointment. This does not, of course, affect the Secretary-General's power to make the appointment. The treaty provides that *either party* may request the Secretary-General to appoint the third member. Either party may do this "should the two parties fail to agree within a period of one month upon the appointment of the third member". The treaty provision states no condition that the request may be made only after the parties have appointed their national representatives. The one-month period begins to run as soon as the time comes for negotiation between the parties concerning selection of the third member. Such negotiation is called for at the end of the two-month period in which the Heads of Mission are empowered to resolve a dispute.

It was on August 1, 1949, that the United States requested Bulgaria, Hungary, and Rumania to join with it in naming treaty disputes commissions. The three Governments subsequently rejected this request. On January 5, 1950, the United States advised the three Governments that Mr. Edwin D. Dickinson was designated as the United States representative on the treaty commissions. At the same time, the United States requested the three Governments to designate their representatives forthwith and enter into consultations immediately with the United States Government through the American Ministers accredited to them with a view to the appointment of the third members of the commissions. Under the treaty provisions, it was open to the United States from September 1, 1949, to request the Secretary-General of the United Nations to appoint the third members of the commissions.

Considering Question III separately in this manner, the conclusion is evident that the Secretary-General is empowered to appoint, on the request of one party, the third member of a disputes commission under the Bulgarian, Hungarian, and Rumanian peace treaties where the parties have failed to agree on the choice of a third member, regardless of the fact that the other party has refused to appoint its representative, though obligated to do so. The language of the treaties is clear, and there is no reason in law or equity why the words of the treaties should not be construed to mean what they say.

QUESTION IV.—A TREATY COMMISSION COMPOSED OF A REPRESENTATIVE OF ONE PARTY AND A THIRD MEMBER APPOINTED BY THE SECRETARY-GENERAL OF THE UNITED NATIONS CONSTITUTES A COMMISSION, WITHIN THE MEANING OF THE RELEVANT TREATY ARTICLES, COMPETENT TO MAKE A DEFINITIVE AND BINDING DECISION IN SETTLEMENT OF A DISPUTE

It should be pointed out that Question IV is closely connected with Question III. Question IV, like Question III, is asked with reference to the condition stated at the beginning of Question III, namely, "If one party fails to appoint a representative to a Treaty Commission under the Treaties of Peace with Bulgaria, Hungary and Romania where that party is obligated to appoint a representative to the Treaty Commission".

The proposition that a commission consisting of the representative of one party and the third neutral member can decide a dispute—both of these members concurring in the decision—is asserted only with respect to a situation where the representative of the other party to the dispute is absent through the default of that party in refusing to appoint a representative. Question IV submitted by the General Assembly presents a situation where just such a default has occurred ; in violation of treaty obligations determined by the Court, Bulgaria, Hungary and Rumania have refused to appoint their representatives to treaty disputes commissions. The proposition is not asserted with respect to other situations, such as those where a commission representative has died, has resigned, is incapacitated to act, etc.

The provisions in the peace treaties for the obligatory settlement of disputes are made to assure and guarantee a final settlement of every dispute—a settlement which will be peaceful and orderly and which will be undertaken and accomplished within a reasonable period of time according to a time schedule set by the treaty provisions. Final settlement cannot be frustrated by disagreement between the representatives appointed by the parties. Express provision is made for just such a contingency. The provision is that a decision can be reached by the neutral member in agreement

with the representative of one of the parties. If the parties themselves are unable to agree in selecting the impartial arbitrator, he is to be chosen by the premier official of the United Nations, on the request of either party to the dispute. Those are the provisions which the parties themselves devised and agreed upon for the settlement of their treaty disputes.

The treaty disputes articles do not provide for referring a dispute to a commission upon the agreement of both parties. The articles do not make a reference optional in any way, but rather *mandatory:* "Any such dispute .... shall .... be referred .... to a Commission...." The articles are deliberately drawn so as to avoid the necessity of subsequent agreement among the parties in order to make the articles operative. If the parties cannot agree on the third member, *either party* may request the Secretary-General to appoint that member. If the representatives of the parties on the commission cannot agree, then a binding decision may be made by a majority of the commission—in practical terms that means by one of the national representatives together with the third member appointed by mutual agreement or by the Secretary-General. The treaty is explicit on this point: "The decision of a majority of the members of the Commission shall be the decision of the Commission, and shall be accepted by the parties as definitive and binding."

A. The purpose of the treaty disputes articles is to provide an obligatory means for the orderly and definitive settlement of treaty disputes.

It is evident from the structure and content of the treaty disputes articles that they are designed to provide the parties to the treaties with orderly and at the same time definitive means of settling any disputes which may arise between parties. The history of the treaties while they were under negotiation clearly confirms that such was the purpose of Article 36 in the Bulgarian Treaty, Article 40 in the Hungarian Treaty, and Article 38 in the Rumanian Treaty. The treaty provisions should, therefore, be construed so as to give effect to the design for providing orderly and definitive means of settlement for disputes which arise between parties. It would be an unnatural interpretation, contrary to the evident purpose of the disputes articles, to hold that a party could by its own default prevent the settlement of a dispute according to the procedures laid down in those articles. It would mean that there would be no legal recourse under the treaties against a defaulting party intent upon circumventing any or all of the treaties' substantive provisions.

1. *The provisions of the disputes articles*

The procedures for settling disputes between parties to the peace treaties are set forth in Article 36 of the Treaty with Bulgaria, Article 40 of the Treaty with Hungary, and Article 38 of

the Treaty with Rumania. It may be appropriate to review these procedures briefly. On the threshold of the treaty machinery there is the effort at settlement of any dispute by direct diplomatic negotiations. How long such an effort is to be made when unattended by success is left by the treaty provisions up to the parties to the dispute themselves. When one party feels that the possibilities of negotiation are exhausted, that party is at liberty to put the dispute before the Heads of Mission of the Soviet Union, United Kingdom, and United States in the capital of the ex-enemy country concerned. The peace treaties allow the Heads of Mission two months within which to resolve the dispute. To do so, they must act in concert; in other words, unanimously.

If the Heads of Mission do not resolve the dispute within two months, the treaty provisions give the parties freedom to agree upon means of settlement of their own choice; this would include such means as mediation, conciliation, arbitration, and reference to an international tribunal for judicial decision. The peace treaties take account, however, of the contingency that the Heads of Mission may not settle a dispute and that the parties may be unable to agree on means of settlement of their own choosing. To meet this contingency, the treaties provide, as a final resort, for what is in effect arbitration of the dispute by a commission composed of one representative of each party and a third member who is a national of a third country. It has been seen earlier that the treaty disputes articles do not make this arbitration optional—either party may require it—so strong is the interest in having disputes settled and settled in a peaceful manner.

If the parties fail to agree on the third member of a commission, the treaties provide that this shall not stall the arbitration; at the end of one month of failure to agree upon the third member, either party may request the Secretary-General of the United Nations to make the appointment. As pointed out above, this third member has the practical power of decision in the dispute if the parties' representatives on the commission do not agree. The disputes provisions do not state that a treaty commission can meet, do its business, and give its decision *only* if all three members are present. They do provide, significantly, that the decision of the majority of the members of the commission is the commission's decision, to be accepted by the parties as definitive and binding.

These disputes provisions in the peace treaties are carefully framed, so as to give full scope to the parties' capacity for settlement by bilateral negotiation, so as to give certain major treaty parties an opportunity at an appropriate stage to decide a dispute, and so as to provide finally a means of settlement by arbitration which shall not depend for its effectiveness on any new agreement of the parties or on unanimity of view within the agency that

is to settle the dispute. The treaty disputes articles contain careful provisions on the time schedule to be followed in referring a dispute to a commission and on the procedure for selecting the third and neutral member of the commission in whose hands is the ultimate power of decision.

Thus the peace treaty provisions are obviously designed and intended to provide for definitive settlement of any disputes that may arise between parties. The parties are not left free by the treaties to agree or disagree according to circumstances, to conclude or fail to conclude special agreements for the settlement of disputes if and when these arise. The parties are committed in the treaties to definite and final settlement of any disputes by arbitration if other prescribed methods of settlement prove in the end unsuccessful.

2. The history of the peace treaties while under negotiation

The provisions of the peace treaties are clear and unequivocal. No reference to the *travaux préparatoires* is in these circumstances necessary. The review which follows of the course of negotiations as they are disclosed in the records kept by the United States Delegation of the meetings of the Council of Foreign Ministers only confirms that the interpretation placed by the United States Government on the clear language of the treaties is entirely consistent with the course and outcome of the treaty negotiations.

The settlement of disputes articles in the treaties of peace with Bulgaria, Hungary, and Rumania were discussed in the Council of Foreign Ministers in the spring of 1946. The United States made the following proposal, at first specifically with reference to the Italian Peace Treaty, on settlement of disputes :

> "Any dispute as to the interpretation or application of this treaty, which may arise between two or more of the parties to the treaty and which has not been satisfactorily resolved either by the Treaty Commission or by direct diplomatic negotiations, shall be submitted to the International Court of Justice upon application by any party to a dispute."

The proposal was considered by the Foreign Ministers' Deputies on June 12, 1946. The United Kingdom Deputy pointed out that at that time no agreement had been reached on the subject of the Treaty Commission. The Soviet Deputy stated that his Delegation agreed to include a clause of this nature and accepted the United States proposal with the following modification :

> "Any dispute as to the interpretation or application of this Treaty, which may arise between two or more of the parties to the Treaty and which has not been settled by direct diplomatic negotiations, shall be submitted to the International Court of Justice upon application by any party to the dispute."

The Deputies agreed to accept the article in principle, and referred it to their drafting committee for further consideration in the light of their discussion.

The drafting committee on June 26 agreed to the disputes article, for the Balkan peace treaties, in the following form:

> "Except where any other procedure is specifically provided under any articles of the present Treaty, disputes concerning the interpretation or execution of the Treaty shall be referred to the Four Ambassadors acting as provided under Article [37, Rumania; 35, Bulgaria; and 39, Hungary], and, if not resolved by them within a period of two months, shall, at the request of any party to any dispute, be referred to the International Court of Justice. Any dispute still pending at, or arising after, the date when the Ambassadors terminate their functions under Article [37, Rumania; 35, Bulgaria; and 39, Hungary], and which is not settled by direct diplomatic negotiations, shall equally, at the request of any party to the dispute, be referred to the International Court of Justice."

The reference to "the Four Ambassadors" appears to have been brought in as a result of discussions which the Foreign Ministers had, prior to June 26, 1946, and specifically in connexion with the Italian Peace Treaty, on the economic disputes articles of the peace treaties; these eventually became Article 31 in the Treaty with Bulgaria, Article 35 in the Treaty with Hungary, and Article 32 in the Treaty with Rumania. On June 20, the Ministers had agreed that the "Ambassadors" of the four Powers at the capital of the ex-enemy nation concerned should select the third member of "conciliation commissions" organized to settle economic disputes, if the parties to the dispute could not agree on a third member.

On June 28, the Ministers discussed this matter further, considering the contingency of "the Four Ambassadors" being unable to agree on the selection of a third member. The United Kingdom and United States Delegations at this time supported a proposal for selection of a third member of a conciliation commission by the President of the International Court of Justice. Secretary Byrnes stated that this proposal seemed very fair to him; it provided for conciliation in advance and for final solution of the dispute if this conciliation failed; he believed that it was important to provide for the settlement of disputes since feelings would be embittered if such disputes were permitted to endure.

The Soviet Foreign Minister stated that the appointment of an arbitrator was not the function of the International Court of Justice. Secretary Byrnes in reply called attention to the fact that it was not the Court but the President of the Court who would select the arbitrator. He said that if it were not desired to have the President select an arbitrator, some other way might be found to settle this question. He would agree to the "Ambas-

sadors" if three out of four of them could make the decision. He said he would also agree to give this task to the Secretary-General of the United Nations. He said he did not consider that it was important who chose the arbitrator as long as a disinterested person was chosen. The Soviet Foreign Minister said he was sure the "Ambassadors" would be successful if their action were concerted. He stated that it would be undesirable to charge the Secretary-General of the United Nations with this function as it would divert his attention to secondary questions; the Secretary-General had many more important questions to deal with.

Foreign Secretary Bevin said he did not mind who made the appointment—the most important matter was to find an impartial person; this was the usual practice in most questions of arbitration; if no agreement were reached by the parties to a dispute, some independent person should be appointed as arbitrator. The Soviet Foreign Minister reiterated his support of the proposal which would give "the Four Ambassadors" the function of appointing the third member of a conciliation commission. Secretary Byrnes again pointed to the defects of this method if it were to be the final resort for selecting a commission's third member. He suggested that if it were not acceptable to name the Secretary-General, the President of the General Assembly might be given the task of appointing an arbitrator. The Soviet Foreign Minister stated that since the Presidents of the General Assembly rotated, cases might be deferred until a suitable President was in office.

Foreign Minister Bidault then proposed to give "the Four Ambassadors" the responsibility for selecting the third member, but, if they did not agree, then the appointment should be made by the President of the International Court of Justice. The United Kingdom and United States Delegations agreed. The Soviet Foreign Minister stated that the difficulties must be taken into account which might arise for small countries. If "the Four Ambassadors" reached agreement on an arbitrator, there would be a guarantee that a just decision would be reached for such small countries. He stated that the drawback of the French proposal was that it might induce "the Four Ambassadors" not to come to agreement. The Foreign Ministers then proceeded to the next item on their agenda without coming to any conclusion concerning this part of the economic disputes article.

On June 28, 1946, the Deputies took up the draft of the general disputes article which had been prepared by the Drafting Committee. The Soviet Deputy proposed the following alternative text for the general disputes article.

> "Any disputes which may arise in the execution of the articles of the Treaty shall be referred to a Conciliation Commission consisting, on a basis of parity, of representatives of the Governments of the United Nation concerned and the Roumanian Government. If within three months from the submission of the dispute, the

> Conciliation Commission has not reached agreement, either Government may ask for the appointment of a third member of the Commission, chosen by mutual agreement of the two Governments from nationals of other countries. Should the two Governments fail to agree on the third member of the Commission, the Governments shall apply to the Ambassadors of the four Powers, who will appoint the third member of the Commission."

The Soviet Deputy explained that the decision of the arbitrator appointed by the "Ambassadors" would be final and binding, and that "the Four Ambassadors" would be bound to appoint an arbitrator ; he did not think that the Deputies need consider the possibility of "the Four Ambassadors" failing to agree on the appointment of an arbitrator.

The Soviet Deputy stated that his Delegation proposed this draft only for the Balkans, where the main disputes in which the Soviet Government was interested were likely to arise. In the Balkans, the Soviet Government wished to maintain the principle of voluntary submission of disputes to the International Court ; the Soviet Delegation would have no objection to the adoption of the drafting committee's text in relation to Italy, entailing compulsory submission to the International Court. The Soviet Delegation stated that it would prefer the Balkan text for Finland also.

The Deputies decided to discuss the question of the general disputes article at a later meeting. They did so again on July 1. Reaching no agreement, they referred the matter to the Foreign Ministers. In the interim, before consideration by the Ministers, a committee of lawyers was instructed by the Deputies to study this question and make a report. This committee reported two texts. The first of these texts was the proposal favoured by the French, United Kingdom and United States Delegations and accepted by the Soviet Delegation for the Italian Peace Treaty on condition that the Soviet proposal be accepted for the Balkan and Finnish treaties. This first text read :

> "Except where any other procedure is specifically provided under any article of the present Treaty, disputes concerning the interpretation or execution of the Treaty shall be referred to the Four Ambassadors acting as provided under Article 76 and, if not resolved by them within a period of two months, shall, at the request of any party to any dispute, be referred to the International Court of Justice. Any dispute still pending at, or arising after, the date when the Ambassadors terminate their functions under Article 76, and which is not settled by direct diplomatic negotiations, shall equally, at the request of any party to the dispute, be referred to the International Court of Justice."

The second text, proposed by the Soviet Delegation for inclusion in the Balkan and Finnish treaties, read as follows :

> "Save where any other procedure is specifically provided under any article of the present Treaty, disputes concerning the inter-

pretation or execution of the Treaty shall be referred to the (Ambassadors or Representatives) acting as provided under Article .... except that in this case the (Ambassadors or Representatives) will not be restricted by the time-limit provided in that Article."

The Deputies considered the report of the committee of lawyers on July 10. They reached no agreement. Likewise the Foreign Ministers failed to resolve the disagreement. The Council of Foreign Ministers, therefore, on July 18, 1946, submitted to the Paris Peace Conference alternate proposals for the general disputes articles in the peace treaties. These alternate proposals were those which had been prepared by the committee of lawyers. The Paris Peace Conference recommended adoption of the proposal favoured by the French, United Kingdom and United States Delegations, the Conference vote being 15 to 6. The alternate Soviet proposal was rejected by the Conference in a vote of 14 to 6, with one abstention.

The Council of Foreign Ministers finally reached agreement on the general disputes article in the New York session held at the end of 1946. The Ministers discussed first the economic disputes article. On November 30, 1946, the Soviet Foreign Minister stated that the Soviet Delegation found it possible to depart from its former position, and therefore proposed to accept a United States suggestion made at the Paris meeting of the Council of Foreign Ministers that the third member of a conciliation commission should, if necessary, be named by the Secretary-General of the United Nations. This provision was agreed to for all the peace treaties. On december 3, the Foreign Ministers took up the general disputes article. Foreign Secretary Bevin said it had been agreed that disputes would go to "the Four Ambassadors", but that it had not been agreed where they would go if "the Four Ambassadors" failed to reach agreement ; the French, United Kingdom and United States Delegations maintained that such disputes should go to the International Court of Justice. The Soviet Foreign Minister then stated that he was prepared to accept the decision reached earlier on the settlement of economic disputes to the effect that the arbiter should be named by the Secretary-General of the United Nations. The Foreign Ministers agreed, and referred the article to the Deputies for drafting.

In the December 4 meeting of the Deputies, the Soviet Delegation stated that it would like to change the term "Arbitration Commission" to "Conciliation Commission" in describing the body which would settle general disputes under the treaties. The United Kingdom Deputy proposed to refer to it simply as a "Commission". The United States Deputy pointed out that it was not correct to call the commission a conciliation commission, because it was more than that ; the conciliation stage would be in the diplomatic negotiations and in the discussions of "the Four Ambassadors" ; the next stage, unless other means should be provided, would be the commission of three. The United States Deputy said he did not

think it was possible to use the word "conciliation" ; the commission of three would exist in order to decide questions ; it was an arbitration commission, but he did not insist that the word "arbitration" be used. The French Deputy stated that there was no question of conciliation, and pointed out that the Soviet Foreign Minister had spoken of arbitration on the day before ; he could not accept the use of the word "conciliation". The Soviet Deputy went on to say that the Soviet Delegation's understanding of the term "conciliation" in the Russian language brought in the concept of taking a decision which is obligatory on the various parties. The Deputies reached no agreement and left the matter for the decision of the Foreign Ministers. At the next meeting of the Ministers, also on December 4, the Soviet Foreign Minister withdrew the Soviet proposal to call the commission a "Conciliation Commission". The redraft as submitted by the Deputies was thereby adopted.

This history of the negotiation of the peace treaties confirms the conclusion that the United States and a majority of the Allied Powers concerned sought to incorporate in the treaties a disputes article capable of settling finally any disputes which might arise. This was first sought to be done through an ultimate reference, if necessary, to the International Court of Justice for a decision.The Soviet Union and a minority of the Allied Powers proposed an ultimate resort to "the Four Ambassadors", who would act only if unanimous. The Paris Peace Conference, by two-thirds votes, sustained the United States point of view on the general disputes article and defeated the Soviet Government's approach. Subsequently, the Soviet Union yielded, and accepted a United States suggestion, made earlier in connexion with the economic disputes article, for appointment of a third commission member by the Secretary-General of the United Nations. The treaties thus embrace the philosophy that disputes under them shall be settled definitively and not allowed indefinitely to smolder.

3. *Rules of interpretation*

It is a familiar principle of international law that treaty provisions are to be construed so that effect will be given to their purpose and so that their design and intention will not be nullified. Vattel in his chapter on "The Interpretation of Treaties" made several statements explaining and elucidating this principle :

> "*Any interpretation that leads to an absurdity should be rejected ;* or, in other words, we can not give to a deed a sense that leads to an absurdity, but we must interpret it so as to avoid the absurdity. As it is not to be presumed that a person intends what is absurd, we can not suppose that the speaker meant that his words should lead to an absurdity. No more can it be presumed that he approached so serious a matter in a trifling spirit ; for what is dishonest and unlawful is not to be presumed. By the word *absurd* is meant not only what is *physically* impossible, but also what is *morally* impos-

sible ; that is to say, what is so contrary to reason that it can not be attributed to a man of good sense.

. . . . . .

The rule we have just laid down is one of absolute necessity and should be followed even when the text of the law or treaty, considered in itself, contains nothing that is obscure or equivocal ; for it must be observed that uncertainty in the meaning to be given to a law or treaty is not due only to obscurities or to other faults of expression, but is likewise due to the limitations of the human mind, which can not foresee all cases and all circumstances nor apprehend all the consequences of what is enacted or agreed to, and, finally, to the impossibility of entering into so many details. Laws and treaties can only be stated in general terms, and in being applied to particular cases they should be interpreted agreeably to the intention of the legislator or of the contracting parties. In no case can it be presumed that the parties had in mind anything absurd. Consequently, when their expressions, taken in the proper and ordinary sense, lead to absurdities, we must deviate from that sense just so far as is necessary to avoid the absurdity....

It is not to be presumed that sensible persons, when drawing up a treaty or any other serious document, meant that nothing should come of their act. *The interpretation which would render the document null and void can not be admitted.* This rule may be considered as a subdivision of the preceding one, for it is a form of absurdity that the very terms of the document should reduce it to mean nothing. *The document must be interpreted in such a way as to produce its effect and not prove meaningless and void ;* and in doing so, the same method is to be followed as was pointed out in the preceding paragraph. In both cases, as in all cases of interpretation, the object is to give the sense which is presumed to be most conformable to the intention of the parties. If several different interpretations offer themselves, any one of which will save the document from being null or absurd, that one must be preferred which appears to be most in accord with the intention of the framer of the document, which intention can be ascertained from the peculiar circumstances of the case and from other rules of interpretation." III, Vattel, *The Law of Nations* (1758), ch. XVII, sec. 282.

Vattel's expressions have been quoted and applied in various international claims cases. *E.g., Costa Rican Claims,* II, International Arbitrations (Moore, 1898), 1551, 1565 (1862) ; *Hudson's Bay Company Claims,* I, *ibid.,* 237, 266 (1869).

Other statements of the same principle have occurred in the decisions of several international tribunals. In the arbitrator's award in the Netherlands-Portugal dispute over Timor it was stated :

> "Conventions between States, like those between individuals, ought to be interpreted 'rather in the sense in which they can have some effect than in the sense in which they can produce none'." *The Island of Timor,* Hague Court Reports (Scott, 1916), 355, 384 (1914).

The American and British Claims Arbitration Tribunal, established pursuant to a special agreement between Great Britain and the United States, dated August 18, 1910, made the following statement in one of the cases which came before it :

> "International law, as well as domestic law, may not contain, and generally does not contain, express rules decisive of particular cases ; but the function of jurisprudence is to resolve the conflict of opposing rights and interests by applying, in default of any specific provision of law, the corollaries of general principles, and so to find—exactly as in the mathematical sciences—the solution of the problem. This is the method of jurisprudence ; it is the method by which the law has been gradually evolved in every country, resulting in the definition and settlement of legal relations as well between States as between private individuals." *Eastern Extension, Australasia and China Telegraph Company, Ltd.*, 18, A.J.I.L. (1924), 835, 838 (1923).

In another of the cases which came before the same tribunal, the award contained the following statement :

> "Nothing is better settled, as a canon of interpretation in all systems of law, than that a clause must be so interpreted as to give it a meaning rather than so as to deprive it of meaning. We are not asked to choose between possible meanings. We are asked to reject the apparent meaning and to hold that the provision has no meaning. This we cannot do." *Cayuga Indian Claims*, 20, A.J.I.L. (1926), 574, 587 (1926).

The Permanent Court of International Justice has stated :

> "But the Court feels obliged to stop at the point where the so-called restrictive interpretation would be contrary to the plain terms of the article and would destroy what has been clearly granted." *The Wimbledon*, Series A, No. 1, 24-25 (1923).

In a subsequent advisory opinion, the Permanent Court declined to construe the disputes article of a treaty in a way which would render it relatively ineffective. The Treaty of Lausanne provided that, in the event of no agreement being reached within nine months between Turkey and Iraq on the frontier separating those two countries, "the dispute shall be referred to the Council of the League of Nations". The Council requested an advisory opinion whether its action was to be "an arbitral award, a recommendation or a simple mediation". Turkey had maintained in the Council that a definitive settlement of the frontier could not be made without its consent. The Court held that :

> "the intention of the Parties was, by means of recourse to the Council, to insure a definitive and binding solution of the dispute which might arise between them, namely, the final determination of the frontier". *Frontier between Iraq and Turkey*, Series B, No. 12, 19 (1925).

In giving its opinion, the Court stated that action by the Council, in deciding the boundary question, required unanimity. But,

assimilating that situation to analogous cases under the League Covenant, the Court maintained that the parties themselves could not vote. Thus, a reasonable and practicable solution was found for giving effect to the design of the Treaty of Lausanne, to provide for definitive settlement of the boundary between Turkey and Iraq.

In Judgment No. 8, the Permanent Court held:

> "An interpretation which would confine the Court simply to recording that the Convention had been incorrectly applied, or that it had not been applied, without being able to lay down the conditions for the re-establishment 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 settling a dispute once and for all, would leave open the possibility of further disputes." *The Chorzów Factory* (Judgment No. 8, Jurisdiction), Series A, No. 9, 24-25 (1927).

Still later, the Permanent Court, in making an order dated August 19, 1929, stated that "in case of doubt, the clauses of a special agreement by which a dispute is referred to the Court must, if it does not involve doing violence to their terms, be construed in a manner enabling the clauses themselves to have appropriate effects". *The Free Zones of Upper Savoy and the District of Gex*, Series A, No. 22, 13 (1929).

Application to the problem now before the Court of the principle affirmed and reaffirmed by these authorities requires the conclusion that the objective of definitive settlement of a dispute by a commission under the peace treaties is not made unattainable by the unlawful refusal of a party to appoint its representative to a treaty disputes commission. To hold that a commission composed of the representatives of one party and a third member appointed by the Secretary-General is competent under the peace treaties to decide a dispute, where the other party has defaulted on its obligation to appoint a representative to the commission, gives effect to the purpose of treaty disputes articles and the evident design of the parties to the treaties in concluding them.

To hold that one party's default on its obligation to appoint a representative defeats definitive settlement of a dispute would nullify the crucial provisions of the disputes articles in the peace treaties. The provisions for definitive settlement of disputes by a commission are crucial because they alone, among the provisions for settlement of disputes, are not conditioned on agreement of the parties to a dispute or on unanimity among the Three Heads of Mission. If a party to a dispute could prevent final settlement by a commission through refusing unlawfully to appoint its representative to the disputes commission, the disputes provisions of the treaty would be effectively nullified, and the parties would

for practical purposes be in the same position as if the treaty contained no provision for settlement of disputes.

Parties to an existing unresolved dispute are always at liberty to make a special agreement referring the dispute to arbitration. This would be the situation if the peace treaties contained no disputes articles constituting a prior commitment to submit future disputes to arbitration. This would be the situation if the treaties contained such provisions—as they do—and one party could defeat the intended operation of these provisions by defaulting on its obligation to appoint a commission representative. So to hold would mean that the disputes provisions would not be given their "appropriate effects", but rendered nugatory and useless as though the provisions had not been incorporated in the treaties.

States in the community of nations of course do not become bound to submit their disputes to arbitration except as they give their consent to this mode of settlement. In the case of some disputes, States give that consent only after a dispute has arisen ; they then make an *ad hoc* agreement to submit the particular dispute to arbitration according to agreed terms. In other cases, States agree in advance that future disputes between them shall be settled by arbitration ; the agreement provides who the arbitrators will be or how they shall be chosen. In such cases, the States' consent to arbitration is given when the initial agreement is made, not when a dispute has arisen and the time has come for designating arbitrators.

With respect to the problem presented by Questions III and IV, the Court has already determined that the parties to the peace treaties gave their consent to arbitration of disputes at the time when these treaties were concluded ; the Court has held that they are obligated to appoint their representatives to the treaty disputes commissions. It is thus established authoritatively that the disputes articles of the peace treaties are binding international agreements, and that the consent to arbitration given in them is not subject to revocation at the will of one party alone. It would, therefore, be anomalous to hold that one party's attempt at unilateral revocation of consent through refusal to appoint a representative could be effective to defeat operation of the arbitration agreement. Where, for example, a State, either by special agreement or through having otherwise accepted jurisdiction, is a party in a contentious case before the International Court of Justice, it obviously cannot prevent the Court from proceeding to judgment simply by attempting to revoke its consent to submission of the case for judicial decision. *The Corfu Channel* (Preliminary Objection), Judgment of March 25, 1948 ; cf. *Minority Schools in Upper Silesia*, Series A, No. 15, 25 (P.C.I.J., 1928).

B. A party to a treaty cannot erect a valid defense, or otherwise improve its position, by alleging circumstances which are the result of the party's own breach of obligation.

The law has expressed this principle in varying ways. The origin of the principle lies very far back in history. For example, the sixth-century Digest commissioned by the Emperor Justinian contains the following quotation from Ulpian :

> "Nemo ex suo delicto meliorem suam condicionem facere potest." Pandects Book L, Chapter XVII, 134 (1).

In the field of international law, the Permanent Court of International Justice has stated the following rule :

> "It is, moreover, a principle generally accepted in the jurisprudence of international arbitration, as well as by municipal courts, that one party cannot avail himself of the fact that the other has not fulfilled some obligation or has not had recourse to some means of redress, if the former party has, by some illegal act, prevented the latter from fulfilling the obligation in question, or from having recourse to the tribunal which would have been open to him." *The Chorzów Factory* (Judgment No. 8, Jurisdiction), Series A, No. 9, 31 (1927).

A number of cases have held that where a State has contracted an international obligation, the State cannot plead, in defense against a claim based on the obligation, that the domestic law of the State is not such as to entitle the claimant ; in other words, failure to enact domestic legislation which will bring domestic law into line with the requirements of an international obligation is no defense against a claim based on the obligation. *German Settlers in Poland*, Series B, No. 6, 36 (1923) ; *Exchange of Greek and Turkish Populations*, Series, B, No. 10, 19-21 (1925) ; *The Chorzów Factory* (Judgment No. 13, Indemnity), Series A, No. 17, 33 (1928) ; *The Free Zones of Upper Savoy and the District of Gex* (Order, December 6, 1930), Series A, No. 24, 12 (1930) ; same (Judgment No. 17), Series A/B, No. 46, 167 (1932) ; *Greco-Bulgarian "Communities"*, Series B, No. 17, 32 (1930) ; *Treatment of Polish Nationals in Danzig*, Series A/B, No. 44, 24 (1932).

In *The Pious Fund of the Californias*, the Permanent Court of Arbitration held that Mexico's failure over 33 years to pay annuities required by treaty did not, through any principle of prescription, extinguish Mexico's obligation to pay the annuities. Hague Court Reports (Scott, 1916), 1, 5-6 (1902).

Where, in an international arbitration, one party becoming aware of the prospect of an award against it brings about the withdrawal of its appointed arbitrator, this default is held ineffective to frustrate the arbitration. *Colombia* v. *Cauca Co.*, 190, U.S. 524 (1903) ; *French-Mexican Mixed Claims* [1929-1930], Ann. Dig., 424, 425

(1929); *United States-German Mixed Claims*, Decision of the Commission rendered by the Umpire, June 15, 1939; *Lena Goldfields Co., Ltd.* v. *U.S.S.R.* [1929-1930], Ann. Dig. 426 (1930); see 2, Hyde, *International Law* (2nd rev. ed., 1945), 1629; Witenberg, *L'Organisation judiciaire, la Procédure et la Sentence internationales* (1937), 281; Mérignhac, *Traité théorique et pratique de l'Arbitrage international* (1895), 276-77; III, Phillimore, *Commentaries upon International Law*, (2nd ed., 1873), 4. But see III, Calvo, *Le Droit international théorique et pratique* (5th ed., 1896), sec. 1768.

In *Colombia* v. *Cauca Co.*, the Republic of Colombia and the Company agreed to submit a controversy to a special commission. This commission consisted of three arbitrators—one appointed on behalf of Colombia, one on behalf of the Company, and the third by agreement between the United States Secretary of State and the Colombian Minister at Washington. The commission was to reach its decisions by majority vote. The controversy in question was tried before the commission. Toward the end of the proceedings, the Colombian commissioner announced his resignation. The remaining two commissioners proceeded to make an award. The United States Supreme Court, in an opinion delivered by Mr. Justice Holmes, held that the award was valid and that the withdrawal of the Colombian commissioner could not frustrate the arbitration.

In the *French-Mexican Mixed Claims* case, a convention of March, 1927, between France and Mexico provided for the arbitration of certain international claims. Subsequently, the Mexican Government took the position that the commission president's functions had already expired, and proposed to the French Government the appointment of a new umpire. The French Government declined to accept this proposal. Thereafter, the Mexican commissioner absented himself from the commission. The commission then proceeded, with the President and the French commissioner present, to dispose of the cases which had already been presented to the commission. They held that the absence of representation of Mexico in the commission did not form a juridical obstacle to the making of awards by majority decision.

Following the First World War, various claims between the United States and Germany were submitted by agreement of the two countries to an arbitral tribunal. This tribunal consisted of an American commissioner, a German commissioner, and an umpire. Hearings were held and an award made in the early 1930's. Subsequently, the American agent moved for a rehearing on the whole record, on the ground that there had been fraud in the original presentation of evidence to the arbitrators. A rehearing was held. After the parties had made their submission, and while the tribunal was engaged in deciding the issues presented to it, the German commissioner announced his retirement from the

commission on March 1, 1939. The American commissioner prepared an opinion holding that this withdrawal did not oust the jurisdiction of the commission. The umpire, in a decision rendered June 15, 1939, gave as the decision of the commission that the commission remained competent to decide the questions before it, despite the withdrawal of the German commissioner. See VI, Hackworth, *Digest of International Law* (1943), 90-97.

In the *Lena Goldfields* case, the Soviet Government, in a concession agreement, had granted to the Company exclusive rights of exploration and mining of certain areas of Soviet territory. The agreement provided that all disputes arising out of the agreement should be decided by a court of arbitration consisting of three members—one to be selected by the Soviet Government, another by the Lena Company, and a third by mutual agreement of the parties. The agreement provided that, if one of the national arbitrators should be absent, the dispute could be settled by the other national arbitrator and the "super-arbitrator", provided their decision be unanimous. In 1929 and 1930, there were various disagreements between the Soviet Government and the Company. The Company demanded arbitration, to which the Soviet Government agreed. The parties proceeded to appoint their arbitrators, and agreed on the "super-arbitrator". After the date for the first meeting of the tribunal had been fixed, but before any meeting took place, the Soviet Government contended that the arbitration was cancelled because, the Soviet Government alleged, the Company had ceased to finance the undertaking provided for in the concession agreement. The Soviet Government's arbitrator never attended a meeting of the tribunal. The "super-arbitrator", together with the arbitrator representing the Company, held that the concession agreement was still operative and that the jurisdiction of the arbitral tribunal remained unaffected.

The holding that withdrawal of an arbitrator does not frustrate the tribunal's work is familiar in municipal law. *Burtlet* v. *Smith*, 2, Barn. K.B. 412, 94, Eng. Rep. 587 (1734); *Goodman* v. *Sayers*, 2, Jac. & W. 249, 37, Eng. Rep. 622 (Ch. 1820); In re *Young and Bulman*, 13 C.B. 623, 627, 138, Eng. Rep. 1344-1345 (1853); *Toledo S.S. Co.* v. *Zenith Transp. Co.*, 184 Fed. 391 (C.C.A., 6th, 1911); *A.T. & S.F. Ry.* v. *Brotherhood of Loc. Firemen & Eng.*, 26 F (2d), 413 (C.C.A. 7th, 1928); *Carpenter* v. *Wood*, 1 Met., 409 (Mass. 1840); *Dodge* v. *Brennan*, 59, N.H., 138 (1879); *American Eagle Fire Ins. Co.* v. *N.J. Ins. Co.*, 240, N.Y. 398, 148, N.E. 562 (1925); *Widder* v. *Buffalo & L. Huron Ry.*, 24, U.C.R. 222 (Upper Canada Q.B. 1865); [1861] I, Dalloz 494 (Fr. Cass. 1860).

There is no difference in principle between an attempt to frustrate arbitration proceedings after they have started by withdrawing an arbitrator, and an attempt to frustrate the commencement of arbitration proceedings, after they have been agreed

to, by refusing to appoint an arbitrator. Both are unilateral and illegal efforts to obstruct the carrying out of agreed settlement procedures. While some of the cases dealing with the withdrawal of an arbitrator have stressed the unfairness of permitting partially executed proceedings to be frustrated by the illegal withdrawal of an arbitrator, it is equally unfair to permit agreed procedures of settlement to be frustrated by the illegal refusal to name an arbitrator.

Of course, the situation is different if there is no refusal to appoint arbitrators and no difficulty in organizing the full arbitral tribunal. And the situation is different if provisions for arbitration—and the statute enacted to give them effect—are not held to create an obligation on parties to appoint arbitrators. The Saint Croix arbitration between Great Britain and the United States and the arbitration provided for in the Irish Free State Agreement Act (1922) are illustrative.

Under a Treaty dated November 19, 1794, between Great Britain and the United States, provision was made for the arbitration of a boundary. The arbitration tribunal was to consist of one commissioner named by Great Britain and one by the United States, the two commissioners to agree on the choice of a third. The two national commissioners were appointed, and met together. At this time the two commissioners debated whether, before selecting a third, they were empowered to appoint a secretary and order a survey to be made. After hearing arguments from counsel, the two commissioners concluded that they did not, in the absence of the third commissioner, have authority to act as a commission. Nevertheless, the two national commissioners, in their individual capacities, advised the agents to have a survey made, and this was in fact done. Three days after the two commissioners gave this advice to the agents, the commissioners agreed without difficulty on the choice of a third commissioner, and the commission then proceeded with its work. I, Moore, *International Arbitrations* (1898), 1, 13-14 (1796). In this case, there was no question of a refusal by either Government to appoint its national commissioner, and the two national commissioners experienced no difficulty in selecting a third. Thus, no possibility of frustration loomed, and nothing stood in the way of the full commission being constituted.

In the Irish Free State case, the Judicial Committee of the Privy Council gave an advisory opinion on July 31, 1924, concerning the effect to be given Article 12 of the Articles of Agreement for a Treaty between Great Britain and the Irish Free State under the Irish Free State Agreement Act, 1922, 12, Geo. V, Ch. 4. Command Paper No. 2214 (1924); [1923-1924], *Ann. Dig.* (Lauterpacht), 368 (1924). The statute purported to give legal effect to the Articles of Agreement. Under Article 12, the boundary between Northern Ireland and the Irish Free State was to be determined by "a Commission consisting of three persons, one to be appointed by the

Government of the Irish Free State, one to be appointed by the Government of Northern Ireland and one who shall be the Chairman to be appointed by the British Government". The Judicial Committee was asked whether, in the absence of a commissioner appointed by the Government of Northern Ireland, a commission within the meaning of Article 12 of the treaty would be constituted and competent to determine the boundary. The Judicial Committee gave a negative answer. Their opinion was based on the fact that "the Tribunal designated by Article 12 is a statutory tribunal brought into existence by the terms of the Article", and that the statute did not authorize the Crown to instruct the Governor of Northern Ireland in default of advice from his Ministers to make an appointment or authorize the Crown, acting on advice of the Ministers of the United Kingdom, to make the appointment for Northern Ireland. The Judicial Committee, as the highest judicial organ within the British Commonwealth, gave its opinion that the conditions laid down in the statute by Parliament had not been satisfied. The agreement which Parliament had sought by statute to implement was an agreement between the United Kingdom and the Irish Free State ; the Government of Northern Ireland was not a party to the agreement and was not by the agreement obligated to appoint an arbitrator or to submit to arbitration. This case therefore differs basically from a case in international law where States, parties to a treaty, have obligated themselves to submit to arbitration. The Judicial Committee of the Privy Council in effect found no obligation on the Government of Northern Ireland resulting from the agreement to which it was not a party, or from the statute which did not purport to go beyond the agreement. The Judicial Committee accordingly held that in the absence of an arbitrator appointed by the Government of Northern Ireland, the factual situation contemplated by the agreement and by the statute did not obtain, and that therefore there was no tribunal.

But the situation is completely different when a State, which is a party to a treaty, defaults upon its treaty obligation to appoint its representative to a treaty commission.

Determination that a peace treaty disputes commission composed of the representative of one party and a third member appointed by the Secretary-General of the United Nations can decide a dispute, when the other party defaults on its obligation to appoint a representative, does not involve the introduction of novel or anomalous doctrine into the law. In the municipal law of the great majority of countries, provision is made for the appointment of an arbitrator (often by a court) if one of the parties to a dispute refuses or fails to appoint its arbitrator under an arbitration agreement. This is true in the commercial arbitration law of 29 out of 43 countries whose law is found summarized in *Commercial Arbitration and the Law throughout the World* (International Chamber of Commerce, Basle, 1949). See also Russell, *Arbitration*

and Award (13th ed., 1935), 125 ; 6, Williston, *Contracts* (rev. ed., 1938), sec. 1920 ; Sturges, *Commercial Arbitrations and Awards* (1930), secs. 146-47.

In municipal law, in the absence of statutes, there was an early reluctance on the part of courts to aid in the specific enforcement of arbitration agreements when one party defaulted and declined to proceed with arbitration, though the validity and binding character of the arbitration agreement was recognized and was held to support an action for damages and to bar an action at law on the principal contract. The theory of this reluctance was a judicial policy against parties contracting to oust the courts of jurisdiction. See 6, Williston, *op. cit. supra*, sec. 1919. This rationale, which subsequently yielded to statutory enactments, has of course no relevance in the field of international law, where there are no courts of general jurisdiction to which States can resort without having in some manner obtained a consent to suit from the other party or parties to a dispute. Justice Holmes pointed this out in the United States Supreme Court's opinion in *Colombia* v. *Cauca Co., supra.* Arbitration thus has a special importance in international law, since it is very often the only mode of peaceful and definitive settlement of a dispute open to the parties.

The principle that a party to a dispute cannot improve its position through its own breach of obligation has obvious application to the situation presented by Questions III and IV now before the Court. The fact that Bulgaria, Hungary, and Rumania have refused to appoint representatives to the treaty commissions—as they are legally bound to do—should not be held to provide them with any escape from definitive settlement under the peace treaties of the disputes to which these States are parties. International tribunals have applied the principle in a variety of situations, enunciating in the course of their application various rules which stem from the principle : such as the rules on failure to enact domestic legislation as required by treaty, and on withdrawal of an arbitrator. It is properly the judicial function to carry on the process of applying general principles of law to particular situations as these are presented for a tribunal's consideration. The principle that a party cannot take advantage of its own default is well-established. Its application to the situation presented in Question IV is evident.

In this connexion, it is significant that the Charter of the United Nations in Article 13 (1) provides that "The General Assembly shall initiate studies and make recommendations for the purpose of:

"(*a*) .... encouraging the progressive development of international law...." And in Resolution 171 (II), the General Assembly recorded its view "that it is a responsibility of the United Nations to encourage the progressive development of international law",

noted the fact "that the International Court of Justice is the principal judicial organ of the United Nations", and considered it to be "of paramount importance that the Court should be utilized to the greatest practicable extent in the progressive development of international law, both in regard to legal issues between States and in regard to constitutional interpretation" [of the Charter and the constitutions of specialized agencies].

C. Consideration and decision of a dispute under the peace treaties by a commission consisting of a representative of one party and a third member appointed by the Secretary-General, when the other party has unlawfully refused to appoint its representative, would not prejudice the rights of the party so refusing to appoint

It has been said, in connexion with municipal arbitration law, that all the members of an arbitral tribunal need to be present for the consideration of a case submitted to the tribunal, because of "the right of each of the parties to the counsel and influence of each arbitrator with every other arbitrator on the board upon the whole case". See Sturges, *Commercial Arbitrations and Awards* (1930), sec. 205. In the situation now before the Court on Question IV, it has already been determined by the Court, in answer to Question II, that Bulgaria, Hungary, and Rumania are legally obligated to appoint their representatives to the treaty disputes commissions. If the Governments of these States persist in their breach of obligation, refusing to appoint representatives to the commissions, they must be taken to have waived their right to be represented on the commissions. They must be considered estopped to complain now or in the future, on the ground of lack of representation, concerning the consideration and decision of disputes by commissions on which they decline to be represented. A party to a dispute committed by treaty to go to arbitration, and obligated to appoint an arbitrator, cannot be heard to say that the arbitration proceedings are invalid for lack of the party's appointed arbitrator when the party has refused, in defiance of legal duty, to appoint an arbitrator. Such party must be considered estopped to deny that it has waived its right to be represented on the arbitral tribunal. No State can claim that its right is denied when it refuses to avail itself of the right which it claims is denied it.

Determination that a tribunal may proceed to consider and decide a case referred to it when one party has refused to name its arbitrator does not, of course, involve exclusion of that party from representation on the tribunal. The proposition is asserted only with respect to a situation where a party persistently declines to be represented ; as pointed out earlier, it is not asserted with respect to cases where a national representative on a treaty disputes com-

mission dies, resigns, or becomes disabled. Determination that a commission may proceed to consider a case when one party has refused to name a representative of course does not mean that if the party changes its position, and appoints a representative, that representative cannot join the commission and take part in its proceedings. Affirmative answers to Questions III and IV definitely would not exclude Bulgarian, Hungarian, and Rumanian representatives from the treaty disputes commissions if these three countries decided to appoint representatives at any stage before final decision by the commissions. The commissions would sit with two members only if and so long as the three countries failed to name their representatives.

It should also be noted that affirmative answers to Questions III and IV would not *oblige* the treaty commissions to decide the disputes in the absence of Bulgarian, Hungarian, and Rumanian representatives. Commissions consisting of the representative of one party and a third member appointed by the Secretary-General would have to determine for themselves whether, in the absence of full representation, it is practicable and advisable for the commissions to decide the disputes. Cf. *Status of Eastern Carelia*, Series B, No. 5, 28-29 (1923).

CONCLUSION

If Questions III and IV are not answered in the affirmative, a party to an arbitration agreement intent upon evading its international obligations will be able in practice to set them at nought and to nullify arbitration just as effectively as by denying the existence of a dispute—if this course were open to such a party. But the Court has alreday held that States cannot avoid the consequence and impact of treaty obligations to arbitrate merely by denying that any dispute exists. Negative answers on Questions III and IV would render illusory the decision given by the Court in its opinion on Questions I and II which the General Assembly submitted for advisory opinion.

If the third and fourth questions are answered negatively, international agreements to arbitrate could then be made ultimately valueless by a State which is not willing to honour its legal obligations. It would be in the power of such a State to avoid arbitration simply by refusing to appoint an arbitrator. Parties to arbitration agreements and to treaties containing arbitration clauses would for practical purposes thus be placed in the same position as if they had undertaken no obligation to arbitrate. States are always free to agree specially to arbitration when a dispute has arisen between them. This would be their position if one party's refusal to appoint an arbitrator frustrated the commitment to arbitrate. Such a result could only operate to further the purposes of a State not prepared

to live according to the law and carry out its responsibilities as a member of the community of nations.

When account is taken of the considerable number of international arbitration clauses and agreements, it is apparent that negative answers to Questions III and IV would have wide effects. Authoritative determination that arbitration clauses similar and analogous to the disputes articles in the peace treaties contain an escape hatch beneficial only to defaulting parties would do grave damage to international arbitration. This would not be a situation capable of prompt and adequate remedy through legislative enactment. Renegotiation of arbitration clauses and agreements on a large scale would be required. It is highly doubtful that such a course would prove satisfactory.

This leads to a further consideration. It would surely be undesirable if, in the course of negotiating international agreements, States felt impelled to consider and propound all sorts of possibilities of bad faith on the part of prospective treaty parties, and to make multifarious and detailed provisions for such contingencies.

It is of basic importance to the fabric of international society that nations shall feel and show respect for law in their dealings with one another. It cannot lightly be concluded that the law in a situation such as that now before the Court brooks evasion by a defaulting party. So to hold could have seriously demoralizing effects on international relations. Disputes clauses should be interpreted so as to facilitate amicable adjustment, and not so as to make parties to a dispute doubt the efficacy of important means of peaceful settlement and on that account resort to non-amicable modes. Treaty provisions, and particularly provisions for the definitive settlement of disputes, should not be construed to allow the parties unsuspected avenues of escape from the fulfilment of obligations. Smoldering disputes among States are too likely to create serious and chronic disturbances of international relations and eventually endanger peace.

The United States submits that the third and fourth questions submitted to the Court by the General Assembly for an advisory opinion should be answered affirmatively.