OLIVER DÖRR

Kompendium völkerrechtlicher Rechtsprechung

2. Auflage

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Eine Auswahl für Studium und Praxis

2., überarbeitete und erweiterte Auflage

Mohr Siebeck

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Vorwort

Völkerrecht ist in Praxis und Ausbildung im wesentlichen Fallrecht. Jeder Lehrsatz, jede Rechtsanwendung, jede Argumentation, die völkerrechtliche Inhalte verarbeitet, stützt sich dafür auf die zu einem Sachproblem ergangenen Gerichtsentscheidungen. Weit mehr als im innerstaatlichen Recht nimmt die Rechtsbehauptung im Völkerrecht die praktische Autorität richterlicher Entscheidungen in Anspruch, und zwar vor allem jene des Internationalen Gerichtshofs. Und auch die juristische Ausbildung rekurriert im Völkerrecht ganz wesentlich auf die Leitentscheidungen internationaler Gerichte, wenn es um die Vermittlung völkerrechtlicher Normen und Prinzipien geht. Kurz: Wer im Völkerrecht lernen oder arbeiten will, braucht Zugang zu völkerrechtlicher Rechtsprechung.

Beiden Gruppen, dem Rechtsanwender wie den Lehrenden und Lernenden des Völkerrechts, will das „Kompendium völkerrechtlicher Rechtsprechung" die Sache etwas leichter machen, indem es die wichtigsten völkerrechtlichen Gerichtsentscheidungen in zitierfähiger Form in einem Band zur Verfügung stellt. Dabei geht es naturgemäß nicht um einen feststehenden „Kanon", sondern um eine Auswahl, die natürlich subjektiv geprägt ist und manches, obwohl es ebenfalls wichtig wäre, außen vor lassen muss. Das „Kompendium" orientiert sich in Umfang und Inhalt am Grundstandard der universitären Schwerpunktausbildung. Es umfasst diejenigen Gerichtsentscheidungen, die nicht nur die Völkerrechtspraxis beeinflusst und die Völkerrechtswissenschaft geprägt haben, sondern auch für das Verständnis des heute geltenden Völkerrechts von wesentlicher Bedeutung sind. Ihre Lektüre sollte das völkerrechtliche Studium ergänzen.

Das Buch soll die Funktion eines Nachschlagewerks erfüllen, gleichzeitig aber für die studienbegleitende Lektüre geeignet sein. Es ist bewusst nicht nach Sachgesichtspunkten sortiert, da dies oft willkürlich ist, zu Überschneidungen führt und die einzelne Gerichtsentscheidung nicht im Zusammenhang erschließt. Stattdessen werden hier die Entscheidungen chronologisch und praktisch in voller Länge wiedergegeben. Ihre sachliche Einordnung ergibt sich durch knappe „Leitsätze" im Anschluss an den Entscheidungstext.

Natürlich ist „völkerrechtliche Rechtsprechung" mehr als die hier aufgenommenen Entscheidungen des Ständigen Internationalen Gerichtshofs (1922-1939) und des Internationalen Gerichtshofs (seit 1948). Es gibt mittlerweile eine ganze Reihe internationaler Rechtsprechungsinstanzen, deren *case law* für die völkerrechtliche Ausbildung und Praxis von großer Bedeutung ist. Genannt seien nur der Internationale Seegerichtshof, die UN-Straftribunale für das ehemalige Jugoslawien und Ruanda, der Internationale Strafgerichtshof, *Panels* und *Appellate Body* der WTO sowie die internationale Schiedsgerichtsbarkeit. Auch die Entscheidungen der europäischen Gerichte oder die nationale Rechtsprechung können wichtige Aufschlüsse über den Stand des allgemeinen Völkerrechts geben. Aus Raumgründen muss sich dieses „Kompendium" jedoch auf die Judikatur von StIGH und IGH beschränken und selbst hierbei noch eine rigide Auswahl treffen.

Während das Manuskript der ersten Auflage des „Kompendiums“ noch überwiegend auf Bahnfahrten zwischen Berlin und Erlangen entstanden war, konnte ich bei der Arbeit an dieser zweiten Auflage auf die Ausstattung meines Lehrstuhls im *European Legal Studies Institute* der Universität Osnabrück zurückgreifen. Für wesentliche Unterstützung danke ich vor allem Wiss. Mitarb. Marco Athen, der manche Unebenheit im Manuskript fand und die Textredaktion in weiten Teilen selbständig verantwortete. Für Anregungen und Kritik aus dem Benutzerkreis bin ich stets dankbar.

Osnabrück, im September 2014 Oliver Dörr

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Hinweise zur Benutzung

Am Anfang jeder Entscheidung steht ihre offizielle Bezeichnung sowie ggf. eine geläufige Kurzbezeichnung. Es folgen Datum und offizielle **Fundstelle**. Das sind für den StIGH die Serien A und B bzw. ab 1931 die Serie A/B, für den IGH die amtliche Sammlung *Reports of Judgments, Advisory Opinions and Orders / Recueil des arrêts, avis consultatifs et ordonnances*. Soweit darin noch nicht erschienen sind, können Judikate des IGH im Volltext unter http://www.icj-cij.org abgerufen werden.

Nach einer knappen Sachverhaltsdarstellung werden die wesentlichen **Entscheidungsgründe** wiedergegeben. Hierbei bleibt der Zusammenhang der gerichtlichen Erwägungen möglichst erhalten, damit jeweils die Entscheidung des Einzelfalles verständlich wird. Die Gründe werden im (englischen) Originalwortlaut wiedergegeben, da sie nur so wirklich zitierfähig sind. Auch jene Entscheidungen von IGH und StIGH, die der Gerichtshof selbst in der französischen Fassung für authentisch erklärt hat, sind hier in der englischen Übersetzung (des Gerichtshofs) abgedruckt, da sie so nach meinen Erfahrungen den deutschen Studierenden leichter zugänglich sind. Man mag dies angesichts der ohnehin allgegenwärtigen Anglisierung bedauern, um einer größeren Benutzerfreundlichkeit willen hielt ich diesen Kompromiss für unumgänglich. Aus Raumgründen kann im Übrigen jeweils nur die Entscheidungsbegründung der Richtermehrheit abgedruckt werden, nicht dagegen die Sondervoten oder abweichenden Meinungen anderer Richter.

Um die **Zitierfähigkeit** zu gewährleisten, sind im Abdruck jeder Entscheidung die Originalseitenzahlen bzw. -randnummern kenntlich gemacht. Soweit das Original nur Seitenzahlen verwendete, sind die Seitenumbrüche im Text durch fette Ziffern in eckiger Klammer kenntlich gemacht, z.B. **[174]**. Das betrifft die unter Nr. 1-19 abgedruckten Judikate. Die übrigen Entscheidungen sind jeweils mit den Absatzziffern des Originals wiedergegeben und sollten auch nach diesen zitiert werden.

Die Entscheidungsauszüge sind stets ergänzt um kurze Hinweise zur **dogmatischen Einordnung** der Entscheidung in das Gefüge des geltenden Völkerrechts. Hier geht vor allem darum zu skizzieren, wofür die Entscheidung/das Gutachten heute noch steht, welche Grundaussagen des Völkerrechts sich auf das betreffende Judikat heute stützen lassen. In keinem Fall ist damit jedoch die systematische Darstellung eines Lehrbuchs oder die themenbezogene Vertiefung im sonstigen Schrifttum zu ersetzen. Den Abschluss jeder Einzeldarstellung bilden einige entscheidungsbezogene **Literaturhinweise** zur vertiefenden Lektüre.

Im Anhang findet sich eine umfassende **Auflistung** der Urteile und Gutachten von StIGH und IGH.

Abkürzungsverzeichnis

AFDI	Annuaire Français de droit international
a.E.	am Ende
AJIL	American Journal of International Law
AJPIL	Austrian Journal of Public International Law
Art.	Artikel
ASIL	American Society of International Law
AusYIL	Australian Yearbook of International Law
AVR	Archiv des Völkerrechts
Buchst.	Buchstabe
BUILJ	Boston University International Law Journal
BYIL	British Yearbook of International Law
Calif. W. ILJ	California Western International Law Journal
CanYIL	Canadian Yearbook of International Law
Case W. Res. JIL	Case Western Reserve Journal of International Law
CAT	Convention Against Torture (UN-Antifolterkonvention 1984)
ColJTL	Columbia Journal of Transnational Law
Com. Int.	La Comunità Internazionale
Cornell ILJ	Cornell International Law Journal
Denver JILP	Denver Journal of International Law and Politics
ders.	derselbe
Diss.	Dissertation
Diss. Op.	Dissenting Opinion
DJZ	Deutsche Juristenzeitung
ebd.	ebenda
ECHR	European Court of Human Rights (amtliche Sammlung)
EGMR	Europäischer Gerichtshof für Menschenrechte
EJIL	European Journal of International Law
etc.	et cetera
EuGH	Gerichtshof der Europäischen Gemeinschaften
EuGRZ	Europäische Grundrechtezeitschrift
EuZW	Europäische Zeitschrift für Wirtschaftsrecht
f., ff.	folgende, fortfolgende
Fn.	Fußnote
FS	Festschrift
FW	Die Friedenswarte
GA	Goltdammer's Archiv für Strafrecht
GA-Res.	Resolution of the UN General Assembly
GG	Grundgesetz
ggf.	gegebenenfalls
GYIL	German Yearbook of International Law
h.M.	herrschende Meinung
Hague YIL	Hague Yearbook of International Law

Harvard ILJ	Harvard International Law Journal
Hastings ICLR	Hastings International and Comparative Law Review
HLKO	Haager Landkriegsordnung (Anhang zum IV. Haager Abkommen betreffend die Gesetze und Gebräuche des Landkriegs v. 18.10.1907)
HRLJ	Human Rights Law Journal
IAGMR	Interamerikanischer Gerichtshof für Menschenrechte
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ICTY	International Criminal Tribunal for the former Yugoslavia
IGH	Internationaler Gerichtshof
IGH-VerfO	Verfahrensordnung (Rules of Court) des IGH
IKRK	Internationales Komitee vom Roten Kreuz
ILM	International Legal Materials
Indian JIL	Indian Journal of International Law
Int. Org.	International Organization
IPbürgR	Internationaler Pakt über bürgerliche und politische Rechte v. 19.12.1966
IPrax	Praxis des internationalen Privat- und Verfahrensrechts
IPwirtR	Internationaler Pakt über wirtschaftliche, soziale und kulturelle Rechte v. 19.12.1966
ItYbIL	Italian Yearbook of International Law
JDI	Journal du droit international (Clunet)
JICL	Journal of International Criminal Law
JIR	Jahrbuch für Internationales Recht
JISD	Journal of International Dispute Settlement
JMLC	Journal of Maritime Law and Commerce
JR	Juristische Rundschau
JuS	Juristische Schulung
Kap.	Kapitel
Leiden JIL	Leiden Journal of International Law
LNTS	League of Nations Treaty Series
MelbJIL	Melbourne Journal of International Law
MPEPIL	Max Planck Encyclopedia of Public International Law, 10 Bände 2012 und online unter mpepil.com
mwN	mit weiteren Nachweisen
NILR	Netherlands International Law Review
NJW	Neue Juristische Wochenschrift
No.	Number
NorTIR	Nordisk Tidsskrift for International Ret
NYIL	Netherlands Yearbook of International Law
o.ä.	oder ähnliches
OAU	Organization of African Unity
ÖZöR	Österreichische Zeitschrift für Öffentliches Recht (Neue Folge)
PCIJ	Permanent Court of International Justice
ProcASIL	Proceedings of the American Society of International Law

RBDI	Revue Belge de droit international
RdC	Recueil des cours
RDI	Revue de droit international, de sciences politiques et diplomatiques
RECIEL	Review of European Community and International Environmental Law
REDI	Revista española de derecho internacional
Rev. droit int.	Revue de droit international et de législation comparée
RGBl	Reichsgesetzblatt
RGDIP	Revue générale de droit international public
RHDI	Revue hellénique de droit international
Riv. Dir. Int.	Rivista di diritto internazionale
RIW	Recht der Internationalen Wirtschaft
S.	Satz
Schweiz. JIR	Schweizerisches Jahrbuch für Internationales Recht
Sep. Op.	Separate Opinion
Slg.	Sammlung der Rechtsprechung des Gerichtshofes und des Gerichts erster Instanz der Europäischen Gemeinschaften
sog.	sogenannte(r)
SRÜ	Seerechtsübereinkommen der Vereinten Nationen v. 10.12.1982
StGB	Strafgesetzbuch
StIGH	Ständiger Internationaler Gerichtshof
st.Rspr.	ständige Rechtsprechung
SVN	Satzung der Vereinten Nationen
Syracuse JILC	Syracuse Journal of International Law and Commerce
SZIER	Schweizerische Zeitschrift für internationales und europäisches Recht
TGS	Transactions of the Grotius Society
u.a.	unter anderem
U.S.	United States Reports
u.U.	unter Umständen
UN	United Nations
UNTS	United Nations Treaty Series
v.	von/vom/versus
Vanderbilt JTL	Vanderbilt Journal of Transnational Law
VB	Völkerbund
vgl.	vergleiche
VirgJIL	Virginia Journal of International Law
VN	Vereinte Nationen
vol.	volume
WdV	Wörterbuch des Völkerrechts, hrsg. v. *H.-J. Schlochauer*, 3 Bände 1960–62
WHO	World Health Organisation
WTO	World Trade Organisation

WÜD	Wiener Übereinkommen über diplomatische Beziehungen v. 18.4.1961
WÜK	Wiener Übereinkommen über konsularische Beziehungen v. 24.4.1963
WVK	Wiener Vertragsrechtskonvention (= Wiener Übereinkommen über das Recht der Verträge v. 23.5.1969)
Yale JIL	Yale Journal of International Law
z.B.	zum Beispiel
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht
ZEuS	Zeitschrift für Europarechtliche Studien
ZfP	Zeitschrift für Politik
ZÖR	Zeitschrift für Öffentliches Recht (Österreich)
ZP I	Zusatzprotokoll zu den Genfer Abkommen vom 12. August 1949 über den Schutz der Opfer internationaler bewaffneter Konflikte (Protokoll I) v. 8.6.1977

Abgekürzt zitierte Literatur

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1. Nationality Decrees Issued in Tunis and Morocco

Gutachten vom 7. Februar 1923 - PCIJ Series B No. 4

Sachverhalt

Frankreich und das Vereinigte Königreich stritten um die Anwendbarkeit von Dekreten, welche den Staatsangehörigkeitserwerb in den französischen Protektoraten Tunis und Marokko regelten, auf britische Staatsangehörige. Das insoweit von britischer Seite vorgeschlagene Streitbeilegungsverfahren lehnte Frankreich ab, da die Regelung der Staatsangehörigkeit eine innere Angelegenheit im Sinne von Art. 15 Abs. 8 der Völkerbundsatzung darstelle. (Nur) Diese Frage legte der daraufhin befasste Völkerbundsrat dem Gerichtshof zur Begutachtung vor.

Aus den Gründen

[21] III.

The question before the Court for advisory opinion is as follows:

> „Whether the dispute between France and Great Britain as to the Nationality Decrees issued in Tunis and Morocco (French zone] on November 8th, 1921, and their application to British subjects, is or is not, by international law, solely a matter of domestic jurisdiction (Article 15, paragraph 8, of the Covenant)."

An examination of the English and French texts of subsection (a) of the resolution shows that they differ slightly in wording as between themselves and also from the French and English texts of paragraph 8 of Article 15 of the Covenant, which, moreover, do not exactly correspond.

The French text of the Resolution speaks of a matter *„exclusivement d'ordre intérieur",* whereas the English text reads: „solely a matter of domestic jurisdiction" and thus very closely resembles that used in the Covenant: „a matter which ... is solely within the domestic jurisdiction". Finally, the French text of the Covenant is worded as **[22]** follows: *„une question que le droit international laisse à la competence exclusive* ...". The Court is of opinion that the expression „solely within the domestic jurisdiction", *„d'ordre intérieur"* and *„à la competence exclusive"* must in the present case be regarded as having the same meaning.

It should next be observed that the resolution also differs from the text of the Covenant, in that the latter speaks of „a matter which by international law is solely within the domestic jurisdiction" - *„question que le droit international laisse à la competence exclusive"* - whereas the resolution asks whether the „dispute" between the two Powers is a matter of „domestic jurisdiction" - *„d'ordre intérieur".* The Court is, however, of opinion that these differences are of no juridical importance.

In effect, the question before the Court is whether the dispute mentioned in the Council's resolution relates to a matter which, by international law, is solely within the domestic jurisdiction of France.

IV.

Under the terms of sub-section (a) of the Council's resolution, the Court, in replying to the question stated above, has to give an opinion upon the nature and

not upon the merits of the dispute, which, under the terms of sub-section (c) may, in certain circumstances, form the subject of a subsequent decision. The Court therefore wishes to emphasise that no statement or argument comprised in the present opinion can be interpreted as indicating a preference on the part of the Court in favour of any particular solution, as regards the whole or any individual point of the actual dispute.

The analysis of the diplomatic correspondence given under Part II above, and the fact that the Council's resolution in **[23]** its sub-section *(a)* refers in parenthesis to paragraph 8 of Article 15 of the Covenant, lead to the conclusion that the question submitted to the Court must be read and answered in the light of the provisions of that paragraph.

The paragraph to which sub-section (a) of the Council's resolution expressly refers is as follows :

> *(English text}:* „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."
>
> *(French text): „Si I'une des parties pretend et si le Conseil reconnaît que le différend porte sur une question que le droit international laisse à la competence exclusive de cette partie, le Conseil le constatera dans un rapport, mais sans recommander aucune solution.*

Special attention must be called to the word *„exclusive"* in the French text, to which the word „solely" (within the domestic jurisdiction) corresponds in the English text. The question to be considered is not whether one of the parties to the dispute is or is not competent in law to take or to refrain from taking a particular action, but whether the jurisdiction claimed belongs *solely* to that party.

From one point of view, it might well be said that the jurisdiction of a State is *exclusive* within the limits fixed by international law - using this expression in its wider sense, that is to say, embracing both customary law and general as well as particular treaty law. But a careful scrutiny of paragraph 8 of Article 15 shows that it is not in this sense that exclusive jurisdiction is referred to in that paragraph. The words „solely within the domestic jurisdiction" seem rather to contemplate certain matters which, though they may very closely concern the interests of more than one State, **[24]** are not, in principle, regulated by international law. As regards such matters, each State is sole judge.

The question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations. Thus, in the present state of international law, questions of nationality are, in the opinion of the Court, in principle within this reserved domain.

For the purpose of the present opinion, it is enough to observe that it may well happen that, in a matter which, like that of nationality, is not, in principle, regulated by international law, the right of a State to use its discretion is nevertheless restricted by obligations which it may have undertaken towards other States. In such a case, jurisdiction which, in principle, belongs solely to the State, is limited by rules of international law. Article 15, paragraph 8, then ceases to apply as re-

gards those States which are entitled to invoke such rules, and the dispute as to the question whether a State has or has not the right to take certain measures becomes in these circumstances a dispute of an international character and falls outside the scope of the exception contained in this paragraph. To hold that a State has not exclusive jurisdiction does not in any way prejudice the final decision as to whether that State has a right to adopt such measures.

This interpretation follows from the actual terms of paragraph 8 of Article 15 of the Covenant, and, in the opinion of the Court, it is also in harmony with that Article taken as a whole.

Article 15, in effect, establishes the fundamental principle that any dispute likely to lead to a rupture which is not submitted to arbitration in accordance with Article 13 shall be laid before the Council. The reservations generally made in arbitration treaties are not to be found in this Article.

[25] Having regard to this very wide competence possessed by the League of Nations, the Covenant contains an express reservation protecting the independence of States; this reservation is to be found in paragraph 8 of Article 15. Without this reservation, the internal affairs of a country might, directly they appeared to affect the interests of another country, be brought before the Council and form the subject of recommendations by the League of Nations. Under the terms of paragraph 8, the League's interest in being able to make such recommendations as are deemed just and proper in the circumstances with a view to the maintenance of peace must, at a given point, give way to the equally essential interest of the individual State to maintain intact its independence in matters which international law recognises to be solely within its jurisdiction.

It must not, however, be forgotten that the provision contained in paragraph 8, in accordance with which the Council, in certain circumstances, is to confine itself to reporting that a question is, by international law, solely within the domestic jurisdiction of one Party, is an exception to the principles affirmed in the preceding paragraphs and does not therefore lend itself to an extensive interpretation.

This consideration assumes especial importance in the case of a matter which, by international law, is, in principle, solely within the domestic jurisdiction of one Party, but in regard to which the other Party invokes international engagements which, in the opinion of that Party, are of a nature to preclude in the particular case such exclusive jurisdiction. A difference of opinion exists between France and Great Britain as to how far it is necessary to proceed with an examination of these international engagements in order to reply to the question put to the Court.

It is certain – and this has been recognised by the Council in the case of the Aaland Islands – that the mere fact that a State brings a dispute before the League of Nations does not suffice to give this dispute an international character calculated to except it from the application of paragraph 8 of Article 15.

[26] It is equally true that the mere fact that one of the parties appeals to engagements of an international character in order to contest the exclusive jurisdiction of the other is not enough to render paragraph 8 inapplicable. But when once it appears that the legal grounds *(titres)* relied on are such as to justify the provisional conclusion that they are of juridical importance for the dispute submitted to the Council, and that the question whether it is competent for one State to take

certain measures is subordinated to the formation of an opinion with regard to the validity and construction of these legal grounds *(titres),* the provisions contained in paragraph 8 of Article 15 cease to apply and the matter, ceasing to be one solely within the domestic jurisdiction of the State, enters the domain governed by international law.

If, in order to reply to a question regarding exclusive jurisdiction, raised under paragraph 8, it were necessary to give an opinion upon the merits of the legal grounds *(titres)* invoked by the Parties in this respect, this would hardly be in conformity with the system, established by the Covenant for the pacific settlement of international disputes.

For the foregoing reasons, the Court holds, contrary to the final conclusions of the French Government, that it is only called upon to consider the arguments and legal grounds *(titres)* advanced by the interested Governments in so far as is necessary in order to form an opinion upon the nature of the dispute. While it is obvious that these legal grounds *(titres)* and arguments cannot extend either the terms of the request submitted to the Court by the Council or the competence conferred upon the Court by the Council's resolution, it is equally clear that the Court must consider them in order to form an opinion as to the nature of the dispute referred to in the said resolution - with regard to which the Court's opinion has been requested. **[27]**

V.

The main arguments developed by the Parties in support of their respective contentions are as follows:

1.

A. The French Decrees relate to persons born, not upon the territory of France itself, but upon the territory of the French Protectorates of Tunis and of the French zone of Morocco. Granted that it is competent for a State to enact such legislation within its national territory, the question remains to be considered whether the same competence exists as regards protected territory.

The extent of the powers of a protecting State in the territory of a protected State depends, first, upon the Treaties between the protecting State and the protected State establishing the Protectorate, and, secondly, upon the conditions under which the Protectorate has been recognised by third Powers as against whom there is an intention to rely on the provisions of these Treaties. In spite of common features possessed by Protectorates under international law, they have individual legal characteristics resulting from the special conditions under which they were created, and the stage of their development.

The position in the present case is determined by the international documents enumerated below: (...)

(a) As regards Tunis: The Treaty of Casr-Said of May 12th, 1881, between France and Tunis; the Treaty between the same Powers signed at La Marsa on June 8th, 1883; the correspondence between France and Great Britain, 1881-1883. (See also the documents referred to under Nos. 2 and 3 below).

(b) As regards Morocco: the Treaty of Fez of March;30th, 1912, between France and Morocco; the Anglo-French Declaration regarding Egypt and Morocco, dated April 8th, 1904; Sir Edward Grey's note to **[28]** M. Daeschner, dated November 14th, 1911; letter from M. Kiderlen-Waechter, Secretary of State for Foreign Affairs of the German Empire to M. Jules Cambon, Ambassador of the French Republic at Berlin, dated November 4th, 1911.

The question whether the exclusive jurisdiction possessed by a protecting State in regard to nationality questions in its own territory extends to the territory of the protected State depends upon an examination of the whole situation as it appears from the standpoint of international law. The question therefore is no longer solely one of domestic jurisdiction as defined above. (See Part IV.)

B. The French Government contends that the public powers *(puissance publique)* exercised by the protecting State, taken in conjunction with the local sovereignty of the protected State, constitute full sovereignty equivalent to that upon which international relations are based, and that therefore the protecting State and the protected State may, by virtue of an agreement between them, exercise and divide between them within the protected territory the whole extent of the powers which international law recognises as enjoyed by sovereign States within the limits of their national territory. This contention is disputed by the British Government.

The Court observes that, in any event, it will be necessary to have recourse to international law in order, to decide what the value of an agreement of this kind may be as regards third States, and that the question consequently ceases to be one which, by international law, is solely within the domestic jurisdiction of a State, as that jurisdiction is defined above.

2.

A. Great Britain denies that the Decrees of November 8th, 1921, are applicable to British subjects, and relies in support of her contention upon the Treaties concluded by her with the two States which were subsequently placed under pro-**[29]**tectorate (Treaty between Great Britain and Morocco dated December 9th, 1856, and Treaty between Great Britain and Tunis dated July 19th, 1875). By virtue of these Treaties, persons claimed as British subjects would enjoy a measure of extraterritoriality incompatible with the imposition of another nationality.

According to the French contention, as developed in the course of the oral statements, these Treaties, which were concluded for an indefinite period, that is to say, in perpetuity, have lapsed by virtue of the principle known as the *clausula rebus sic stantibus* because the establishment of a legal and judicial regime in conformity with French legislation has created a new situation which deprives the capitulatory regime of its *raison d'être.*

It is clearly not possible to make any pronouncement upon this point without recourse to the principles of international law concerning the duration of the validity of treaties. It follows, therefore, that in this respect also the question does not, by international law, fall solely within the domestic jurisdiction of a State, as that jurisdiction is defined above.

B. As regards Tunis more especially, France contends that, following upon negotiations between the French and British Governments, Great Britain formally

renounced her rights of jurisdiction in the Regency (Note from Lord Granville to M. Tissot dated June 20th, 1883; Order in Council of December 31st, 1883), and that by the Franco-British Arrangement of September 18th, 1897, she accepted a new basis for the relations between France and herself in Tunis. It appears from the Cases and Counter-Cases that the two Governments take different views with regard to the scope of the declarations made by Great Britain in this respect and also with regard to the construction to be placed upon the Arrangement of 1897.

The appreciation of these divergent points of view involves, owing to the very nature of the divergence, the interpretation **[30]** of international engagements. The question therefore does not, according to international law, fall solely within the domestic jurisdiction of a single State, as that jurisdiction is defined above.

C. As far as Morocco is concerned, it is certain that Great Britain still exercises there her consular jurisdiction. France argues that Great Britain, by consenting to the Franco-German Convention of November 4th, 1911, with regard to Morocco, agreed to renounce her capitulatory rights as soon as the new judicial system contemplated by the Convention had been introduced.

The British Government, on the contrary, contends that the Franco-German Convention of 1911 - its adhesion to which was conditional upon the internationalisation of the town and district of Tangiers, a condition which has not yet been fulfilled - was not an agreement for the suppression of the capitulatory regime: in this respect, the relations between France and Great Britain are, it is said, still governed by the second of the Secret Articles of the Anglo-French Declaration of April 8th, 1904.

In the case of Morocco also, therefore, as in the case of Tunis, there is a difference with regard to the interpretation of international engagements. The international character of the legal situation follows not only from the fact that the two Governments concerned place a different construction upon the obligations undertaken, but also from the fact that Great Britain exercises capitulatory rights in the territory of the French Protectorate in Morocco. Again, from this standpoint, the question does not, according to international law, fall solely within the domestic jurisdiction of a State, as that jurisdiction is defined above.

3.

Apart from all considerations which relate to the protectorate and to the capitulations in Tunis, Great Britain relies, as regards that country, upon the most-favoured-nation clause (Anglo-French Arrangement of September 18th, 1897, **[32]** a matter which, by international law, is not solely within the domestic jurisdiction of France as such jurisdiction is defined in this opinion.

FOR THESE REASONS:

The Court is of the opinion that the dispute referred to in the Resolution of the Council of the League of Nations of October 4th, 1922, is not, by international law, solely a matter of domestic jurisdiction (Article 15, paragraph 8, of the Covenant), and therefore replies to the question submitted to it in the NEGATIVE.

Dogmatische Einordnung

1. a) Innere Angelegenheiten eines Staates, welche seiner ausschließlichen Regelungsgewalt unterliegen, sind solche, die nicht vom Völkerrecht geregelt werden. Die Reichweite dieses *domaine réservé* des Staates hängt dementsprechend vom Entwicklungsstand des Völkerrechts ab. (S. 23 f.)

b) Der *domaine réservé* eines Staates wird nach Maßgabe seiner völkerrechtlichen Verpflichtungen gegenüber anderen Staates eingeschränkt. Diese Beschränkung wirkt relativ, d.h. im Verhältnis zu denjenigen Staaten, welche berechtigt sind, die betreffenden Verpflichtungen geltend zu machen (S. 24).

c) Für eine Beschränkung des *domaine réservé* eines Staates genügt es nicht, daß ein anderer Staat eine Streitigkeit vor ein internationales Forum bringt oder sich auf völkerrechtliche Verpflichtungen des ersten Staates beruft. Erforderlich ist vielmehr, daß die geltend gemachten Verpflichtungen tatsächlich von juristischer Bedeutung für die Beurteilung des staatlichen Verhaltens sind (S. 25 f.). Dies ist z.B. der Fall, wenn es insoweit auf die Auslegung völkerrechtlicher Verträge oder die Anwendung des allgemeinen Völkervertragsrechts ankommt (S. 28-30).

2. Die Frage, ob ein Staat zur Regelung der Staatsangehörigkeit in von ihm beherrschten Protektoraten zuständig ist, richtet sich nach der (vertraglichen) Ausgestaltung des Protektoratsverhältnisses im Einzelfall sowie ggf. nach der Anerkennung dieses Verhältnisses durch dritte Staaten. Es handelt sich somit nicht um eine innere Angelegenheit des Protektorstaates (S. 27 f.).

3. Eine Vertragsnorm, die eine Ausnahmeregelung zu anderen Bestimmungen des Vertrages enthält, ist grundsätzlich nicht extensiv auszulegen (S. 25).

4. Das Gutachtenverfahren des (Ständigen) Internationalen Gerichtshofs kann mit dem Einverständnis der Parteien faktisch dazu genutzt werden, eine zwischen ihnen entstandene Streitigkeit friedlich beizulegen[1].

Zur Vertiefung

N. Berman, The Nationality Decrees Case, or, Of Intimacy and Consent, Leiden JIL 13 (2000), 265; *C.N. Gregory*, An Important Decision by the Permanent Court of International Justice, AJIL 17 (1923), 298; *P. de Vineuil*, Les leçons du quatrième avis consultatif de la Cour Permanente de Justice Internationale, Rev. droit int. 50 (1923), 291.

1 Für den Fall, dass dieses Einverständnis fehlt, vgl. *Status of Eastern Carelia* (PCIJ Series B No. 5) sowie den IGH in *Interpretation of Peace Treaties* (ICJ Reports 1950, 65 (71 f.)), *Namibia* (→Nr. 22), §§ 30-35 und *Western Sahara* (→ Nr. 24), §§ 27-42.

2. Case of the S.S. „Wimbledon"

Urteil vom 17. August 1923 – PCIJ Series A No. 1

Sachverhalt

Am 21. März 1921 verweigerten die deutschen Behörden dem britischen Dampfschiff *Wimbledon* die Durchfahrt durch den Kieler Kanal (Nordostseekanal). Das Schiff war von einer französischen Gesellschaft gechartert worden, um Waffen und Munition nach Danzig zu bringen. Das Deutsche Reich berief sich zur Begründung auf seine Neutralitätsvorschriften im Zusammenhang mit dem Krieg zwischen Rußland und Polen. Die französische Regierung beanspruchte dagegen das Recht der Durchfahrt auf der Grundlage von Art. 380 des Versailler Friedensvertrages, der den Kanal für Schiffe aller Nationen, die sich im Frieden mit Deutschland befänden, geöffnet hatte. Nachdem Verhandlungen ergebnislos blieben, verklagten Frankreich, das Vereinigte Königreich, Italien und Japan das Deutsche Reich vor dem Gerichtshof. Dieser entschied in seiner ersten streitigen Entscheidung mit Mehrheit, daß die Verweigerung der Durchfahrt gegen den Versailler Vertrag verstieß und das Deutsche Reich daher Schadensersatz zu zahlen habe.

Aus den Gründen

[20] III.

The first question to be considered is whether proceedings could be instituted by the four Governments above mentioned in the terms of the Application filed. The Respondent has left this point to the appreciation of the Court.

The Court has no doubt that it can take cognizance of the application instituting proceedings in the form in which it has been submitted. It will suffice to observe for the purposes of this case that each of the four Applicant Powers has a clear interest in the execution of the provisions relating to the Kiel Canal, since they all possess fleets and merchant vessels flying their respective flags. They are therefore, even though they may be unable to adduce a prejudice to any pecuniary interest, covered by the terms of Article 386, Paragraph 1 of which is as follows:

> „In the event of violation of any of the conditions of Articles 380 to 386, or of disputes as to the interpretation of these articles, any interested Power can appeal to the jurisdiction instituted for the purpose by the League of Nations".

[21] IV.

The question upon which the whole case depends is whether the German authorities were entitled to refuse access to and passage through the Kiel Canal to the S.S. „Wimbledon" on March 21st, 1921, under the conditions and circumstances in which they did so.

The reply to this question must be sought in the provisions devoted by the Peace Treaty of Versailles to the Kiel Canal, in Part XII, entitled „Ports, Waterways and Railways", Section VI. This Section commences with a provision of a general and peremptory character, contained in Article 380, which is as follows:

> "The Kiel Canal and its approaches shall be maintained free and open to the vessels of commerce and of war of all nations at peace with Germany on terms of entire equality".

Then follow various provisions intended to facilitate and regulate the exercise of this right of free passage. Article 381, after mentioning that „the nationals, property and vessels of all Powers, shall, in respect of charges, facilities, and in all other respects, be treated on a footing of perfect equality in the use of the canal ...", adds that „no impediment shall be placed on the movement of persons or vessels other than those arising out of police, customs, sanitary, emigration or immigration regulations, and those relating to the import and export of prohibited goods, and that such regulations must be reasonable and uniform and must not unnecessarily impede traffic".

Again, Article 382 forbids the levying of charges upon vessels using the canal or its approaches other than those intended to cover, in an equitable manner, the cost of maintaining in a navigable condition, or of improving, the canal or its approaches, or to meet expenses incurred in the interests of navigation; furthermore, Article 383 provides for the **[22]** placing of goods in transit under seal or in the custody of customs' agents, and Article 385 places Germany under the obligation to take all suitable measures to remove any obstacle or danger to navigation and to ensure the maintenance of good conditions of navigation, whilst, at the same time, forbidding Germany to undertake any works of a nature to impede navigation on the canal or its approaches.

The claim advanced by the Applicants, that the S.S. „Wimbledon" should have enjoyed the right of free passage through the Kiel Canal, is based on the general rule embodied in Article 380 of the Treaty of Versailles. (...)

The Court considers that the terms of article 380 are categorical and give rise to no doubt. It follows that the canal has ceased to be an internal and national 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, and that it has become an international waterway intended to provide under treaty guarantee easier access to the Baltic for the benefit of all nations of the world. Under its new regime, the Kiel Canal must be open, on a footing of equality, to all vessels, without making any distinction between war vessels and vessels of commerce, but on one express condition, namely, that these vessels must belong to nations at peace with Germany.

[23] The right of the Empire to defend herself against her enemies by refusing to allow their vessels to pass through the canal is therefore proclaimed and recognised. In making this reservation in the event of Germany not being at peace with the nation whose vessels of war or of commerce claim access to the canal, the Peace Treaty clearly contemplated the possibility of a future war in which Germany was involved. 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 the German Empire, the Treaty would not have failed to say so. It has not said so and this omission was no doubt intentional.

The intention of the authors of the Treaty of Versailles to facilitate access to the Baltic by establishing an international regime, and consequently to keep the canal open at all times to foreign vessels of every kind, appears with still greater force from a comparison of the wording of Article 380 with that of the other provisions to be found in Part XII.

Although the Kiel Canal, having been constructed by Germany in German territory, was, until 1919, an internal waterway of the state holding both banks, the Treaty has taken care not to assimilate it to the other internal navigable waterways of the German Empire. A special section has been created at the end of Part XII, dealing with ports, waterways and railways, and in this special section rules exclusively designed for the Kiel Canal have been inserted; these rules differ on more than one point from those to which other internal navigable waterways of the Empire are subjected by Articles 321 to 327. This difference appears more especially from the fact that the Kiel Canal is open to the war vessels and transit traffic of all nations at peace with Germany, whereas free access to the other German navigable waterways referred to above is limited to the Allied and Associated Powers alone. This comparison furnishes a further argument with regard to the construction of Article 380, over and above those already deduced from its letter and spirit.

The provisions relating to the Kiel Canal in the Treaty of **[24]** Versailles are therefore self-contained. If they had to be supplemented and interpreted by the aid of those referring to the inland navigable waterways of Germany in the previous Sections of Part XII, they would lose their „raison d'être", such repetitions as are found in them would be superfluous and there would be every justification for surprise at the fact that, in certain cases, when the provisions of Articles 321 to 327 might be applicable to the canal, the authors of the Treaty should have taken the trouble to repeat their terms or re-produce their substance.

The idea which underlies Article 380 and the following articles of the Treaty is not to be sought by drawing an analogy from these provisions but rather by arguing *a contrario,* a method of argument which excludes them.

In order to dispute, in this case, the right of the S.S. „Wimbledon" to free passage through the Kiel Canal under the terms of Article 380, the argument has been urged upon the Court that this right really amounts to a servitude by international law resting upon Germany and that, like all restrictions or limitations upon the exercise of sovereignty, this servitude must be construed as restrictively as possible and confined within its narrowest limits, more especially in the sense that it should not be allowed to affect the rights consequent upon neutrality in an armed conflict. The Court is not called upon to take a definite attitude with regard to the question, which is moreover of a very controversial nature, whether in the domain of international law, there really exist servitudes analogous to the servitudes of private law. Whether the German Government is bound by virtue of a servitude or by virtue of a contractual obligation undertaken towards the Powers entitled to benefit by the terms of the Treaty of Versailles, to allow free access to the Kiel Canal in time of war as in time of peace to the vessels of all nations, the fact remains that Germany has to submit to an important limitation of the exercise of the sovereign rights which no one disputes that she possesses over the Kiel Canal. This fact constitutes a sufficient reason for the restrictive interpretation, in case of doubt, of the clause which produces such a limitation. But the Court feels obliged to stop at the point where the so-called **[25]** restrictive interpretation would be contrary to the plain terms of the article and would destroy what has been clearly granted.

The argument has also been advanced that the general grant of a right of passage to vessels of all nationalities through the Kiel Canal cannot deprive Germany of the exercise of her rights as a neutral power in time of war, and place her under an obligation to allow the passage through the canal of contraband destined for one of the belligerents; for, in this wide sense, this grant would imply the abandonment by Germany of a personal and imprescriptible right, which forms an essential part of her sovereignty and which she neither could nor intended to renounce by anticipation. This contention has not convinced the Court; it conflicts with general considerations of the highest order. It is also gainsaid by consistent international practice and is at the same time contrary to the wording of Article 380 which clearly contemplates time of war as well as time of peace. 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. No doubt any convention creating an obligation of this kind places a restriction upon the exercise of the sovereign rights of the State, in the sense that it requires them to be exercised in a certain way. But the right of entering into international engagements is an attribute of State sovereignty.

As examples of international agreements placing upon the exercise of the sovereignty of certain states restrictions which though partial are intended to be perpetual, the rules established with regard to the Suez and Panama Canals were cited before the Court. These rules are not the same in both cases; but they are of equal importance in that they demonstrate that the use of the great international waterways, whether by belligerent men-of-war, or by belligerent or neutral merchant ships carrying contraband, is not regarded as incompatible with the neutrality of the riparian sovereign.

By the Convention of Constantinople of October 29th, **[26]** 1888 the Governments of Austria-Hungary, France, Germany, Great Britain, Italy, Holland, Russia, Spain and Turkey, declared, on the one hand, that the Suez Maritime Canal should „always be free and open, in time of war as in time of peace, to every vessel of commerce or of war without distinction of flag" including even the vessels of countries at war with Turkey, the territorial sovereign, and on the other hand, that they would not in any way „interfere with the free use of the canal, in time of war as in time of peace", the right of self-defence on the part of the territorial sovereign being nevertheless reserved up to a certain point; no fortifications commanding the canal may be erected. In fact under this regime belligerent men-of-war and ships carrying contraband have been permitted in many different circumstances to pass freely through the Canal; and such passage has never been regarded by anyone as violating the neutrality of the Ottoman Empire.

For the regime established at Panama, it is necessary to consult the Treaty between Great Britain and the United States of November 18th, 1901, commonly called the Hay-Pauncefote Treaty, and the Treaty between the United States and the Republic of Panama of November 18th, 1903. In the former, while there are various stipulations relating to the „neutralisation" of the Canal, these stipulations being to a great extent declaratory of the rules which a neutral State is bound to observe, there is no clause guaranteeing the free passage of the canal in time of war as in time of peace without distinction of flag and without reference to the possi-

ble belligerency of the United States, nor is there any clause forbidding the United States to erect fortifications commanding the Canal. On the other hand, by the Treaty of November 18th, 1903, the Republic of Panama granted to the United States „in perpetuity the use, occupation and control" of a zone of territory for the purposes of the canal, together with the use, occupation and control in perpetuity of any lands and waters outside the zone which might be necessary and convenient for the same purposes; and further granted to the United States in such zone and in the auxiliary lands and waters „all the rights, power and authority ... which the United **[27]** States would possess and exercise if it were the sovereign of the territory ... to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power or authority". The Treaty further conceded to the United States the right to police the specified lands and waters with its land and naval forces „and to establish fortifications for these purposes". In view of these facts, it will be instructive to consider the view which the United States and the nations, of the world have taken of the rights and the liabilities of the United States as the builder and owner of the Panama Canal exercising, subject always to the stipulations of existing treaties, sovereign powers and exclusive jurisdiction over the Canal and the auxiliary territory and waters.

By the Proclamation issued by the President of the United States on November 13th, 1914, for the regulation of the use of the Panama Canal and its approaches in the world war, express provision was made for the passage of men-of-war of belligerents as well as of prizes of war, and no restriction whatever was placed upon the passage of merchant ships of any nationality carrying contraband of war. But by the Proclamation of May 23rd, 1917, issued after the entrance of the United States into the war, the use of the canal by ships, whether public or private, of an enemy or the allies of an enemy, was forbidden, just as, by Article 380 of the Treaty of Versailles, the Kiel Canal is closed to the vessels of war and of commerce of nations not at peace with Germany.

In the Proclamation of May 23rd, 1917, the carriage of contraband is not mentioned; but, by the Proclamation of December 3rd, 1917, issued under the Act of Congress of June 15th, 1917, the Secretary of the Treasury was authorised to make regulations governing the movement of vessels in territorial waters of the United States; and by a subsequent Executive Order, issued under the same law, the Governor of the Panama Canal was authorised to exercise within the territory and waters of the canal the same powers as were conferred by the law upon the Secretary of the Treasury. By **[28]** a Proclamation of August 27th, 1917, it was made unlawful to take munitions of war out of the United States or its territorial possessions to its enemies without licence.

It has never been alleged that the neutrality of the United States, before their entry into the war, was in any way compromised by the fact that the Panama Canal was used by belligerent men-of-war or by belligerent or neutral merchant vessels carrying contraband of war.

The precedents therefore afforded by the Suez and Panama Canals invalidate in advance the argument that Germany's neutrality would have necessarily been imperilled if her authorities had allowed the passage of the „Wimbledon" through the Kiel Canal, because that vessel was carrying contraband of war consigned to a

state then engaged in an armed conflict. Moreover they are merely illustrations of the general opinion according to which when an artificial waterway connecting two open seas has been permanently dedicated to the use of the whole world, such waterway is assimilated to natural straits in the sense that even the passage of a belligerent man-of-war does not compromise the neutrality of the sovereign State under whose jurisdiction the waters in question lie.

The next question to be considered is whether Germany was entitled to invoke her rights and duties as a neutral power and the provisions of her Neutrality Orders issued in connection with the Russo-Polish war as a ground for her refusal to allow the „Wimbledon" to enter the Kiel Canal, in spite of the categorical terms of Article 380 of the Treaty of Versailles.

The first of the Orders above mentioned dated July 25th, 1920, contains the following:

> „In consequence of Germany's neutrality in the war which has arisen between the Republic of Poland and the Federal Socialist Republic of the Russian Soviets ... the Government enacts as follows :
>
> Article 1: The export and transit of arms, munitions, **[29]** powder and explosives and other articles of war material is prohibited in so far as these articles are consigned to the territories of the Polish Republic or of the Federal Socialist Republic of the Russian Soviets". (...)

The export prohibition contained in the German Neutrality Order clearly could not apply to the passage through the Canal of the articles enumerated when such articles were dispatched from one foreign country and consigned to another foreign country. Nor does the word „transit" appear to refer to the Kiel Canal; it no doubt only refers to the German territory to which the stipulations of Article 380 are not applicable. In any case a neutrality order, issued by an individual State could not prevail over the provisions of the Treaty of Peace.

Since Article 380 of the Treaty of Versailles lays down that the Kiel Canal shall be maintained free and open to the vessels of commerce and war of all nations at peace with Germany, it is impossible to allege that the terms of this article preclude, in the interests of the protection of Germany's neutrality, the transport of contraband of war. The German Government had not at the time when the „Wimbledon" incident took place claimed any right to close the Canal to ships of war of belligerent nations at peace with Germany. On the contrary, in the note of the President of the German Delegation to the President of the Conference of Ambassadors of April 20th, 1921, it is expressly stated that the German Government claimed to apply its neutrality orders only to vessels of commerce and not to vessels of war. The Court is not called upon to give an opinion in regard to the legal effect of such statement; but if, as seems certain, it contains, in regard to the passage of belligerent war vessels through the Kiel Canal, an accurate interpretation of the Treaty of Versailles, it follows *a fortiori* that the passage of neutral vessels carrying contraband of war is authorised by Article 380, and cannot be **[30]** imputed to Germany as a failure to fulfil its duties as a neutral. If, therefore, the „Wimbledon", making use of the permission granted it by Article 380, had passed through the Kiel Canal, Germany's neutrality would have remained intact and irreproachable.

From the foregoing, therefore, it appears clearly established that Germany not only did not, in consequence of her neutrality, incur the obligation to prohibit the passage of the „Wimbledon" through the Kiel Canal, but, on the contrary, was entitled to permit it. Moreover under Article 380 of the Treaty of Versailles, it was her definite duty to allow it. She could not advance her neutrality orders against the obligations which she had accepted under this Article. Germany was perfectly free to declare and regulate her neutrality in the Russo-Polish war, but subject to the condition that she respected and maintained intact the contractual obligations which she entered into at Versailles on June 28th, 1919.

In these circumstances it will readily be seen that it would be useless to consider in this case whether the state of war between Russia and Poland, and with it Germany's neutrality, had or had not terminated at the date on which the „Wimbledon" incident occurred. In war time as in peace time the Kiel Canal should have been open to the „Wimbledon" just as to every vessel of every nation at peace with Germany.

B.

The Court having arrived at the conclusion that the respondent, Germany, wrongfully refused passage through the Canal to the vessel „Wimbledon", that country is responsible for the loss occasioned by this refusal, and must compensate the French Government, acting on behalf of the Company known as „Les Affréteurs réunis", which sustained the loss.

The claim for compensation formulated is tabulated as follows in the Case filed by the Applicants:

[31] 1. Demurrage: 11 days freight from March 21st to April 1st inclusive. The rate at which the vessel was chartered being 17/6 per ton per month and the vessel being of 6,200 tons deadweight, the monthly freight is £ 5.425; on the basis of the mean rate of exchange from March 20th to April 1st, 1921, that is to say 56 francs 284, the amount equivalent to 11 days freight is: 111.956,20

2. Deviation: 2 days estimated in the same manner 20.355,65

3. Fuel 8.437,50

4. Contribution of the vessel to the general expenses of the Company and compensation for loss of profit 33.333,33

Total: 174.082,68

with interest at 6 % per annum from March 21st, 1921.

After the statements by Counsel the claim under heading (4) was reduced to Frs. 25.000, and was finally composed as follows:

4a. Contribution of the vessel to the general expenses 13.508,35

4b. Stamp duty etc. 9.491,65

Other costs of recovery 2.000,00

Total: francs 25.000,00

And the total claim is thus reduced to 165.749,35.

As regards the first three items of the claim, which refer to the sums payable for freight during eleven days demurrage and two days deviation and the cost of fuel, the Court approves the estimates submitted. The respondent has not questioned their correctness; moreover these estimates are for the most part borne out by the evidence produced during the proceedings. As regards the number of days it appears to be clear that the vessel, in order to obtain recognition of its right, was

justified in awaiting for a reasonable time the result of the diplomatic negotiations entered into on the subject, before continuing its voyage.

[32] The fourth item, which relates to the claim for repayment of the share of the vessel in the general expenses of the Company, has been contested by the respondent. The Court considers that he is justified in doing so. The expenses in question are not connected with the refusal of passage. The Court has arrived at the same conclusion with regard to the claim for Government stamp duty and other costs of recovery included under the same heading.

As regards the rate of interest, the Court considers that in the present financial situation of the world and having regard to the conditions prevailing for public loans, the 6 % claimed is fair. This interest, however, should run, not from the day of the arrival of the „Wimbledon" at the entrance to the Kiel Canal, as claimed by the applicants, but from the date of the present judgment, that is to say from the moment when the amount of the sum due has been fixed and the obligation to pay has been established.

The Court does not award interim interest at a higher rate in the event of the judgment not being complied with at the expiration of the time fixed for compliance. The Court neither can nor should contemplate such a contingency. With regard to the limit of time for compliance, the Court is of opinion that the exigencies of the organisation of government services and financial and administrative regulations necessitate a longer time than that suggested by the applicants for the payment of the sum for which Germany is liable. For this reason the Court has fixed the time at three months. Payment shall be effected in French francs. This is the currency of the applicant in which his financial operations and accounts are conducted, and it may therefore be said that this currency gives the exact measure of the loss to be made good.

Article 64 of the Statute lays down that each party shall bear its own costs unless otherwise decided by the Court. The Court sees no reason for departing from this general rule. (…)

Dogmatische Einordnung

1. Aus einer Verletzung der Schiffahrtsbestimmungen in Art. 380 ff. des Versailler Vertrages resultierte für jede interessierte Vertragspartei gemäß Art. 386 Abs. 1 des Vertrages ein Klagerecht vor dem Gerichtshof. Das notwendige „Interesse" ergab sich für alle Staaten aus ihrem Status als Flaggenstaaten (S. 20). Damit statuierte der Versailler Vertrag ausdrücklich einen Durchsetzungsmodus für Vertragsbestimmungen mit einer bestimmten Normstruktur, die wir heute als *erga-omnes*-Pflichten bezeichnen.

2. a) Durch die Öffnungsklausel in Art. 380 des Versailler Vertrages wurde der Kieler Kanal zu einer internationalen Wasserstraße, die allen Staaten der Welt offenstehen sollte. Da dies offensichtlich auch für Nichtvertragsparteien galt, handelte es sich um einen Vertrag zugunsten Dritter (S. 22).

b) Ob es im Völkerrecht wirklich so etwas wie „internationale Servituten" gibt, bleibt offen (S. 24).