29

COUR INTERNATIONALE DE JUSTICE

MÉMOIRES, PLAIDOIRIES ET DOCUMENTS

AFFAIRE DE L'OR MONÉTAIRE PRIS A ROME EN 1943

(ITALIE c. FRANCE, ROYAUME-UNI DE GRANDE-BRETAGNE ET D'IRLANDE DU NORD ET ÉTATS-UNIS D'AMÉRIQUE)

INTERNATIONAL COURT OF JUSTICE

PLEADINGS, ORAL ARGUMENTS, DOCUMENTS

CASE OF THE MONETARY GOLD REMOVED FROM ROME IN 1943

(ITALY *v.* FRANCE, UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AND UNITED STATES OF AMERICA)

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ARRÊT DU 15 JUIN 1954 (QUESTION PRÉLIMINAIRE)

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5. STATEMENT OF THE GOVERNMENT OF THE UNITED STATES OF AMERICA ON THE PRELIMINARY QUESTION OF JURISDICTION RAISED BY THE GOVERNMENT OF ITALY

I. *Introduction*

The present case concerns certain claims to gold which is subject to distribution under the Paris Agreement on Reparation from Germany, on the Establishment of an Inter-Allied Reparation Agency and on the Restitution of Monetary Gold. The Agreement came into force on January 24, 1946. Part III of the Agreement provided for the pooling of "monetary gold found in Germany by the Allied Forces"; this gold was to be distributed "as restitution among the countries participating in the pool in proportion to their respective losses of gold through looting or by wrongful removal to Germany". The Governments of France, the United Kingdom, and the United States—as occupying Powers in Germany—were to take appropriate steps to carry out the agreed restitution, upon receipt from the participating countries of proof concerning gold losses.

In 1943 Germany removed from Rome a quantity of monetary gold constituting the gold reserve which had backed the note issue of the National Bank of Albania. Eighty-eight and one-half percent of the stock of the National Bank of Albania was owned by the Government of Italy.

France, the United Kingdom and the United States established a Tripartite Commission for the Restitution of Monetary Gold on September 27, 1946. This Commission was set up for the discharge of the three countries' responsibilities under Part III of the Paris Agreement. The decisions of the Commission were required to be unanimous.

France, the United Kingdom, the United States, and Albania were all parties to the Paris Agreement of January 24, 1946. On December 16, 1947, the Governments of France, the United Kingdom, the United States, and Italy concluded a protocol, pursuant to Part III D of the Paris Agreement, by which Italy was to participate in the restitution of gold from the pool.

The Tripartite Gold Commission conducted proceedings relative to the gold removed from Rome by Germany. On November 17, 1950, the Commission decided to refer the claims concerning this gold to the Governments of France, the United Kingdom and the United States. These three Governments agreed on April 25, 1951, to refer to an arbitrator designated by the President of the International Court of Justice the questions whether "(i) Albania has

established that 2,338.7565 kilograms of monetary gold, which were looted by Germany from Rome in 1943, belonged to Albania, or (ii) Italy has established that 2,338.7565 kilograms of monetary gold, which were looted by Germany from Rome in 1943, belonged to Italy, or (iii) neither Albania nor Italy has established that 2,338.7565 kilograms of monetary gold, which were looted by Germany from Rome in 1943, belonged to either of them". Both Italy and Albania were entitled to present their respective cases to the arbitrator. An arbitrator was designated in accordance with the agreement, and his Opinion was given on February 20, 1953. The arbitrator concluded that the gold belonged to Albania within the meaning of Part III of the Paris Agreement.

The Governments of France, the United Kingdom and the United States issued a statement to accompany the Agreement of April 25, 1951. That statement read, in part, as follows:

> "The three Governments have agreed that, if the opinion of the arbitrator is that Albania has established a claim under Part III of the Paris Act to 2,338.7565 kilograms of monetary gold looted by Germany, they will deliver the gold to the United Kingdom in partial satisfaction of the judgment in the Corfu Channel case unless within 90 days from the date of the communication of the arbitrator's opinion to Italy and Albania either *(a)* Albania makes an application to the International Court of Justice for the determination of the question whether it is proper that the gold, to which Albania has established a claim under Part III, should be delivered to the United Kingdom in partial satisfaction of the Corfu Channel judgment; or *(b)* Italy makes an application to the International Court of Justice for the determination of the question, whether by reason of any right which she claims to possess as a result of the Albanian law of January 13, 1945, or under the provisions of the Italian Peace Treaty, the gold should be delivered to Italy rather than to Albania and agrees to accept the jurisdiction of the Court to determine the question whether the claim of the United Kingdom or of Italy to receive the gold should have priority, if this issue should arise.
>
> The Governments of the French Republic, the United Kingdom and the United States declare that they will accept as defendants the jurisdiction of the Court for the purpose of the determination of such applications by Italy or by Albania or by both.
>
> The three Governments agree to conform in the matter of the delivery of gold with any decisions of the International Court of Justice given as the result of such applications by Italy or by Albania."

Albania had not appeared in the proceedings before the arbitrator, and made no application to the International Court of Justice within ninety days from February 20, 1953. Italy, however, which had appeared in the proceedings before the arbitrator, filed an Application with the Court on May 19, 1953. Italy accompanied this Application with the deposit of a declaration that the Government of Italy accepted the jurisdiction of the Court, in accordance

with the United Nations Security Council resolution of October 15, 1946, for the purposes of part *(b)* in the fifth paragraph of the tripartite statement accompanying the agreement of April 25, 1951.

Subsequent to the filing of the Italian Application with the Court, time-limits were fixed for the deposit of a Memorial and Counter-Memorial in the case. November 1, 1953, was the date fixed for the deposit of the Memorial. On October 30, 1953, the Agent of the Government of Italy filed in the Registry of the International Court of Justice a document entitled "Case of the Monetary Gold removed from Rome in 1943—Preliminary Question". In this document Italy requested the Court to adjudicate on the preliminary question of its jurisdiction. On November 3, 1953, the Court suspended the proceedings on the merits, and fixed December 15, 1953, as the time-limit within which the Government of Italy might present a written statement defining its position, together with supporting documents. A statement and annexed documents were submitted to the Court by Italy before the expiration of that time-limit. A date was also set by the Court for the filing of written statements by the other Governments concerned in the case. This time-limit was extended, on the request of the United Kingdom, until March 31, 1954.

II. *Interest and attitude of the United States in the present case*

The Government of the United States has no claims with respect to any of the gold involved in the present proceeding. The United States is a party in the present case before this Court only because it is one of the three countries which, under the Paris Agreement, were to distribute monetary gold found in Germany by the Allied Forces. The gold involved here has not yet been distributed.

Since the United States stands in the position of a stakeholder, concerned only to give effect to the engagements made in relevant international agreements and to discharge any other obligations it may have in the matter, the Government of the United States does not submit the present written statement to urge the Court to make any particular disposition of the question now before it. Instead, the Government of the United States wishes to take this opportunity to suggest some considerations which seem relevant to the question of the Court's jurisdiction.

III. *Action by the Applicant in this case to challenge the Court's jurisdiction*

Italy made Application to the International Court of Justice, in accordance with a joint statement issued by the Governments of France, the United Kingdom and the United States, in order to assert that the gold involved here should be delivered to Italy. In the Italian Application, the contentions of Italy were based upon (1) the Italian Government's *ownership* of 88.5% of the

stock of the Bank of Albania (whose gold reserve had been removed to Germany from Rome in 1943), and (2) an Albanian law of January 13, 1945, which purported to abrogate a Banking Convention concluded by Albania in 1925 with a company wholly owned by the Italian Government and to nationalize, without compensation, the assets of the National Bank of Albania. In the Application Italy further reserved the right to assert a claim to the monetary gold in question by virtue of the Treaty of Peace with Italy. In the written statement of Italy concerning the preliminary question of jurisdiction, it is said that Italy's claim, based upon the Albanian law of January 13, 1945, would require a determination of Albania's international responsibility with respect to that law and its consequences. According to the Italian statement, such a determination could only be made by the Court if Albania had consented to the Court's jurisdiction. Italy maintains that Albania has not given its consent, and that, therefore, the Court lacks jurisdiction to pass upon the Italian claim.

As the Italian Government itself recognizes, a somewhat anomalous situation is created when an applicant in a case before the Court proceeds to assert that the Court does not have jurisdiction over the claim submitted to the Court by the applicant. The Statute and Rules of the Court do not appear to have envisaged such a situation.

Article 36 of the Statute states that "The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force". In the present case the three respondents, France, the United Kingdom, and the United States, consented in advance, by the tripartite statement accompanying the 1951 Arbitration Agreement, to accept the jurisdiction of the International Court of Justice in the suit which Italy has brought. Italy invoked the jurisdiction of the Court in filing its Application. Contemporaneously Italy filed a declaration accepting the Court's jurisdiction in satisfaction of the requirement in the tripartite statement that Italy agree "to accept the jurisdiction of the Court to determine the question whether the claim of the United Kingdom or of Italy to receive the gold should have priority, if this issue should arise".

By the tripartite statement accompanying the Agreement of April 25, 1951, the Governments of France, the United Kingdom and the United States made two offers of a contractual nature. One offer was made to Albania ; the other to Italy. The latter was an offer by the three Governments to submit to the jurisdiction of the Court for the adjudication of certain specified issues upon the Application of Italy. By the act of filing its Application, accompanied by the Italian declaration accepting the Court's jurisdiction, the Italian Government accepted the offer of the three Governments.

Article 32, paragraph 2, of the Rules provides, in part:

> "When a case is brought before the Court by means of an application, the application must, as laid down in Article 40, paragraph 1, of the Statute, indicate the party making it, the party against whom the claim is brought and the subject of the dispute. It must also, so far as possible, specify the provision on which the applicant founds the jurisdiction of the Court...."

In its Application to the Court [see page 12 of this volume] the Italian Government has relied on the tripartite statement as the basis of the Court's jurisdiction. If Italy had considered that Albania was a necessary party in the case, the normal course would have been for Italy to name Albania as one of the respondents. If Italy had doubted that Albania would be subject to the Court's jurisdiction, it would have made its application on the principle of *forum prorogatum*. Cf. *The Corfu Channel Case*, [1948] I.C.J. 15; *Minority Schools in Upper Silesia*, [1928] P.C.I.J., Series A, No. 15, 4; see *Anglo-Iranian Oil Co. Case*, [1952] I.C.J. 93, 113-14. This would have been done in the hope that Albania would come before the Court and in fact accept the Court's jurisdiction. In such a case, the Court itself must ultimately decide whether it has jurisdiction. Article 53 (2) of the Statute of the International Court of Justice. If the Court decides that it has not, the case will be dismissed. *Anglo-Iranian Oil Co. Case, supra.*

It is evident from the history of Article 32 of the Rules of Court that the inclusion of the phrase "so far as possible" in that Article was designed to allow for invocation of the principle of *forum prorogatum*. See [1936] P.C.I.J., Series D, Third Addendum to No. 2, 54-55, 64-72, 104, 153-60, 573-75, 728; *id.*, Fourth Addendum to No. 2, 87-103. It does not appear that the Article was designed to enable an applicant to institute proceedings against respondents accepting the Court's jurisdiction and then to object to the Court's jurisdiction in the case because a State not named as a party was not believed to have accepted the Court's jurisdiction.

Article 62 of the Rules of Court provides for the filing of preliminary objections in a contentious case. The Italian Government asserts, in its statement on the preliminary question of jurisdiction, that this Article does not "prevent the party which instituted the proceedings from being the party filing the objection". While the Article does not expressly prevent, there is a question whether the Article, read as a whole and in the light of its history, should be held to cover a preliminary objection raised by an applicant against the Court's jurisdiction to consider the case which the applicant has submitted.

Paragraph 1 of Article 62 of the Rules of Court derives from paragraph 1 of Article 38 of the 1931 Rules of the Permanent Court of International Justice, which read as follows:

> "When proceedings are begun by means of an application, any preliminary objection shall be filed after the filing of the Case by

> the applicant and within the time fixed for the filing of the Counter-Case."

This language strongly implies that only a party against whom a case was filed could make a preliminary objection to the jurisdiction of the Court.

In the 1936 Revision of the Rules, this provision was changed to read as it now appears in the present Article 62 :

> "A preliminary objection must be filed by a party at the latest before the expiry of the time-limit fixed for the delivery of its first pleading."

The history of this revision indicates that its purpose was to expand the Article to cover cases brought pursuant to a special agreement as well as those brought by means of an application. [1936] P.C.I.J., Series D, Third Addendum to No. 2, 84-97, 148-50, 644-46, 705-08, 733, 767-68, 819, 903. There is no intimation anywhere that the judges envisaged that under the revised rule a moving party would be able to object to the Court's jurisdiction in a case which it brought to the Court, regardless of whether the case was brought by an application or pursuant to a special agreement.

Several of the judges opposed extension of the rule to cover cases other than those brought by application. Judge Anzilotti said that "it appeared to him inconceivable that a State that had signed a special agreement could come and inform the Court that it had no jurisdiction". *Id.* at 85. Other judges felt that the respondent in a case brought pursuant to a special agreement might have grounds for a preliminary objection based on jurisdiction or other reasons. None of the judges expressed any thought that under the revised rule a moving party would be able to object to the Court's jurisdiction over the case brought by it.

If the applicant State were successful in its challenge to the jurisdiction it had invoked, and the case were dismissed for want of jurisdiction, the applicant should not be able to derive legal advantage from the inconsistent course of action it had followed. In the present case the applicant State should not be able later to assert, for its own purposes, that the situation then differed from what it would be if the applicant had withdrawn its application or had never filed any application within the time permitted by the 1951 tripartite statement. To hold otherwise would permit the applicant State to improve its own position, at the expense of others, by first invoking a tribunal's jurisdiction and then denying it.

In municipal law, the doctrine of estoppel is applied in many fields. A party which has made an assertion necessary to its case is not permitted, subsequently in a lawsuit, to deny that assertion to the detriment of another party. This doctrine of estoppel exists also in international law. The Permanent Court of International

Justice and the International Court of Justice have applied the doctrine in several important cases brought before them. *Legal Status of Eastern Greenland*, (1933) P.C.I.J., Series A/B, No. 53, 73 ; see *International Status of South-West Africa*, (1950) I.C.J. 128, 135-36. International arbitral tribunals apply the doctrine as a matter of course. For example, the Germano-Polish Mixed Arbitral Tribunal, in its decision of December 2, 1925, held that Poland would be estopped to deny the German nationality of persons whose estates had been liquidated on the ground that they were Germans. (1925-26) *Annual Digest of Public International Law Cases*, 419.

By the Washington Agreement of 1951 the three Powers declared their intention to make a distribution of the gold in question, taking into account the claims of interested governments and allowing for an adjudication on the merits of these claims. No government may be permitted to frustrate the carrying out of this intention by first invoking the jurisdiction of the Court and then securing a dismissal of the proceedings on jurisdictional grounds.

IV. *Question whether Albania is an indispensable Party in the present case*

A. Issues before the Court

In its "Statement on the Preliminary Question of Jurisdiction" the Italian Government cited this Court's Advisory Opinions of April 11, 1949, and of March 30, 1950, for the proposition that the Court cannot have jurisdiction in contentious cases without the consent of the parties. [1949] I.C.J. 174, 178 ; [1950] I.C.J. 65, 71. This would seem to be axiomatic, but the Italian contention appears to beg the question of who are indispensable parties to this particular case.

Article 36 of the Statute provides that the Court shall have jurisdiction over "all cases which the parties refer to it....". The present case was referred by Italy and the three respondent countries by the steps outlined earlier in the present statement. Under Article 62, and perhaps also Article 63, of the Court's Statute, Albania can ask to intervene if it feels that it has a legal interest in the present case. The inclusion of these Articles, taken in conjunction with Article 36, shows that the Statute allows two or more States to have their claims adjudicated despite possible legal interests of third States. The real question is whether, despite all of this, there is any validity to Italy's contention that Albania is an indispensable party to the case between Italy on the one hand and France, the United Kingdom and the United States on the other.

The present case is materially different from a suit in which Italy might file with the Court an application directed to Albania,

claiming compensation on account of damage inflicted on Italy by the Albanian law of January 13, 1945, and in which Albania had not consented to the jurisdiction of the Court. Here Italy is suing three Powers to establish that her claim to gold held by them is superior to the claim of the United Kingdom to that gold. There is a *res*, and it is under the control of the three respondents named by Italy.

In the present instance the Governments of France, the United Kingdom and the United States have a responsibility under the Paris Agreement to dispose of certain gold found by the Allied Forces in Germany and now under the control of the three Powers. When the three Governments agreed to submit certain questions to an arbitrator for advice, they agreed at the same time on the steps they would take to dispose of the gold either in the event that Italy established a claim under Part III of the Paris Agreement or that Albania established a claim under the same provisions. If Italy's claim were established, the three Governments would accept that determination as decisive under the Paris Agreement. If, on the other hand, the arbitrator should decide that Albania had established its claim, the three Governments would deliver the gold in question to the United Kingdom in partial satisfaction of the unpaid judgment given by the International Court of Justice in the Corfu Channel case, "unless within 90 days from the date of the communication of the arbitrator's opinion to Italy and Albania either *(a)* Albania makes an application to the International Court of Justice for the determination of the question whether it is proper that the gold, to which Albania has established a claim under Part III, should be delivered to the United Kingdom in partial satisfaction of the Corfu Channel judgment; or *(b)* Italy makes an application to the International Court of Justice for the determination of the question, whether by reason of any right which she claims to possess as a result of the Albanian law of January 13, 1945, or under the provisions of the Italian Peace Treaty, the gold should be delivered to Italy rather than to Albania and agrees to accept the jurisdiction of the Court to determine the question whether the claim of the United Kingdom or of Italy to receive the gold should have priority, if this issue should arise".

Albania has made no application to the Court. The statement of the three Powers made it clear that in this event they would not deliver the gold in question to Albania. Thus, Albania's failure to receive the gold involved would not stem from any judgment of the International Court of Justice, but instead from the decision of the three Powers. For the same reason, Albania's failure to appear as a party in the present case could not affect the possibility of Albania's receiving the gold. Under the circumstances it is difficult to see that Albania is an indispensable party.

The case now before the Court concerns rights, as between the United Kingdom and Italy, with respect to a quantity of gold held by the Governments of France, the United Kingdom and the United States for distribution. The three Governments are in a position to dispose of the gold without Albania's agreement, and have declared their intention to do so in the absence of an Albanian application to this Court. A judgment of the Court settling rights between Italy and the United Kingdom in the present case would not bind Albania if the latter had not accepted the Court's jurisdiction and were not a party. Article 59 of the Statute of the Court states that

> "The decision of the Court has no binding force except between the parties and in respect of that particular case."

While it is true that certain contentions made by Italy relate to international obligations of Albania, any decision on these contentions, for the purpose of settling rights as between the United Kingdom and Italy, would not bind Albania.

In view of the above, it seems doubtful whether Albania must have accepted the jurisdiction of the Court and have become a party in the present case before the Court can properly adjudicate on the claims of Italy *vis-à-vis* the United Kingdom concerning the gold here in question.

B. The Statute's provisions on intervention

Not infrequently, a suit by one State against another may involve, directly or indirectly, the rights or interests of third States. The existence of such a situation does not preclude the original parties to the suit from securing an adjudication by the Court of their rights as between themselves. Rather than bar the Court from giving judgments in such cases and frustrate the desire of the original parties for an adjudication of issues directly concerning them, the Statute of the International Court of Justice includes a provision authorizing the intervention of a third State if "it has an interest of a legal nature which may be affected by the decision in the case". Article 62 provides that such a third State "may submit a request to the Court to be permitted to intervene.... It shall be for the Court to decide upon this request."

Thus, any State which considers that pending litigation before the International Court of Justice affects its own legal interests may protect those interests by coming into Court. Albania is free to do so now in the present suit, even though Albania chose not to make an application as envisaged in the tripartite statement accompanying the 1951 Agreement to submit certain issues to arbitration. Such intervention by a third State is a recognized procedure, and was resorted to in litigation before the Permanent Court of International Justice. *The Wimbledon*, [1923] P.C.I.J.,

Series A, No. 1, 11. The fact that a third State, in this case Albania, may not choose to intervene, for reasons considered sufficient by the third State, should not be held to make it impossible for the Court to give judgment on rights as between the original Parties in the suit.

The Agent of the Government of the
United States of America,
(Signed) Herman PHLEGER.