Abbreviated reference:

*I.C.J. Pleadings, Temple of Preah Vihear*, Vol. II

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# CASE CONCERNING THE TEMPLE OF PREAH VIHEAR

(CAMBODIA *v.* THAILAND)

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# AFFAIRE DU TEMPLE DE PRÉAH VIHÉAR

(CAMBODGE *c.* THAÏLANDE)

INTERNATIONAL COURT OF JUSTICE

PLEADINGS, ORAL ARGUMENTS, DOCUMENTS

# CASE CONCERNING THE TEMPLE OF PREAH VIHEAR

(CAMBODIA *v.* THAILAND)

**(General List No. 45—Judgments of 26 May 1961 and 15 June 1962)**

**VOLUME II**

**Oral Arguments.—Documents.—Correspondence**

COUR INTERNATIONALE DE JUSTICE

MÉMOIRES, PLAIDOIRIES ET DOCUMENTS

# AFFAIRE DU TEMPLE DE PRÉAH VIHÉAR

(CAMBODGE c. THAÏLANDE)

**(Rôle général n° 45 — Arrêts du 26 mai 1961 et du 15 juin 1962)**

**VOLUME II**

**Plaidoiries. — Documents. — Correspondance**

PRINTED IN THE NETHERLANDS

# CONTENTS[1] — TABLE DES MATIÈRES[2]

## PART II. ORAL ARGUMENTS

## DEUXIÈME PARTIE. PLAIDOIRIES

### SECTION A. ORAL ARGUMENTS CONCERNING THE PRELIMINARY OBJECTIONS

### SECTION A. PLAIDOIRIES RELATIVES AUX EXCEPTIONS PRÉLIMINAIRES

MINUTES. — PROCÈS-VERBAUX



ANNEX TO THE MINUTES. — ANNEXE AUX PROCÈS-VERBAUX



[1] The page references originally appearing in the oral arguments have been altered to correspond with the pagination of the present edition; references to Volume I of this edition are indicated by the figure **I** in bold type. Of the maps filed in the Registry by the Parties, only those which the Court deemed necessary for an understanding of the Judgment of 15 June 1962 have been reproduced in the present edition.

[2] Les renvois d'une plaidoirie à l'autre ont été modifiés pour tenir compte de la pagination de la présente édition; les renvois au volume I de la présente édition sont indiqués par le chiffre **I** en caractères gras. Des cartes déposées au Greffe par les Parties, seules sont reproduites dans la présente édition celles que la Cour a jugées nécessaires à l'intelligence de l'arrêt du 15 juin 1962.

## PART III. DOCUMENTS SUBMITTED TO THE COURT AFTER THE CLOSURE OF THE WRITTEN PROCEEDINGS

## TROISIÈME PARTIE. DOCUMENTS PRÉSENTÉS A LA COUR APRÈS LA FIN DE LA PROCÉDURE ÉCRITE

### SECTION A. DOCUMENTS FILED BY THE AGENT FOR THE GOVERNMENT OF CAMBODIA

### SECTION A. DOCUMENTS DÉPOSÉS PAR L'AGENT DU GOUVERNEMENT CAMBODGIEN

PART II

# ORAL ARGUMENTS

## PUBLIC HEARINGS

*held at the Peace Palace, The Hague, from 10 to 15 April 1961 and 26 May 1961 and from 1 to 31 March 1962 and 15 June 1962, the President, M. Winiarski, presiding*

DEUXIÈME PARTIE

# PLAIDOIRIES

## AUDIENCES PUBLIQUES

*tenues au Palais de la Paix, La Haye, du 10 au 15 avril 1961 et le 26 mai 1961 et du 1er au 31 mars 1962 et le 15 juin 1962, sous la présidence de M. Winiarski, Président*

SECTION A

# ORAL ARGUMENTS CONCERNING THE PRELIMINARY OBJECTIONS

PUBLIC HEARINGS

*held from 10 to 15 April 1961 and 26 May 1961, the President, M. Winiarski, presiding*

SECTION A

# PLAIDOIRIES CONCERNANT LES EXCEPTIONS PRÉLIMINAIRES

AUDIENCES PUBLIQUES

*tenues du 10 au 15 avril 1961 et le 26 mai 1961, sous la présidence de M. Winiarski, Président*

# MINUTES OF THE HEARINGS HELD FROM 10 TO 15 APRIL 1961

## YEAR 1961

### FIRST PUBLIC HEARING (10 IV 61, 10.30 *a.m.*)

*Present : President* WINIARSKI; *Vice-President* ALFARO; *Judges* BASDEVANT, BADAWI, MORENO QUINTANA, WELLINGTON KOO, SPIROPOULOS, Sir PERCY SPENDER, Sir Gerald FITZMAURICE, KORETSKY, TANAKA, BUSTAMANTE Y RIVERO, JESSUP, MORELLI; *Registrar* GARNIER-COIGNET.

*Also present :*

*For the Government of Cambodia :*

H.E. TRUONG CANG, Member of the *Haut Conseil du Trône, as Agent;*

*assisted by :*

Hon. Dean ACHESON, Member of the Bar of the Supreme Court of the United States of America,

M. Roger PINTO, Professor at the Paris Law Faculty,

M. Paul REUTER, Professor at the Paris Law Faculty,

*as Counsel;*

*For the Government of Thailand :*

H.R.H. Prince VONGSAMAHIP JAYANKURA, Ambassador of Thailand to the Netherlands, *as Agent;*

*assisted by :*

The Rt. Hon. Sir Frank SOSKICE, Q.C., M.P., former Attorney-General of England,

M. Seni PRAMOJ, Member of the Thai Bar,

Mr. James Nevins HYDE, Member of the Bar of the State of New York and Member of the Bar of the Supreme Court of the United States,

Me Marcel SLUSNY, Member of the Bar of the Brussels Court of Appeal,

Mr. J. G. LE QUESNE, Member of the English Bar,

*as Advocates and Counsel;*

*and*

Mr. David S. DOWNS, Solicitor, Supreme Court of Judicature, England,

Mr. Sompong SUCHARITKUL, Member of the Legal Division, Ministry of Foreign Affairs,

*as Advisers.*

The PRESIDENT opened the hearing and stated that the Court was assembled today to deal with the dispute between the Kingdom of

# PROCÈS-VERBAUX DES AUDIENCES TENUES DU 10 AU 15 AVRIL 1961

## ANNÉE 1961

### PREMIÈRE AUDIENCE PUBLIQUE (10 IV 61, 10 *h.* 30)

*Présents :* M. WINIARSKI, *Président ;* M. ALFARO, *Vice-Président ;* MM. BASDEVANT, BADAWI, MORENO QUINTANA, WELLINGTON KOO, SPIROPOULOS, sir Percy SPENDER, sir Gerald FITZMAURICE, MM. KORETSKY, TANAKA, BUSTAMANTE Y RIVERO, JESSUP, MORELLI, *Juges ;* M. GARNIER-COIGNET, *Greffier.*

*Présents également :*

*Pour le Gouvernement cambodgien :*

S. Exc. M. TRUONG CANG, membre du Haut Conseil du Trône, *comme agent ;*

*assisté par :*

l'honorable Dean ACHESON, membre du barreau de la Cour suprême des Etats-Unis d'Amérique,

M. Roger PINTO, professeur à la faculté de droit de Paris,

M. Paul REUTER, professeur à la faculté de droit de Paris,

*comme conseils ;*

*Pour le Gouvernement thaïlandais :*

S.A.S. le prince VONGSAMAHIP JAYANKURA, ambassadeur de Thaïlande aux Pays-Bas, *comme agent ;*

*assisté par :*

Le très honorable sir Frank SOSKICE, Q.C., M.P., ancien *Attorney-General* d'Angleterre,

M. Seni PRAMOJ, membre du barreau de Thaïlande,

M. James Nevins HYDE, membre du barreau de l'Etat de New York et membre du barreau de la Cour suprême des Etats-Unis,

Me Marcel SLÜSNY, avocat près la Cour d'appel de Bruxelles,

M. J. G. LE QUESNE, membre du barreau d'Angleterre,

*comme avocats et conseils ;*

*et*

M. David S. DOWNS, *Solicitor, Supreme Court of Judicature* d'Angleterre,

M. Sompong SUCHARITKUL, membre du service juridique du ministère des Affaires étrangères,

*comme conseillers.*

Le PRÉSIDENT ouvre l'audience et annonce que la Cour se réunit aujourd'hui pour connaître du différend entre le Royaume de Cambodge

Cambodia and the Kingdom of Thailand concerning the Temple of Preah Vihear. This is the first public sitting of the Court since important changes in its membership. In November 1960 the General Assembly and the Security Council of the United Nations elected to this Court six new Members. Firstly, Sir Gerald Fitzmaurice of the United Kingdom, who fills the vacancy caused by the death of Sir Hersch Lauterpacht, and whose term of office under the Statute began with the day of his election. Five further judges were then elected by the three-year system of a partial renewal of membership, and entered upon their duties on 6 February 1961. These are M. Vladimir M. Koretsky (Union of Soviet Socialist Republics), M. Kotara Tanaka (Japan), M. José Luis Bustamante y Rivero (Peru), Mr. Philip C. Jessup (United States of America) and M. Gaetano Morelli (Italy).

These new Members are required by Article 20 of the Statute of the Court to make solemn declarations in open Court that they will exercise their powers impartially and conscientiously. In accordance with Article 5 of the Rules of Court, these declarations must be made at the first public sitting of the Court at which the Judges are present after their election.

The President asked each of these Judges, as his name was called, to make this Declaration.

(The Court rose.)

Sir Gerald FITZMAURICE made his declaration.

M. KORETSKY made his declaration.

M. TANAKA made his declaration.

M. BUSTAMANTE made his declaration.

Mr. JESSUP made his declaration.

M. MORELLI made his declaration.

The PRESIDENT placed on record the declarations made by Judges Sir Gerald Fitzmaurice, Koretsky, Tanaka, Bustamante, Jessup and Morelli and declared them duly installed as Members of this Court.

The President announced that the Court would adjourn for a few moments.

(The Court rose at 10.40 a.m.)

*(Signed)* B. WINIARSKI,
President.

*(Signed)* GARNIER-COIGNET,
Registrar.

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## SECOND PUBLIC HEARING (10 IV 61, 10.55 *a.m.*)

*Present:* [See hearing of 10 IV 61, 10.30 *a.m.*, except for Judge Jessup.]

The PRESIDENT opened the hearing. He announced that Judge Córdova was prevented, for reasons of health, from attending the present

et le Royaume de Thaïlande au sujet du temple de Préah Vihéar. Or, la présente audience est la première séance publique de la Cour après l'important renouvellement de sa composition. En novembre 1960, l'Assemblée générale et le Conseil de Sécurité des Nations Unies ont élu six nouveaux membres de la Cour. En premier lieu, sir Gerald Fitzmaurice, du Royaume-Uni, a été élu pour remplir la vacance causée par le décès de sir Hersch Lauterpacht; conformément au Statut, son mandat a commencé le jour même de l'élection. Ensuite, par voie de renouvellement partiel triennal, cinq juges ont été élus qui sont entrés en fonction le 6 février 1961. Ce sont: M. Vladimir M. Koretsky, de l'Union des Républiques socialistes soviétiques; M. Kotaro Tanaka, du Japon; M. José Luis Bustamante y Rivero, du Pérou; M. Philip C. Jessup, des Etats-Unis d'Amérique, et M. Gaetano Morelli, d'Italie.

Aux termes de l'article 20 du Statut de la Cour, ces nouveaux membres doivent prononcer en séance publique un engagement solennel d'exercer leurs attributions en pleine impartialité et en toute conscience. Conformément à l'article 5 du Règlement, ces déclarations doivent être prononcées au cours de la première séance publique à laquelle le juge assiste après son élection.

Le Président invite donc chacun de ces juges, à l'appel de son nom, à prononcer cette déclaration.

(La Cour se lève.)

Sir Gerald FITZMAURICE prononce sa déclaration.

M. KORETSKY prononce sa déclaration.

M. TANAKA prononce sa déclaration.

M. BUSTAMANTE prononce sa déclaration.

M. JESSUP prononce sa déclaration.

M. MORELLI prononce sa déclaration.

Le PRÉSIDENT prend acte des déclarations qui viennent d'être prononcées par sir Gerald Fitzmaurice, MM. Koretsky, Tanaka, Bustamante, Jessup et Morelli et les déclare dûment installés comme juges à la Cour et annonce que la séance est maintenant suspendue pour quelques instants.

(L'audience est levée à 10 h. 40.)

Le Président,
*(Signé)* B. WINIARSKI.

Le Greffier,
*(Signé)* GARNIER-COIGNET.

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## DEUXIÈME AUDIENCE PUBLIQUE (10 IV 61, 10 *h.* 55)

*Présents:* [Voir audience du 10 IV 61, 10 *h.* 30, à l'exception de M. Jessup.]

Le PRÉSIDENT ouvre l'audience et annonce que M. le juge Córdova ne pourra pas assister à la présente session de la Cour pour raisons de santé.

session of the Court. Judge Jessup had stated that, in pursuance of Article 17 of the Statute of the Court, he would not be able to participate in the decision of this case.

The President called upon the Agent for the Government of Thailand.

H.R.H. Prince VONGSAMAHIP JAYANKURA made the speech reproduced in the Annex [1].

The PRESIDENT called upon Sir Frank Soskice.

Sir Frank SOSKICE made the speech reproduced in the Annex [2].

(The Court adjourned from 12.48 p.m. to 4 p.m.)

The PRESIDENT called upon Mr. Hyde.

Mr. HYDE made the speech reproduced in the Annex [3].

The PRESIDENT called upon Me Slusny.

Me SLUSNY began the speech reproduced in the Annex [4].

(The Court rose at 5.59 p.m.)

*[Signatures.]*

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## THIRD PUBLIC HEARING (11 IV 61, 10.30 *a.m.*)

*Present:* [See hearing of 10 IV 61, 10.55 *a.m.*]

The PRESIDENT opened the hearing and called upon Me Slusny.

Me SLUSNY concluded the speech reproduced in the Annex [5].

The PRESIDENT called upon the Agent for Cambodia.

M. TRUONG CANG, Agent for Cambodia, made a declaration [6] and asked the President to call upon Mr. Acheson.

The PRESIDENT called upon Mr. Acheson.

Mr. ACHESON began the speech reproduced in the Annex [7].

(The Court adjourned from 12.56 p.m. to 4 p.m.)

Mr. ACHESON concluded the speech reproduced in the Annex [8].

The PRESIDENT called upon M. Pinto.

M. PINTO began the speech reproduced in the Annex [9].

(The Court rose at 5.58 p.m.)

*[Signatures.]*

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## FOURTH PUBLIC HEARING (12 IV 61, 10.30 *a.m.*)

*Present:* [See hearing of 10 IV 61, 10.55 *a.m.*]

The PRESIDENT opened the hearing and called upon M. Pinto.

M. PINTO concluded the speech reproduced in the Annex [10].

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[1] See p. 9.
[2] See pp. 10-19.
[3] See pp. 20-30.
[4] See pp. 31-36.
[5] See pp. 36-40.
[6] See pp. 41-42.
[7] See pp. 43-53.
[8] See pp. 53-56.
[9] See pp. 57-66.
[10] See pp. 66-73.

M. Jessup, juge, a déclaré ne pas pouvoir participer au règlement de la présente affaire par application de l'article 17 du Statut.

Le Président donne la parole à M. l'agent du Gouvernement de Thaïlande.

S.A.S. le prince VONGSAMAHIP JAYANKURA prononce le discours reproduit en annexe [1].

Le PRÉSIDENT donne la parole à sir Frank Soskice.

Sir Frank SOSKICE prononce la plaidoirie reproduite en annexe [2].

(L'audience, suspendue à 12 h. 48, est reprise à 16 h.)

Le PRÉSIDENT donne la parole à M. Hyde.

M. HYDE prononce la plaidoirie reproduite en annexe [3].

Le PRÉSIDENT donne la parole à Me Slusny.

Me SLUSNY commence la plaidoirie reproduite en annexe [4].

(L'audience est levée à 17 h. 59.)

*[Signatures.]*

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## TROISIÈME AUDIENCE PUBLIQUE (11 IV 61, 10 *h.* 30)

*Présents :* [Voir audience du 10 IV 61, 10 *h.* 55].

Le PRÉSIDENT ouvre l'audience et donne la parole à Me Slusny.

Me SLUSNY termine la plaidoirie reproduite en annexe [5].

Le PRÉSIDENT donne la parole à l'agent du Cambodge.

M. TRUONG CANG fait une déclaration [6] et demande au Président de donner la parole à M. Dean Acheson.

Le PRÉSIDENT donne la parole à M. Dean Acheson.

M. Dean ACHESON commence la plaidoirie reproduite en annexe [7].

(L'audience, suspendue à 12 h. 56, est reprise à 16 h.)

M. Dean ACHESON termine la plaidoirie reproduite en annexe [8].

Le PRÉSIDENT donne la parole au professeur Pinto.

M. PINTO commence la plaidoirie reproduite en annexe [9].

(L'audience est levée à 17 h. 58.)

*[Signatures.]*

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## QUATRIÈME AUDIENCE PUBLIQUE (12 IV 61, 10 *h.* 30)

*Présents :* [Voir audience du 10 IV 61, 10 *h.* 55]

Le PRÉSIDENT ouvre l'audience et donne la parole à M. Pinto.

M. PINTO termine la plaidoirie reproduite en annexe [10].

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[1] Voir p. 9.
[2] Voir pp. 10-19.
[3] Voir pp. 20-30.
[4] Voir pp. 31-36.
[5] Voir pp. 36-40.
[6] Voir pp. 41-42.
[7] Voir pp. 43-53.
[8] Voir pp. 53-56.
[9] Voir pp. 57-66.
[10] Voir pp. 66-73.

The PRESIDENT called upon M. Reuter.

M. REUTER began the speech reproduced in the Annex [1].

(The Court adjourned from 12.50 p.m. to 4 p.m.)

M. REUTER concluded the speech reproduced in the Annex [2].

The PRESIDENT, after consulting the Agent for Thailand, announced that the next sitting would be on Friday, 14 April 1961, at 10.30 a.m. The Court would then hear the Government of Thailand in their oral reply.

(The Court rose at 5.10 p.m.)

*[Signatures.]*

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FIFTH PUBLIC HEARING (14 IV 61, 10.30 *a.m.*)

*Present:* [See hearing of 10 IV 61, 10.55 *a.m.*]

The PRESIDENT opened the hearing and called upon Sir Frank Soskice.

Sir Frank SOSKICE began the speech reproduced in the Annex [3].

(The Court adjourned from 12.54 p.m. to 4 p.m.)

Sir Frank SOSKICE concluded the speech reproduced in the Annex [4].

The PRESIDENT called upon Mr. Hyde.

Mr. HYDE made the speech reproduced in the Annex [5].

The PRESIDENT, after consulting the Cambodian Agent, announced that the next hearing would be held on Saturday, 15 April 1961, at 10.30 a.m. to hear the oral rejoinder on behalf of the Government of Cambodia.

(The Court rose at 5.35 p.m.)

*[Signatures.]*

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SIXTH PUBLIC HEARING (15 IV 61, 10.30 *a.m.*)

*Present:* [See hearing of 10 IV 61, 10.55 *a.m.*]

The PRESIDENT opened the hearing and called upon Mr. Acheson.

Mr. ACHESON made the speech reproduced in the Annex [6].

The PRESIDENT called upon the Agent of the Government of Cambodia.

M. TRUONG CANG made the speech reproduced in the Annex [7].

The PRESIDENT closed the oral hearings on the Preliminary Objections.

(The Court rose at 11.53 a.m.)

*(Signed)* B. WINIARSKI,
President.

*(Signed)* GARNIER-COIGNET,
Registrar.

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[1] See pp. 74-80.
[2] See pp. 80-86.
[3] See pp. 87-100.
[4] See pp. 100-105.
[5] See pp. 106-109.
[6] See pp. 110-116.
[7] See pp. 117-118.

Le PRÉSIDENT donne la parole à M. Reuter.

M. REUTER commence la plaidoirie reproduite en annexe [1].

(L'audience, suspendue à 12 h. 50, est reprise à 16 h.)

M. REUTER termine la plaidoirie reproduite en annexe [2].

Le PRÉSIDENT, après avoir interrogé l'agent du Gouvernement de la Thaïlande, annonce que la prochaine audience aura lieu le vendredi 14 avril 1961, à 10 h. 30, pour entendre ce Gouvernement en sa réplique orale.

(L'audience est levée à 17 h. 10)

*[Signatures.]*

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## CINQUIÈME AUDIENCE PUBLIQUE (14 IV 61, 10 *h.* 30)

*Présents :* [Voir audience du 10 IV 61, 10 *h.* 55]

Le PRÉSIDENT ouvre l'audience et donne la parole à sir Frank Soskice.

Sir Frank SOSKICE commence la plaidoirie reproduite en annexe [3].

(L'audience, suspendue à 12 h. 54, est reprise à 16 h.)

Sir Frank SOSKICE termine la plaidoirie reproduite en annexe [4].

Le PRÉSIDENT donne la parole à M. Hyde.

M. HYDE prononce la plaidoirie reproduite en annexe [5].

Le PRÉSIDENT, après avoir consulté l'agent du Cambodge, annonce que la prochaine audience aura lieu le samedi 15 avril 1961, à 10 h. 30, pour entendre la duplique orale du Gouvernement cambodgien.

(L'audience est levée à 17 h. 35.)

*[Signatures.]*

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## SIXIÈME AUDIENCE PUBLIQUE (15 IV 61, 10 *h.* 30)

*Présents :* [Voir audience du 10 IV 61, 10 *h.* 55]

Le PRÉSIDENT ouvre l'audience et donne la parole à M. Dean Acheson.

M. Dean ACHESON prononce la plaidoirie reproduite en annexe [6].

Le PRÉSIDENT donne la parole à M. l'agent du Gouvernement du Cambodge.

M. TRUONG CANG prononce la plaidoirie reproduite en annexe [7].

Le PRÉSIDENT prononce la clôture des débats oraux sur les exceptions préliminaires.

(L'audience est levée à 11 h. 53.)

Le Président,
*(Signé)* B. WINIARSKI.

Le Greffier,
*(Signé)* GARNIER-COIGNET.

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[1] Voir pp. 74-80.
[2] Voir pp. 80-86.
[3] Voir pp. 87-100.
[4] Voir pp. 100-105.
[5] Voir pp. 106-109.
[6] Voir pp. 110-116.
[7] Voir pp. 117-118.

## SEVENTH PUBLIC HEARING (26 v 61, 11 *a.m.*)

*Present: President* WINIARSKI; *Vice-President* ALFARO; *Judges* BADAWI, MORENO QUINTANA, WELLINGTON KOO, SPIROPOULOS, Sir Percy SPENDER, Sir Gerald FITZMAURICE, KORETSKY, TANAKA, BUSTAMANTE Y RIVERO, MORELLI; *Registrar* GARNIER-COIGNET.

*Also present:*

*For the Government of Cambodia:*

H.E. TRUONG CANG, Member of the *Haut Conseil du Trône, as Agent;*

M. Roger PINTO, Professor at the Paris Law Faculty, *as Counsel.*

*For the Government of Thailand:*

H.R.H. Prince VONGSAMAHIP JAYANKURA, Ambassador of Thailand to the Netherlands, *as Agent.*

The PRESIDENT opened the sitting and declared that the Court had met today to deliver its Judgment on the Preliminary Objections raised by the Government of the Kingdom of Thailand in the case concerning the Temple of Preah Vihear brought before the Court by the application of the Government of the Kingdom of Cambodia.

He regretted to announce that Judge Basdevant who participated in the oral hearings was subsequently prevented for reasons of health from participating in the deliberations in this case.

The President read the French text of the Judgment [1] and asked the Registrar to read the operative part of the Judgment in English.

The REGISTRAR read the relevant clause in English.

The PRESIDENT announced that Vice-President Alfaro and Judge Wellington Koo had appended Declarations to the Judgment.

Judge Sir Gerald Fitzmaurice and Judge Tanaka appended a Joint Declaration to the Judgment.

Judges Sir Percy Spender and Morelli appended to the Judgment statements of their Separate Opinions.

The President closed the sitting.

(The Court rose at 12.15 a.m.)

*(Signed)* B. WINIARSKI,
President.

*(Signed)* GARNIER-COIGNET,
Registrar.

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[1] See *I.C.J. Reports 1961*, pp. 17-50.

## SEPTIÈME AUDIENCE PUBLIQUE (26 v 61, 11 *h.*)

*Présents :* M. WINIARSKI, *Président ;* M. ALFARO, *Vice-Président ;* MM. BADAWI, MORENO QUINTANA, WELLINGTON KOO, SPIROPOULOS, sir Percy SPENDER, sir Gerald FITZMAURICE, MM. KORETSKY, TANAKA, BUSTAMANTE Y RIVERO, MORELLI, *Juges ;* M. GARNIER-COIGNET, *Greffier.*

*Présents également :*

*Pour le Gouvernement cambodgien :*

S. Exc. M. TRUONG CANG, membre du Haut Conseil du Trône, *en qualité d'agent ;*

M. Roger PINTO, professeur à la faculté de droit de Paris, *en qualité de conseil.*

*Pour le Gouvernement thaïlandais :*

S.A.S. le prince VONGSAMAHIP JAYANKURA, ambassadeur de Thaïlande aux Pays-Bas, *en qualité d'agent.*

Le PRÉSIDENT ouvre l'audience et annonce que la Cour se réunit aujourd'hui pour rendre son arrêt sur les exceptions préliminaires soulevées par le Gouvernement du Royaume de Thaïlande dans l'affaire du temple de Préah Vihéar, introduite devant la Cour par requête du Gouvernement du Royaume du Cambodge.

Il a le regret d'annoncer que M. Basdevant qui a pris part aux audiences de la procédure orale a ensuite été empêché, pour raisons de santé, de participer au délibéré en cette affaire.

Il donne lecture du texte français de l'arrêt [1] et invite le Greffier à donner lecture du dispositif de l'arrêt en langue anglaise.

Le GREFFIER lit le dispositif en anglais.

Le PRÉSIDENT annonce que MM. Alfaro, Vice-Président, et Wellington Koo, juge, ont joint à l'arrêt des déclarations.

Sir Gerald Fitzmaurice et M. Tanaka, juges, ont joint à l'arrêt une déclaration commune.

Sir Percy Spender et M. Morelli, juges, ont joint à l'arrêt les exposés de leurs opinions individuelles.

Le Président lève l'audience.

(L'audience est levée à 12 h. 15.)

Le Président,
*(Signé)* B. WINIARSKI.

Le Greffier,
*(Signé)* GARNIER-COIGNET.

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[1] Voir *C.I.J. Recueil 1961*, pp. 17-50.

## ANNEX TO THE MINUTES
## ANNEXE AUX PROCÈS-VERBAUX

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### 1. STATEMENT OF H.R.H. PRINCE VONGSAMAHIP JAYANKURA

(AGENT FOR THE GOVERNMENT OF THAILAND)
AT THE PUBLIC HEARING OF 10 APRIL 1961, MORNING

Mr. President, Members of the Court.

As I believe is known to the Court, I appear before you as Agent for the Government of Thailand which desires to raise two preliminary objections to the jurisdiction of the Court in the present proceedings.

First, Mr. President, and Members of the Court, may I, with your permission, extend to the new Members of the Court who were sworn this morning our warmest welcome on taking up the very high responsibilities incumbent upon them as Judges of this Court. We are indeed delighted to see them, and wish them well.

The Court may have noticed that our objections fall into two parts, and Counsel for Thailand would desire to divide amongst themselves the task of presenting separately the two points.

The first part, which you will find dealt with in paragraphs 5-16 in our Preliminary Objections, will be dealt with by Sir Frank Soskice, and when he has completed his submissions on the first point we propose that the second point should be dealt with by Mr. Hyde, who will speak next, and by Maître Slusny, who will devote himself particularly to the questions of law that are raised by the second objection.

This being so, Mr. President and Members of the Court, I should be grateful if you would be so good as to call on Sir Frank Soskice to make his address to the Court.

## 2. ARGUMENT OF SIR FRANK SOSKICE

(COUNSEL FOR THE GOVERNMENT OF THAILAND)
AT THE PUBLIC HEARING OF 10 APRIL 1961, MORNING

Mr. President, Members of the Court.

The Court will have appreciated that this case concerns the ownership as between Thailand and Cambodia of a very famous and ancient temple situated on an eminence which we say is clearly within the boundaries of Thailand, as settled by treaty in the early years of this century. It is a monument of antiquity which means a great deal to the people of Thailand. If the case has to be tried on the merits a great deal will have to be placed by way of evidence before the Court as to the precise situation of the temple and the true effect of the treaties under which the boundaries between Thailand and Cambodia were demarcated between the French authorities then in control of Cambodia and the Royal Thai Government in the years 1904 and 1907. At present, it is the desire of the Thai Government to ask for the opinion of the Court upon preliminary objections to the jurisdiction of the Court, which, in the respectful submission of the Thai Government, raise very real and important questions of legal interpretation of the documents conferring jurisdiction on the Court. These are questions divorced entirely from the merits of the case, and involve entirely legal arguments of construction and interpretation. The Thai Government desires respectfully to submit to the Court that, upon the true construction of these documents, and the authority of the decision of this Court in the case of *Israel* v. *Bulgaria*, there can be little doubt that, for reasons which my colleagues and I will venture to deploy before the Court and which are already adumbrated in the Preliminary Objections filed on behalf of the Thai Government, the decision of the ownership of the temple does not fall within the jurisdiction conferred upon the Court.

At the present stage, our arguments will be limited to that, and for this reason we do not think it necessary to invite the Court to consider in any detail the geographical configuration of the ground through which the boundary runs, as shown in a map in the pocket of the Thai Objections, and in a number of other maps which, if the Court is called upon to pronounce upon the merits, will have to be placed before the Court for examination. The Thai Government desires at this stage, however, to make it perfectly plain that, in raising these preliminary points of law, they do not wish to be thought in any way to be anxious to shun a full investigation of the merits of the case. The two questions are entirely separate, and it is respectfully submitted that, when there is a real question as to the jurisdiction conferred upon the Court, a party is fully justified in seeking the opinion of the Court upon the question, which is one of fundamental importance. I say no more on this aspect of the case and will, if I may, now address myself directly to the first of the points which are raised in the Thai Preliminary Objections.

That point is set out in paragraphs 5 to 16. At the outset may I, by way of reminder, formulate the point in a very few sentences. We contend that this Court is not given jurisdiction to try the present dispute by the Thai declaration of 20 May 1950. The Thai declaration of 3 May 1940, accepting as compulsory the jurisdiction of the Permanent Court, lapsed when the Permanent Court of International Justice was dissolved on 19 April 1946. Since Thailand was not at that date a party to the Statute of this Court, her declaration of 3 May 1940 was not preserved, or converted into an acceptance of the jurisdiction of this Court, by Article 36, paragraph 5, of the Statute. This follows from the decision of this Court in the case of *Israel* v. *Bulgaria*. The Thai declaration of 20 May 1950 clearly on its terms is not a fresh acceptance of the jurisdiction of this Court, but an ineffective attempt to preserve in being the declaration of 3 May 1940 which, in view of the decision in the case of *Israel* v. *Bulgaria*, was impossible. The declaration of 20 May 1950 was therefore wholly ineffective for all purposes.

My task now is to add to what has been stated in the Preliminary Objections raised by the Government of Thailand, such additional considerations as, in my submission, arise in view of the Observations of the Government of Cambodia upon this first objection. It would not assist the Court if, in the course of my speech today, I were to recapitulate what has been said on behalf of the Government of Thailand in paragraphs 5 to 16 of their Preliminary Objections. I content myself by saying that the Government of Thailand relies on what is there stated, and respectfully submits, for reasons which I will seek to deploy, that the Observations of the Government of Cambodia do not in any sense invalidate the submissions made on behalf of the Government of Thailand in those paragraphs. May I therefore begin by assuming that in effect the contentions in those paragraphs stand as the forefront of my argument today, and may be taken as having been respectfully repeated by way of reminder of their content.

The contentions of the Government of Cambodia in reply to our first objection, as contained in paragraphs 11 to 26 of their Observations, begin with an indication of certain differences of fact between the present case and the facts which were considered by this Court in the *Israel* v. *Bulgaria* case. The differences in question, upon which the Government of Cambodia seeks to place great reliance, can be summarized under three heads:

1. The Government of Cambodia points out that in the *Israel* v. *Bulgaria* case it was shown that Bulgaria only became a Member of the United Nations in 1955, whereas Bulgaria's declaration accepting the compulsory jurisdiction of the Permanent Court was made in 1921. An interval, therefore, of 34 years had elapsed between the date of that declaration and the date of the admission of Bulgaria as a Member of the United Nations. In the present case, on the other hand, the last renewal by the Government of Thailand, before its admission as a Member of the United Nations, of its declaration accepting the compulsory jurisdiction of the Permanent Court was in 1940, and the admission of Thailand as a Member of the United Nations took place in 1946. A contrast is accordingly drawn between the interval of 34 years in the *Israel* v. *Bulgaria* case and the interval of six years in the present case.

2. In the present case, the interval between the dissolution of the Permanent Court on 19 April 1946 and the admission to the United Nations of Thailand on 16 December 1946 was only some eight months. In the case of *Israel* v. *Bulgaria*, however, the interval between the dissolution of the Permanent Court and the admission of Bulgaria to the United Nations, the one having taken place in 1946 and the other in 1955, was some nine years.

3. As is pointed out in paragraphs 14 to 17 of the Observations of the Government of Cambodia, Bulgaria had, between the dissolution of the old Court and her admission to the United Nations, shown herself quite unwilling to submit to the jurisdiction of the International Court. On the other hand, the Government of Thailand was at all material times under the impression that it was subject to the jurisdiction of this Court.

It is respectfully submitted that these distinctions of fact between the circumstances investigated in the case of *Israel* v. *Bulgaria* and the circumstances of the present case have no possible bearing on the validity or otherwise of the objections raised to the jurisdiction of this Court by the Government of Thailand. With the very greatest respect to our opponents, it is apparent throughout the contentions which they have embodied in their Observations that they have misunderstood the true basis of the reasoning of this Court in the *Israel* v. *Bulgaria* case. If this reasoning is properly understood, the differences of fact above indicated are seen to be quite immaterial, and to produce no result on the proper determination of the questions now before the Court.

Mr. President, Members of the Court. Upon a true analysis of the reasoning of the Court, it is, I respectfully submit, quite apparent that the lapse of time between Bulgaria's declaration under the Statute of the Permanent Court and her admission to the United Nations, and between the dissolution of the Permanent Court and Bulgaria's admission to the United Nations, and Bulgaria's unwillingness to submit to the jurisdiction of the Court, although mentioned in the Judgment as part of the circumstances, were not among the material and vital facts on which the decision of the Court was based. That decision turned upon the meaning of Article 36, paragraph 5, of the Statute of this Court. It is necessary in these circumstances to examine precisely what that Article enacts, and exactly how it impinges upon the circumstances now under investigation in the present case. The Article provides, as is well known, that declarations made under Article 36 of the Statute of the Permanent Court

> "and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction"

of this Court. What is requisite, therefore, is that there should be a declaration under Article 36 of the Statute of the Permanent Court, and that that declaration should still be in force at the date on which the State which made it becomes a party to the Statute of the International Court. If these requisites are found to be present, the declaration in question is to be deemed to constitute an acceptance of the compulsory jurisdiction of this Court, but only as between the parties to the Statute of this Court. This is clear from the terms of Article 36, paragraph 5,

and it is precisely what was made the basis of the decision in the *Israel* v. *Bulgaria* case by this Court. This emerges quite clearly from the language used in the Judgment of this Court, quoted in paragraph 11 of the Preliminary Objections of the Government of Thailand. I would respectfully venture to quote the language again, because it is of great importance for the purposes of this case. The relevant passage reads as follows:

> "Since this provision [that is, Article 36 (5)] was originally subscribed to only by the signatory States, it was without legal force so far as non-signatory States were concerned... So far as non-signatory States were concerned ... the Statute, in the absence of their consent, could neither maintain nor transform their original obligation. Shortly after the entry into force of the Statute, the dissolution of the Permanent Court freed them from that obligation."

That is to say, in the case of non-signatory States, Article 36, paragraph 5, of the Statute of this Court did not, and could not, convert acceptances by them of the jurisdiction of the Permanent Court into acceptances of the jurisdiction of this Court. On the contrary, in the case of those States acceptances by them of the jurisdiction of the Permanent Court inevitably lapsed on 19 April 1946, when the Permanent Court was dissolved.

This analysis shows that the differences of fact on which the Government of Cambodia seeks to rely are entirely irrelevant to the reasoning of the Court in the case of *Israel* v. *Bulgaria*. According to that reasoning, those States which had declarations under Article 36 of the Statute of the Permanent Court still in force on 19 April 1946 must be divided into two categories:

(1) Those which, by 19 April 1946, had already become parties to the Statute of this Court. By so doing, those States had agreed, by Article 36 (5) of the Statute, that their declarations under the Statute of the Permanent Court should be deemed to be acceptances of the compulsory jurisdiction of this Court.

(2) Those States which, on 19 April 1946, had not become parties to the Statute of this Court. Their declarations under Article 36 of the Statute of the Permanent Court became altogether void on the dissolution of the Permanent Court on 19 April 1946.

It is thus quite clear that the position *vis-à-vis* this Court of any State which on 19 April 1946 had a declaration still in force under Article 36 of the Permanent Court depends entirely on the question whether that State by that date had become a party to the Statute of this Court. It is solely to the position on that date, 19 April 1946, that enquiry must be directed. The reasoning of the Court shows that it makes no difference whether the declaration under Article 36 of the Statute of the Permanent Court had been in existence for many years of for few, or was of indefinite or a limited duration. It is also clear that, if the State was not a party to the Statute of this Court on 19 April 1946, it makes no difference whether it became a party a few months or many years after that date. Likewise, whether the State was on 19 April 1946 willing to accept the compulsory jurisdiction of this Court is also an irrelevant question. What is to be seen is whether the necessary formal steps for adhering to the Statute of this Court had been taken.

It may be, as indicated in the Judgment of the Court in the case of *Israel* v. *Bulgaria*, that mere formalities will not suffice to create compulsory jurisdiction if the State did not have the will to accept it. Nevertheless, it is certain that the will alone does not suffice if the necessary formalities are not observed. If a State was not party to the Statute of this Court on 19 April 1946, its declaration under Article 36 of the Statute of the old Court lapsed on that day. However willing that State may have been to accept the compulsory jurisdiction of this Court, it did not in law accept it unless on becoming a party to this Court's Statute it made a new, independent declaration.

What is therefore in my submission beyond any controversy is this. On 19 April 1946, any declaration made before that date by the Government of Thailand accepting the compulsory jurisdiction of the Permanent Court became wholly ineffective for all purposes. The declaration then in force was that made by the Government of Thailand on 20 September 1929 and renewed on 3 May 1940.

As from 19 April 1946, therefore, the Government of Thailand was not subject to the compulsory jurisdiction of the Permanent Court, because it had been dissolved, nor to the compulsory jurisdiction of this Court, because Thailand was not a party to the Statute. The only way in which, in accordance with the provisions of the Statute of this Court, the Government of Thailand could subject itself to the compulsory jurisdiction of this Court was by (1) becoming a party to the Statute and (2) then making a declaration under Article 36, paragraph 2. There was no other method. Thailand became a party to the Statute on 16 December 1946. The only document which is alleged to constitute a declaration under Article 36, paragraph 2, is the letter of 20 May 1950 to the Secretary-General. The sole question, therefore, in the respectful submission which I present to the Court, which falls for determination, is whether that letter of 20 May 1950 was a declaration made under Article 36, paragraph 2, of the Statute of this Court. The only way in which this question can be tested is by an examination of the terms of that letter, in order to ascertain from the terms used whether, in fact, it is a declaration which falls within the four corners of Article 36, paragraph 2. It is respectfully submitted that it is perfectly plain upon a consideration of the terms of the letter that it is nothing of the sort.

On 20 May 1950, when the letter was written, the Government of Thailand was not subject to the compulsory jurisdiction of this Court. It could become subject to that jurisdiction only by making a new declaration accepting it. It could not do so in any other way. The question is whether the letter of 20 May 1950 did constitute such a new acceptance of jurisdiction. It is plain that upon its terms it was nothing of the sort. It was the contrary. The letter did not purport to make a fresh start and to submit the Government of Thailand to the compulsory jurisdiction of the Court. Without more, therefore, it may well be said, in my respectful submission, that the enquiry may end here, and the Application of the Government of Cambodia ought to be held incompetent without further investigation. In their Observations, however, the Government of Cambodia maintain, in paragraphs 22 to 24, that the letter of 20 May 1950, even although it may not in terms be an acceptance of the compulsory jurisdiction of this Court, is in substance the equivalent of such an acceptance and should

be treated as if it did constitute such an acceptance, broadly because it was the intention of the Government of Thailand to accept the compulsory jurisdiction of this Court. This contention, however, of the Government of Cambodia is in direct conflict with the reasoning of this Court in the *Israel* v. *Bulgaria* case, as it appears from the quotation from the Judgment of this Court contained in paragraph 13 of the Preliminary Objections of the Government of Thailand. I would respectfully repeat that quotation, which reads as follows:

> "It is one thing to preserve an existing undertaking by changing its subject-matter; it is quite another thing to revive an undertaking which has already been extinguished."

The latter the Court held to be impossible; yet it was precisely this which the Government of Thailand tried and purported to achieve by the letter of 20 May 1950. The renewal attempted by that letter was impossible; but that does not justify the Government of Cambodia in reading the letter as though it said, not "renew", but something else. The impossibility of reviving an undertaking which had already been extinguished was the whole basis of the reasoning of this Court in the case of *Israel* v. *Bulgaria*, and it is respectfully submitted that the present Application of Cambodia cannot possibly be entertained by the Court unless this reasoning is not followed. The submission made by the Government of Thailand may, in other words, be put as follows: the Government of Thailand could most certainly on 20 May 1950 have accepted the compulsory jurisdiction of this Court; what it did do, however, was to attempt to revive its declaration of acceptance of the compulsory jurisdiction of the Permanent Court, made on 20 September 1929 and renewed on 3 May 1940. The Government of Thailand made this attempt under the mistaken impression that that declaration, made in 1929 and renewed in 1940, was still valid. It was in fact invalid, and accordingly no declaration made by the Government of Thailand in 1950 could continue in being an application which was at that time no longer in being, since it had lapsed several years before. The sharp distinction drawn by this Court between the preservation of an existing undertaking and the attempted revival of an extinct undertaking is fundamental to the case which I respectfully present on behalf of the Government of Thailand. The letter of the Government of Thailand of 20 May 1950 plainly, I submit, upon its terms, is of the latter description. Therefore, in accordance with the decision of this Court in the case of *Israel* v. *Bulgaria*, that letter was of no effect, and did not submit the Government of Thailand to the compulsory jurisdiction of this Court.

In these circumstances, it is submitted that it is quite beside the point to refer to the circumstances, as does the Government of Cambodia, that the Government of Thailand indicated by that letter its willingness to be bound by the jurisdiction of this Court. The Government of Thailand, no doubt, was willing, and by taking the proper steps could have submitted to the compulsory jurisdiction of this Court in May 1950. The question is whether the proper steps were taken. Being under a complete misapprehension as to the validity of her declaration under the Statute of the Permanent Court and the effect of a letter in the form of that of 20 May 1950, the Government of Thailand did not succeed in submitting herself to the compulsory

jurisdiction of this Court. This was a misapprehension on the part of the Government of Thailand which was only revealed when this Court pronounced its Judgment in the case of *Israel* v. *Bulgaria*.

Mr. President, Members of the Court, the misapprehension to which I have referred was indeed a misapprehension which was not peculiar to the Government of Thailand. In this connection I would call attention to a letter from the Registrar of this Court to the Thai Minister of Foreign Affairs dated 11 November 1949, which makes it plain that the Registrar was under a similar misapprehension. The letter reads as follows:

> *"Dans l'intérêt du bon fonctionnement de la Cour, j'ai l'honneur de signaler à la bienveillante attention de Votre Excellence qu'à la date du 3 mai 1940, par une déclaration faite en application de l'article 36 du Statut de la Cour permanente de Justice internationale et considérée comme étant encore en vigueur (article 36, paragraphe 5, du Statut de la présente Cour), le Gouvernement de la Thaïlande avait reconnu comme obligatoire la juridiction de la Cour dans les conditions prévues à l'article 36 précité.*
>
> *Cette acceptation, qui était valable pour une durée de dix ans, expire le 2 mai 1950*[1]."

In this letter it is made plain that the Registrar was under the impression that the declaration of the Government of Thailand made under the Statute of the Permanent Court continued in operation until 2 May 1950. The fact is that until the precise legal effect of Article 36, paragraph 5, of the Statute of this Court was examined by the Court in the *Israel* v. *Bulgaria* case, it was generally assumed without question that a declaration such as that of 20 September 1929, renewed on 3 May 1940, could be continued, upon the basis that it remained effective notwithstanding the dissolution of the Permanent Court. From the Judgment in the case of *Israel* v. *Bulgaria*, however, it is now clear that the letter of 20 May 1950 could not renew the declaration of 20 September 1929, and so did not submit the Government of Thailand to the compulsory jurisdiction of this Court. There is a further consideration concerning the case of *Israel* v. *Bulgaria* which I desire to bring to the notice of the Court. Counsel for Israel in the course of his argument did expressly make reference to the declaration made by the Government of Thailand and did, in terms, discuss the effect of the arguments advanced on behalf of Bulgaria on the Government of Thailand's letter of 20 May 1950. I refer to the following passage in Counsel's argument on the afternoon of 24 March 1959:

> "This basic assumption, Mr. President, is incorrect. The Declaration of Thailand has been overlooked... If the Bulgarian contention is correct, then in 1950 the Government of Thailand was

[1] *[Translation]:* "In the interests of the administration of the Court, I have the honour to invite Your Excellency's kind attention to the fact that, on 3 May 1940, by a Declaration made pursuant to Article 36 of the Statute of the Permanent Court of International Justice and considered as being still in force (Article 36, paragraph 5, of the Statute of the present Court), the Government of Thailand recognized as compulsory the jurisdiction of the Court in the circumstances provided for in Article 36 quoted above.

This acceptance, which was valid for a period of ten years, will expire on 2 May 1950."

purporting to renew something which could not be renewed. If the Bulgarian contention is correct, the automatic adaptation of the Thailand Declaration accepting the compulsory jurisdiction of the Permanent Court under Article 36, paragraph 5, so that that declaration is deemed to be acceptance of the compulsory jurisdiction of this Court, would not have applied. I submit, Mr. President, that if the Court upholds the Bulgarian contention, this would lead to the automatic consequence that Thailand has not accepted the compulsory jurisdiction of this Court."

It is respectfully submitted, therefore, that this Court must have had in mind the possible impact of its decision upon the position of Thailand. With this clearly in mind, nevertheless the Court arrived at the conclusion to which attention has been called.

Le PRÉSIDENT: J'ai compris que M. le professeur Pinto voudrait prendre la parole. Voulez-vous faire votre observation après la fin de la plaidoirie de sir Frank Soskice, ou bien tenez-vous à la faire maintenant?

M. PINTO: Je suis à la disposition de la Cour, M. le Président; comme il s'agit d'une remarque au sujet d'un document dont nous n'avons pas eu connaissance, j'aurais voulu prier respectueusement la Cour de bien vouloir se reporter à l'article 48 du Règlement qui interdit à une Partie de déposer un nouveau document sans l'assentiment de la Partie adverse.

Le PRÉSIDENT: La Cour ne manquera pas d'examiner le point soulevé par M. le professeur Pinto.

Sir Frank SOSKICE: I take it, Mr. President, that you do not invite me to reply to the objection at this moment.

Le PRÉSIDENT: Vous n'êtes pas obligé; c'est comme vous voulez: la Cour le laisse à votre convenance.

Sir Frank SOSKICE: In those circumstances, Mr. President, perhaps I might be allowed, briefly, simply to say this: the letter which I sought to place before the Court is merely a short letter which actually comes from the files of the Court itself. I am not really introducing any outside and extraneous material; this is a letter which, as it appears from its form and content, was sent to us by the Registrar of the Court, and inasmuch as the Court has a discretion whether to allow further documentation to be produced or not, I would respectfully submit that there can be no objection of substance at any rate to the letter being taken into account by the Court.

Le PRÉSIDENT: Je vous prie de continuer.

Sir Frank SOSKICE: Mr. President and Members of the Court. I must add some brief comments on the arguments set out in paragraphs 19 to 24 of the Cambodian Observations.

In paragraph 19, it is alleged that the Thai documents of 1929, 1940 and 1950 do not present "an absolute continuity", because the renewal by the letter of 20 May 1950 was expressed to operate from 3 May 1950, whereas the renewal of 3 May 1940 did not expire until 6 May 1950. It is not clear what argument the Government of Cambodia seek to base upon this overlap of three days. However, the explanation of the overlap is provided by the Registrar's letter of 11 November 1949, to which I have already referred. In that letter, the Registrar

said the Thai acceptance would expire on 2 May 1950. This, clearly, was the reason why the purported renewal was made to operate from the next day, 3 May 1950.

The Government of Cambodia proceeds to argue that the letter of 20 May 1950, unlike the declaration of 1929 and its renewal in 1940, is "based on the Statute of the International Court of Justice" (Observations, paragraph 21). This argument is founded on the following words in the letter:

> "In accordance with the provisions of Article 36, paragraph 4, of the Statute of the International Court of Justice..."

The illusory character of this argument becomes clear the moment one looks at Article 36, paragraph 4, of the Statute. That paragraph is merely procedural. Its only purpose is to make the Secretary-General of the United Nations the proper recipient of communications. Had the Minister of Foreign Affairs, in the letter of 20 May 1950, relied upon the substantive provisions of Article 36, paragraph 2, of the Statute of this Court, there might have been some force in the Cambodian argument. As it is, he relies upon the Statute of this Court only for the procedural provisions of Article 36, paragraph 4; and this gives added significance to the fact that for a substantive provision he refers back to Article 36, paragraph 2, not of the Statute of this Court, but of the Statute of the Permanent Court. It is Article 36, paragraph 2, of the Statute of the Permanent Court that the Minister mentions in the first paragraph of the letter.

It is plain that Article 36, paragraph 4, is mentioned only to explain why the communication is addressed to the Secretary-General. The nature and purpose of the communication are not to be found in Article 36, paragraph 4, but in the language of the letter itself, namely to "renew the declaration above mentioned", that is to say, the declaration of 20 September 1929. The effect of the letter depends entirely upon that declaration. It contains no reference to any substantive provision of the Statute of this Court. It is, to use the language of paragraph 21 of the Cambodian Observations, a "renewal pure and simple" of the declaration of 1929. The Government of Cambodia has stated the position with entire accuracy in that paragraph, saying that the nullity of the letter of 1950 is the result of its attempt to "prolong the declarations of 1929 and 1940".

I have already referred to paragraphs 22 to 24 of the Observations, in which the Government of Cambodia tries to interpret the letter of 20 May 1950 as a new acceptance of the compulsory jurisdiction of this Court, independent of the declaration of 1929 and its renewal in 1940. I will only repeat that such an interpretation does violence to the language of the letter. As the Court pointed out in the Judgment in the case of *Israel* v. *Bulgaria*, in a passage quoted in paragraph 15 of the Preliminary Objections, recognition of the compulsory jurisdiction of this Court is a "new obligation" distinct from any obligation under the Statute of the Permanent Court. A letter which attempts to renew an old obligation cannot be interpreted as an acceptance of a new obligation under a different instrument.

Mr. President and Members of the Court: for the above reasons, the Government of Thailand respectfully submits that the first of its two preliminary objections is shown, on examination, to be well-

founded, and respectfully asks that it may be declared that this Court is not able to entertain the application of the Government of Cambodia on the grounds and for the reasons above given.

I will now, with the permission of the Court, leave it to my colleague, Mr. Hyde, to present, on behalf of the Government of Thailand, the first part of the arguments which they would ask to be considered in support of the second preliminary objection which they have raised.

## 3. ARGUMENT OF MR. JAMES NEVINS HYDE

(COUNSEL FOR THE GOVERNMENT OF THAILAND)
AT THE PUBLIC HEARINGS OF 10 APRIL 1961

*[Public hearing of 10 April 1961, morning]*

May it please the Court.

The second preliminary objection of the Government of Thailand is that its consent to the jurisdiction of this Court cannot be derived, nor can it be inferred, from the invocation by the Government of Cambodia of the General Act for the Pacific Settlement of International Disputes of 26 September 1928.

The second paragraph of the Cambodian Application begins:

> "Having regard to the General Act for the Pacific Settlement of International Disputes of 26 September 1928."

This recital the Government of Cambodia has now supplemented or amended in the Submissions contained in its Observations on the Preliminary Objections. And its second Submission now reads:

> "Having regard to Articles 21 and 22 of the Franco-Siamese Treaty of 7 December 1937, Article 2 of the Settlement Agreement of 17 November 1946, and the General Act for the Pacific Settlement of International Disputes dated 26 September 1928."

This supplemented or amended specification of the provisions upon which the Applicant founds the jurisdiction of the Court comes as no surprise to Counsel for Thailand, and, therefore, the Government of Thailand does not press the point that two of the three agreements relied on were not pleaded in the Application. Rather, we shall indicate the inapplicability of all three agreements so pleaded, as we have done in developing our second preliminary objection. Accordingly, Mr. President, the Government of Thailand formally requests the Court to consider that its own second objection be considered to extend to the two additional agreements now pleaded by Cambodia.

We shall first examine the General Act, that famous multilateral Treaty of League of Nations days, which has served so often as a procedural model and compendium and which also contained a system of compulsory pacific settlement, to see how it was intended to operate, how States became parties to it and how its provisions have been used as models in the long quest for effective procedures for pacific settlement.

Two striking facts, however, should be noted at the outset. Thailand is not, and at no time has been, a signatory to or a party to the General Act. Secondly, Cambodia is not, and at no time has been, a signatory to or a party to that Treaty.

There is no dispute about these two facts. They are stated in the Preliminary Objections of the Government of Thailand at paragraphs 22

and 23, and the Cambodian Observations state in paragraph 29 that neither Cambodia nor Thailand is directly a party to the General Act.

Thus the Government of Cambodia argues that this Court can rest its jurisdiction in this case upon a treaty to which neither the Applicant itself nor the Respondent is directly a party.

This, then, is the essence of the second basis upon which this Court is asked to exercise its jurisdiction. After considering the General Act, we shall turn to the Treaty of Friendship, Commerce and Navigation between Siam and France, signed at Bangkok on 7 December 1937 (and to be found in the *League of Nations Treaty Series*, Volume 201, at p. 113). There are two articles of that Treaty which directly relate to the present contention, Articles 21 and 22, which we shall consider in some detail.

Cambodia has also relied upon a Protocol or Settlement Agreement of 17 November 1946. This agreement was signed in Washington by representatives of the Government of the French Republic and the Kingdom of Siam on 17 November 1946. In essence it provided for the re-establishment of the prewar boundaries between Thailand and what was then French Indo-China, and then, in Article III, it provided for the setting up of a conciliation commission in accordance with the General Act to examine ethnical, geographical and economic arguments of the parties with a view to the revision or confirmation of certain boundaries. This Article is reproduced in Annex V of the Memorial of Cambodia. It also contained in Article II the declaration of France that it would no longer oppose the admission of Thailand to membership in the United Nations. As we have indicated in paragraph 8 of our Preliminary Objections, a special Franco-Siamese Commission on Conciliation was, in fact, established by the two Governments following the signature in Washington of this Agreement.

These, then, are all of the jurisdictional documents which either directly or indirectly or by implication are put forward as a basis for the Court's jurisdiction. Cambodia is a party to none of them. The Treaty of Friendship, Commerce and Navigation is between Siam, as Thailand was then known, and France, as is the Settlement Agreement. Yet France is not an Applicant in this case, nor, so far as Counsel is aware, has France asked to appear as an interested party. Yet this Court is asked to interpret these two bilateral agreements to which France is a party, in its absence, and to find in them the consent of Thailand to this proceeding. As I have indicated, it is common ground between the Parties here that neither Party in this proceeding is or ever has been a signatory or party to the General Act itself.

This then is the long and tortuous road which must be traversed to show that Thailand has consented to the compulsory judicial settlement of a dispute with Cambodia, because of Thailand's relationships with France, and because of this reference in Article 21 of the 1937 Treaty to the great League of Nations model—the General Act.

Our argument in support of the second objection divides itself naturally into two parts. I shall address myself to the first part, showing that the treaties I have discussed cannot be so interpreted as to find that Thailand has, through some reasoning, consented to the jurisdiction of the Court.

And my distinguished colleague, Maître Marcel Slusny, will then present the second part of Thailand's argument on its second preliminary

objection. He will show that under general principles of international law there exists no indirect process through which, as a matter of interpretation or through the operations of principles of law, including the law of State succession, Cambodia might claim to assert the rights of another State, if such rights exist, as a basis for this Court's jurisdiction. Maître Slusny will also summarize the entire argument on the second objection and formulate the Submissions of the Government of Thailand in respect to it.

*[Public hearing of 10 April 1961, afternoon]*

Mr. President, may it please the Court, I should now like to address myself to the three international agreements pleaded by the Government of Cambodia. First of all, the General Act.

This multilateral Treaty, intended as creative of a system of compulsory pacific settlement, did not, as events transpired, have that effect.

However, I shall refer to three articles of the Treaty which will indicate its compulsory aspect. We are particularly concerned with Chapter II entitled "Judicial Settlement". The first article of Chapter II, which is Article 17, provides:

> "All disputes with regard to which the parties are in conflict as to their respective rights shall, subject to any reservations which may be made under Article 39, be submitted for decision to the Permanent Court of International Justice, unless the parties agree, in the manner hereinafter provided, to have resort to an arbitral tribunal.
>
> It is understood that the disputes referred to above include in particular those mentioned in Article 36 of the Statute of the Permanent Court of International Justice."

We shall then touch on the procedure of conciliation. Article 1 of Chapter I, entitled "Conciliation", provides:

> "Disputes of every kind between two or more parties to the present General Act which it has not been possible to settle by diplomacy shall, subject to such reservations as may be made under Article 39, be submitted, under the conditions laid down in the present chapter, to the procedure of conciliation."

The chapter then goes on to provide for the composition and procedure of a Conciliation Commission.

Now, the apparent conflict between the obligations defined in these two articles is resolved by Article 20, contained in the chapter on "Judicial Settlement", which states in its first clause:

> "Notwithstanding the provisions of Article 1, disputes of the kind referred to in Article 17 arising between parties who have acceded to the obligations contained in the present chapter shall only be subject to the procedure of conciliation if the parties so agree."

While twenty-two States were parties to some or all of the separable chapters of this treaty, its principal significance has been as a model of

procedure for pacific settlement, especially in the field of conciliation, and until the application of Cambodia to this Court on the sixth day of October 1959, no State had attempted to invoke the General Act as a basis for this Court's jurisdiction, so far as our research can indicate, or as a basis for the jurisdiction of its predecessor.

In the light of the present attempt, Counsel for the Government of Thailand have examined the detailed and meticulous procedures under the original treaty plan whereby the Secretary-General of the League of Nations and the Registry of the Permanent Court of International Justice recorded and kept up to date lists of States parties to the General Act through their adherence to one or more of its substantive chapters.

This examination shows, and there is no dispute about this fact, that Thailand was never a party to the General Act either as a whole or in part.

Cambodia could not have become a party to the General Act before 1953 when, according to its Application in this Court, it first became a sovereign State. We have also examined the records for possible references to Cambodia. Again the position is verified and supported that Cambodia was never a party to the General Act either as a whole or in part.

Lists were kept to indicate the position of each party to the Treaty as to adherence to *(a)* the entire General Act; *(b)* the Conciliation and Judicial Settlement chapters; and *(c)* the Conciliation chapter alone. The fact that a State could thus adhere to part of the General Act is, in itself, one variable. It was still not enough in a particular case to conclude that a State was a party.

We examined the *Annual Reports* of the Secretary-General of the League of Nations recording adherences in the categories of *(a)*, *(b)* and *(c)* which I have mentioned, as well as the annual Year Books of the Permanent Court of International Justice, especially the lists of instruments considered by its Registry as governing the jurisdiction of that Court.

Parenthetically, a second variable is the fact that a State might condition its original adherence by some other reservation, such as domestic jurisdiction. This was permissible under Article 39 of the General Act. Such reservations under the language of Article 39, paragraph 3, had reciprocal effect. It was also possible to record a reservation *after* adherence and this was treated as a partial denunciation, specifically under Article 45, paragraph 4.

So that a State seeking to invoke the General Act would also have to consider to what extent, if any, a State party to the General Act had adhered to the compulsory jurisdiction of the Permanent Court of International Justice. Such declaration of adherence might at the same time constitute a limitation of obligations under the General Act, and hence itself be a partial denunciation.

Thus, it would have created great uncertainty if a third State, such as Cambodia, in this proceeding, never having subjected itself to the adherence and reservation procedures of the General Act, could invoke it as against another State also not a party.

If Cambodia could invoke the General Act as against Thailand, the latter's obligations, if any, would depend at least in part on the then adherence of France to the General Act as evidenced by its reservations to adherence and to the jurisdiction of the Permanent Court.

Here I should say a word about the Revised General Act of 1949. This was, as the Court will recall, a revision, in fact it was a new treaty, recommended by the General Assembly of the United Nations in a resolution of 28 April 1949 (General Assembly Resolution No. 268 of the Third Session).

The recommendation of the General Assembly came out of a discussion in its Interim Committee. There the doubtful efficacy of the General Act of 1928 as to States which had not adhered to it during the life of the League of Nations and before the dissolution of the Permanent Court of International Justice in April 1946 was discussed. The Interim Committee suggested a new and revised General Act which would be a new treaty in which references to the League of Nations organizations would be replaced by references to appropriate United Nations organs. In describing a Belgian proposal which was ultimately adopted by the General Assembly, the Report of the Interim Committee stated in part, and this quotation will be found in paragraph 29 of our Preliminary Objections and I would like to restate it:

> "... Thanks to a few alterations, the new General Act would, for the benefit of those States acceding thereto, restore the original effectiveness of the machinery provided in the Act of 1928, an Act which though still theoretically in existence, has become largely inapplicable."

and continuing from the Report of the Interim Committee:

> "It was noted, for example, that the provisions of the Act relating to the Permanent Court of International Justice had lost much of their effectiveness in respect of parties which are not Members of the United Nations or parties to the Statute of the International Court of Justice."

The Revised General Act of 1949 was then open for accessions and the Secretary-General of the United Nations was instructed to record such accessions just as the Secretary-General of the League of Nations had kept records of the original General Act of 1928 which I have described.

The *Annual Reports* of the Secretary-General of the United Nations have never reported adherences to the General Act of 1928 presumably because the Secretary-General does not consider that he has succeeded to the obligations of the League of Nations Secretary-General in this respect. As instructed by the General Assembly, he does hold open and list the accession of States to the "Revised General Act for the Pacific Settlement of International Disputes". We have examined his lists, as contained in his *Annual Reports*, as well as related Secretariat publications recording accessions to multilateral conventions. We have also consulted the *Yearbooks* of this Court. While we are aware that those *Yearbooks* in no way involve the responsibility of the Court, we have noted that neither Cambodia nor Thailand has ever been listed in them as acceding to the Revised General Act. (In fact, only four States are so listed: Belgium, Sweden, Norway and Denmark.)

We also observed that the Court's *Yearbooks*, beginning with the year 1949-1950, include the Revised General Act of 1949, but not the General Act of 1928.

Cambodia could have acceded to the Revised General Act. Thailand could have acceded to it. The records consulted show that neither State did so. As recently as 1958, negotiations between Thailand and Cambodia included proposals and counter-proposals suggesting as one element of a settlement formula that Article 33 of the United Nations Charter and appropriate provisions of the Revised General Act might govern controversies between the two States. The proposals, as we have stated in paragraph 36 of our Preliminary Objections, did not lead to an agreement. Thus our research has disclosed no evidence that either State is or has been listed as a party to the Revised General Act of 1949.

There is also no suggestion and no evidence that Cambodia was regarded by the record-keeping authorities either of the League of Nations or of the United Nations as possessing, or succeeding to, rights under the General Act of 1928 or under the Revised General Act of 1949.

I turn now to the second treaty pleaded in the Observations of Cambodia, the Treaty of Friendship, Commerce and Navigation between Siam and France of 7 December 1937. This bilateral Treaty is the most recent in a series of Friendship, Navigation and Commerce Treaties between France and Thailand. Its first twenty articles, with which we are not directly concerned, deal with matters typical to this type of instrument, including commercial matters and "most favoured nation" treatment.

The final three articles contain, in Article 21 a broad reference to the General Act, in Article 22 a guaranty of boundaries between Siam and French Indo-China, and in Article 23 a termination clause on one year's notice after 1944.

I turn now to Article 21. It is a single sentence which reads as follows:

> "In accordance with the principles embodied in the Covenant of the League of Nations, the High Contracting Parties agree to apply the provisions of the General Act for the Pacific Settlement of International Disputes, adopted on September 26, 1928 by the Assembly of the League of Nations, for the settlement of any disputed questions which may arise between them in the future and which cannot be settled through the diplomatic channel."

The reference is to the General Act for the settlement of any disputed questions *which may arise between the parties*, that is to say, between Thailand and France, in the future, which cannot be settled through diplomatic channels. The next article of the Treaty, Article 22, contains two paragraphs. The first one, although it is common law, I would like to read:

> "The present Treaty shall, as from the date of its entry into force, replace the Treaty of Friendship, Commerce and Navigation concluded at Bangkok on 14 February 1925. It shall also annul, as from the same date, the other Treaties, Conventions and Agreements concluded between Siam and France, with the exception, however, of the clauses relating to the definition and delimitation of the frontiers, the guarantee in respect thereof, the demilitarization of the Mekong frontier (contained in the Treaty of 3 October 1893, the Convention of 13 February 1904, the Treaty of 23 March 1907 and the Protocol annexed thereto, and the Treaty of 14 February 1925) and also the Convention relating to Indo-China, signed at

> Bangkok on 25 August 1926, and the Agreements provided for therein. It is further agreed that the present Treaty shall, as from the date of its entry into force, replace the Treaty of 14 February 1925, in regard to the relations between Siam and Indo-China, in so far as the provisions thereof are not incompatible with those of the Convention in question and of the Agreements provided for therein."

The second clause of this Article 22 reads:

> "The provisions of the present Treaty may, by a declaration agreed upon between the two Governments, be subsequently extended in whole or in part to French colonies and possessions and to countries placed under French protectorate or mandate."

It will be noticed that the first clause of this Article is a saving clause, saving the guaranty in respect to clauses of earlier treaties relating to the definition and delimitation of frontiers. Of these earlier frontier definition treaties, those of 1904 and 1907 in particular would be material if the Court had to consider the merits of this case.

The second clause emphasizes the bilateral nature of the Treaty as a whole, by providing that a future declaration between the two Governments, that is to say between Thailand and France, might subsequently extend the provisions of the Treaty—not simply this Article 22 but the Treaty—between the two Governments in whole, or in part, to French colonies and possessions. Of course, in 1937 Cambodia was a French Protectorate.

If one compares this saving clause contained in the first part of Article 22, and the provision for the extension of the Treaty to countries under a French Protectorate under the second clause, with the next earlier in the series of Treaties of Friendship, Commerce and Navigation of 14 September 1925, which the 1937 Treaty under the precise language of Article 22 replaces, then it is apparent that this Article of the 1937 Treaty simply combines in one article of two clauses what the earlier Treaty contained in two separate articles (Articles 26 and 27 of the 1925 Treaty).

And then, turning to Article 23 of the 1937 Treaty dealing with its duration, as I have indicated it may be denounced after its first five years, that is to say after 1944, upon one year's notice by either party, without having the effect of bringing into force any of the treaties which it abrogates.

That means that either Thailand or France could, under Article 23, denounce this Treaty and it would then be terminated at the end of one year.

Such denunciation would destroy the possibility of Cambodia thereafter pleading the Treaty as a basis for this Court's jurisdiction. Yet such an act by France would not destroy the legal status of the boundary between Thailand and Cambodia. Thus the Treaty cannot be considered as any part of the boundary delimitation provided for in the Treaties of 1904 and 1907 between France and Thailand which do establish this boundary, and which would be presented to the Court in any consideration of the merits of this case.

This bilateral Treaty of 1937 is in no sense one which constitutes a title deed of Cambodia or of France to the boundary with Thailand. Nor does it create a continuing procedure for the servicing and adjusting of

boundary disputes as such. Indeed, the entire thrust of Article 22 is in the opposite direction.

The reference to the procedure of pacific settlement and to the General Act in Article 21 is a general provision, quite independent of the saving clause in the first paragraph of Article 22.

The reference to pacific settlement through the General Act in Article 21 is quite different from the provisions contained in the Treaties of 1904 and 1907 providing for demarcation procedures.

This interpretation of Article 21 with its references to the General Act was stated in the clearest language by the Agent of France when he referred to this 1937 Treaty before a Conciliation Commission created under the Settlement Agreement of 17 November 1946, upon which Cambodia also relies as part of its theory on jurisdiction. That agreement I shall consider in my next point.

But in the Cambodian Memorial, at page 89 **(I)**, this statement of M. Francis Lacoste, the Agent of France before the Conciliation Commission created by Thailand and France under this bilateral Agreement, is contained in a memorandum to the Commission which discussed a French view of the interpretation of Article 21. Considering the history of the Treaty of 1937 during the period from 1940 to 1946, M. Lacoste used these words to formulate the position of France as to Article 21 of the Treaty with reference to pacific settlement. He said:

> "The legal position of the French Government was even stronger than shown by the concise and moderate wording of the memorandum of 2 October. Not only had the High Contracting Parties confirmed, in their successive treaties of 1925 and 1937, and the 1907 boundary settlement, declared final at the outset, they had also mutually guaranteed each other's boundaries, thus forbidding themselves to dispute them. It was therefore out of the question, in the circumstances, to apply Article 21 of the 1937 Treaty, since no dispute, according to the meaning of this provision, could arise in connection with the boundary. The absolute refusal of the French Government was therefore perfectly well founded."

This statement is a clear indication of the French position that there was no inter-relationship between the guaranty of boundaries contained in Article 22 and the general reference to pacific settlement of disputes with reference to the General Act in Article 21.

It also emphasizes what emerges from a careful reading of Article 21 itself; that it created an obligation of an essentially political nature between the two parties to the Treaty, between Thailand and France.

I have indicated that our research shows no record of Cambodia as a party to, or successor of, rights under the General Act. At the same time we did find in the *Sixteenth Report* of the Permanent Court of International Justice this Treaty of Friendship, Commerce and Navigation between Thailand and France listed under the section entitled "Other instruments providing for the jurisdiction of the Court" and this we have duly noted in paragraph 26 of our Preliminary Objections.

This distinction between parties and interested States is implicit in the general provisions of the General Act and as we have observed in our Preliminary Objections, this distinction is supported by the structure and precise language of Article 22 with its two clauses, the first guaranteeing certain boundaries and the second providing that

the Treaty can be extended to countries placed under French protectorate.

So again I return to the inevitable conclusion that Cambodia is here attempting to find the consent of Thailand to the jurisdiction of the Court in Article 21 of a bilateral treaty to which it is not a party. One of the parties to that Treaty, France, has interpreted it as creative of no rights in third States interested in boundary matters guaranteed by the Treaty.

Turning now to the Settlement Agreement of 17 November 1946, finally, I shall say a word about the third agreement upon which Cambodia in its Observations relies as a direct basis for asserting the consent of Thailand to the jurisdiction of the Court. We begin with the fact that Cambodia was not a party to the Settlement Agreement of 1946 which was negotiated between Thailand and France. It represented a settlement of a controversy between those two States existing at the end of World War Two. This was the time when Thailand was seeking admission to the United Nations. The history of the Agreement is to be found in the records of the Security Council, which we have cited in paragraph 8 of our Preliminary Objections. It begins with the Report of the Committee on the Admission of New Members of the Security Council, which had before it the application of Thailand. The French representative, according to the record, told the Committee of the Security Council in August of 1946 that his Government would not be able to vote in favour of the admission of Siam to membership in the United Nations and would consider itself in an actual state of war with Siam so long as agreement had not been reached for the procedure for the solution of a territorial dispute (this occurs in an Annex to the Official Record of the 81st Meeting of the Security Council of 29 November 1946).

A representative of Siam, Mr. Konthi Suphamongkhon, thereupon addressed a letter on 24 August 1946 to the Secretary-General, in which he referred to this Report of the Committee for New Members. He stated that his Government would accept a decision of the Security Council or a French proposal to refer the territorial dispute to this Court. As events developed, in fact, a Franco-Siamese Settlement Agreement was reached on 17 November 1946, and was laid before the Security Council at its meeting of 29 November together with letters from the representative of France and from His Royal Highness Prince Wan of Siam. Prince Wan, in his letter to the Secretary-General, which was read to the Security Council, stated:

> "I now have the honour to inform Your Excellency that in accordance with the provisions of Article 33 of the Charter, contact was established in Washington between the representatives of Siam and the representatives of France and that, as a result of the negotiations thus undertaken, an Agreement of Settlement and Protocol was concluded on 17 November 1946, a copy of which I beg to forward herewith."

The representative of France in the Security Council, M. Parodi, read to the Security Council his own letter of 28 November 1946, which referred to this Agreement, and the letter concluded by saying:

> "As a token of its sentiments in this respect, and in accordance with the provisions of Article II of the Settlement Agreement

of 17 November, the French Government has instructed me to request you to inform the Security Council that France is in favour of the admission of Siam to the United Nations." (Security Council, *Official Records*, 81st Meeting, 29 November 1946.)

The text of the Settlement Agreement itself is therefore to be found in Annex 14 to the 81st Meeting of the Council. Its first Article refers to the transfer of Indo-Chinese territories to the French authorities. The second Article states that relations between France and Siam shall once more be regulated by the Treaty of 7 December 1937, as well as by a Commercial and Customs Agreement of 9 December 1937.

Article 3 of the Settlement Agreement provides:

"Immediately upon the signature of the present Agreement, France and Siam shall set up, in application of Article 21 of the Franco-Siamese Treaty of 7 December 1937, a Conciliation Commission composed of two representatives of the parties and three neutrals, in accordance with the General Act of Geneva dated 26 September 1928 for the pacific settlement of international disputes which regulates the constitution and operation of the Commission. The Commission shall begin its work as soon as possible after the transfer of the territories referred to in Article 1, paragraph 2, has been effected. It shall be responsible for examining the ethnical, geographical and economic arguments of the parties with a view to the revision or confirmation of the clauses of the Treaty of 3 October 1893, of the Convention of 13 February 1904 and of the Treaty of 23 March 1907, maintained in force by Article 22 of the Treaty of 7 December 1937."

And so it came about that after considering other possible methods of settlement, Thailand and France entered into this bilateral Settlement Agreement which provided for a Conciliation Commission. According to the language of Article 3, which I have just read, the Commission would be responsible for examining the ethnical, geographical and economic arguments of the parties relating to the boundary treaties between them.

This Conciliation Commission was created in accordance with the procedures contained in the first chapter of the General Act, which bears the title "Conciliation", and when the Thai Agent presented his case, with a covering letter dated 12 May 1947, to the President of the Commission, he stated that he was submitting an application on behalf of the Royal Siamese Government in accordance with Article 7 of the General Act, and this letter is to be found in the Cambodian Memorial at page 38 **(I)**. Article 7 of the General Act provides that each party to a dispute may bring it before a Conciliation Commission by means of an application. And correspondingly, the French Agent, M. Francis Lacoste, wrote to the President of the Commission on 5 May 1947 that he held himself at the disposition of the Commission since he understood that, in accordance with Article 7 of the General Act, a Siamese application had been submitted (his letter is to be found at page 32 **(I)** of the Cambodian Memorial).

The Conciliation Commission was composed of the representatives of Siam, the representative of France and three neutral members, Mr. Victor Belaunde of Peru, Mr. William Phillips of the United States

and Sir Horace Seymour of the United Kingdom. Its final Report stated that the functions of the Commission were determined by Article 3 of the Settlement Agreement and by the first chapter of the General Act which, as I have said, bears the title "Conciliation".

This, then, is the briefest history of the relationship between Article 3 of the Settlement Agreement referring to the General Act and the way in which the Conciliation Commission organized itself and drew on the procedures of the General Act.

This Settlement Agreement, whose history I have described, is evidence of the usefulness and of the use of these procedures for the establishment of a Conciliation Commission contained in Chapter 1 of the General Act. As indicated by this bilateral agreement, France and Thailand found them useful as the pacific settlement measure to be preferred, given the relations between them in 1946.

But so far as the research of Counsel can determine, neither France nor Thailand moved to take their dispute to this Court on the basis of those references to the Permanent Court of International Justice contained in Chapter 2 of the General Act under the general title "Judicial Settlement".

And this brings me to the end of my opening statement. There are three agreements on which Cambodia relies to show the consent of Thailand to this proceeding.

First, there is the General Act of 1928 with its references to judicial settlement by the Permanent Court of International Justice. It has never been adhered to either by Thailand or Cambodia.

Second, there is the Treaty of Friendship, Commerce and Navigation of 1937 with its references in Article 21 to the peaceful settlement procedures of the General Act. This is a bilateral treaty between Thailand and France. Cambodia is not a party to it.

Third, there is the Settlement Agreement of November 1946 between Thailand and France, referring in its Article 3 to a Conciliation Commission set up in application of Article 21 of the 1937 Treaty *and* in accordance with the General Act. This was an *ad hoc* bilateral agreement. Cambodia was not a party to it. That essential privity between Cambodia and Thailand which would evidence the consent of Thailand to this proceeding is thus lacking throughout.

And so it remains for my colleague, Maître Slusny, to show that under general principles of international law there exists no indirect process whereby Cambodia may claim for itself the rights of another State under treaties and under an agreement to which Cambodia itself is not a party.

## 4. PLAIDOIRIE DE Me MARCEL SLUSNY

(CONSEIL DU GOUVERNEMENT DE THAÏLANDE)
AUX AUDIENCES PUBLIQUES DES 10 ET 11 AVRIL 1961

*[Audience publique du 10 avril 1961, après-midi]*

Monsieur le Président, Messieurs de la Cour.

Mon excellent confrère, Me Hyde, vient de vous démontrer par une analyse rigoureuse des textes, dans une plaidoirie que je crois extrêmement complète et convaincante, qu'aucun des titres que le Gouvernement cambodgien a invoqués dans ses observations, savoir l'acte général de 1928, le traité d'amitié, de navigation et de commerce de 1937 ou l'accord de règlement du 17 novembre 1946, ne peut servir de base à la compétence de la Cour.

La tâche qui m'est dévolue parmi les conseils de la Thaïlande consiste à présenter quelques brèves observations supplémentaires sur la question de savoir si, compte tenu de la théorie générale en matière de succession des États, le Cambodge peut prétendre succéder à la France dans les droits que celle-ci peut éventuellement puiser dans l'article 21 du Traité de 1937, auquel, comme on le sait, le Cambodge n'est pas partie en tant que tel.

Il va de soi que je n'ai nullement l'ambition — et j'ajouterais volontiers la présomption —, ayant à examiner ce point particulier, de reprendre l'ensemble de la théorie sur la succession des États, par ailleurs si complexe et si controversée dans bien de ses aspects. Mais je me bornerai, avec la permission de la Cour, à me référer à certains principes, dans la mesure où cette référence me sera utile pour faire la démonstration que le point de vue du Gouvernement cambodgien sur les incidences de cette théorie sur la compétence de la Cour, point de vue exposé aux paragraphes 31, 32 et 33 des observations du Cambodge sur les exceptions préliminaires de la Thaïlande, ne peut, à notre sens, être retenu.

Si nous laissons de côté les auteurs qui nient l'existence même d'une théorie de la succession des États, et qui vont ainsi à l'encontre de la jurisprudence à tout le moins de la Cour permanente de Justice internationale, les auteurs qui ont été amenés à examiner le problème de la succession des États aux traités ont, dans l'ensemble, admis une distinction fort nette entre deux catégories de traités, étant entendu cependant que la terminologie diffère souvent d'un auteur à l'autre, sans compter, bien sûr, qu'il existe des difficultés considérables pour passer d'une langue utilisée à l'autre.

Cette réserve étant formulée, ces deux catégories peuvent être caractérisées comme étant, d'une part, les traités à caractère personnel et, d'autre part, les traités réels ou encore d'ordre territorial. Cette distinction, la Cour le sait, est celle admise par de nombreux auteurs, et parmi les auteurs les plus récents je me permettrai de citer, sans le lire, car rien n'est plus fastidieux que la lecture de citations, le professeur Castrén, dans le cours donné par lui à l'Académie de droit

international et qui figure au *Recueil des cours* de l'Académie de Droit international, 1951, sous les pages 430 *et seq.*

La même distinction entre traités personnels, d'une part, et traités territoriaux ou d'ordre réel, d'autre part, est faite par l'auteur d'une monographie récente également sur cet immense sujet, O'Connell, qui établit une dichotomie entre, d'une part — et ici je m'excuse d'employer les termes anglais qui ne recouvrent pas exactement les termes français — *personal treaties* (traités personnels) et *dispositive treaties*, qu'il faudrait traduire, pour reprendre le langage de Castrén, par traités réels ou d'ordre territorial. (O'Connell, D.P., *The Law of State Succession*, Cambridge, 1956, p. 15.)

Un autre auteur également, ayant à examiner le problème, très particulier d'ailleurs, qui était celui posé par le partage de l'Inde britannique entre l'Inde et le Pakistan, et reprenant à cet égard l'avis du Département juridique des Nations Unies, Oscar Schachter, étant lui-même le principal conseiller juridique de ce Département, a examiné ce problème dans un article qui a paru dans le *British Year Book of International Law* de 1948 (p. 106). Il fait, lui également, la distinction traditionnelle — quoique, je le répète, les termes utilisés soient souvent différents — entre les traités qui ont un lien local avec le territoire cédé ou qui a fait sécession et, d'autre part, les traités politiques comme les traités d'alliance ou de règlement pacifique.

Cette distinction fondamentale entre ces deux catégories de traités étant faite, il faut bien reconnaître que les divergences apparaissent immédiatement en doctrine lorsqu'il s'agit de déterminer quels sont, en fait, les traités qu'il faut ranger plutôt dans une catégorie que dans l'autre. Et il serait d'ailleurs extrêmement hasardeux et inutile pour notre propos de reprendre les controverses qui existent à cet égard, par exemple à propos des traités à caractère économique, administratif ou judiciaire qui, quoique relevant de la première catégorie et étant des traités à caractère personnel, pourraient cependant donner lieu à une certaine application de la notion de succession et s'imposeraient à l'État successeur ou créeraient des droits en sa faveur.

Par contre, où il semble n'y avoir aucune espèce de divergence entre les auteurs qui ont examiné ce problème, c'est quant au sort des traités politiques, des traités purement politiques, parmi lesquels il faut ranger les traités d'alliance, de neutralité, d'amitié ou de règlement pacifique, selon l'opinion de O'Connell, déjà citée; l'opinion également émise par votre regretté collègue Lauterpacht, dans la nouvelle édition qu'il avait donnée de l'ouvrage classique de Oppenheim (Oppenheim-Lauterpacht, *International Law*, 8th Edition, Vol. I, p. 159), et également par Schachter, dans l'article auquel j'ai déjà fait allusion.

Car, lorsqu'il s'agit de traités d'alliance, de neutralité, d'amitié ou de règlement pacifique, on se trouve devant des traités purement politiques conclus, pourrait-on dire, *intuitu personae*, en considération de la personnalité de l'État avec lequel on traite, dans un contexte politique donné, souvent en vue d'obtenir des concessions corrélatives du co-contractant, et l'on peut donc dire qu'il s'agit de traités qui ont un caractère à ce point personnel que l'on ne peut concevoir que le bénéfice ou la charge s'en transmette à un État tiers qui n'était pas le co-contractant originaire.

Sans doute nos estimés contradicteurs seront-ils amenés à plaider que le principe de non-succession aux traités purement politiques,

parmi lesquels les auteurs rangent donc les traités prévoyant un mode de règlement pacifique des litiges, ne joue qu'en cas de disparition de l'État originairement lié, soit par absorption ou annexion, c'est-à-dire en cas de succession totale, mais que ce principe ne s'applique pas en cas de succession partielle, et plus particulièrement en cas d'accession à l'indépendance d'un territoire sous mandat, d'un protectorat ou d'un territoire dépendant ayant eu une large autonomie administrative.

Il est possible que nos estimés contradicteurs citent à ce propos certains exemples historiques, notamment de pays ayant accédé à l'indépendance après la seconde guerre mondiale, et invoquent que dans des traités conclus entre l'État qui acquiert son indépendance et celui auquel il était précédemment soumis, l'État devenu indépendant se voyait continuer le bénéfice de traités précédemment conclus et acceptait d'en assumer la charge.

Nous nous réservons évidemment de reprendre ce point si de pareils exemples sont invoqués de part adverse, mais nous désirons dès à présent formuler deux brèves remarques à ce propos:

*a)* les États tiers peuvent de toute manière considérer de pareils traités comme des *res inter alios acta*, qui en tout cas ne les lient pas;

*b)* si pour certains traités à caractère personnel, l'opinion peut être défendue qu'ils peuvent être transférés à un État successeur, en cas de succession partielle, question sur laquelle nous ne nous prononçons pas, en tout état de cause, les traités à caractère proprement politique, comme les traités d'alliance, d'amitié ou de règlement pacifique, ont un caractère à ce point personnel, qu'ils ne peuvent être considérés comme étant de ceux auxquels un État successeur peut succéder, et cela à cause de l'*intuitus personae*.

Nous estimons qu'il est inutile d'en dire pour l'instant davantage sur ce sujet précis, et qu'étant donné le caractère fragmentaire des solutions intervenues dans divers cas, après la seconde guerre mondiale notamment, et l'impossibilité à notre sens d'en dégager avec certitude une règle qui viendrait contredire celle que nous avons formulée, savoir la non-succession aux traités politiques, nous croyons, sous réserve des considérations que nous pourrions faire valoir en cours de réplique, qu'il vaut mieux, au stade actuel, examiner le texte sur lequel se fonde le Gouvernement cambodgien, savoir l'article 21 du Traité de 1937.

Cependant, avant de passer à cet examen et de soumettre en quelque sorte l'article 21 du Traité de 1937 à l'épreuve du principe général retenu, je voudrais cependant citer un traité conclu entre la France et le Laos, repris chez un auteur qui a également traité récemment le problème de la succession des États aux traités, M. de Muralt, dans un ouvrage intitulé *The Problem of State Succession with regard to Treaties* (La Haye, 1954, p. 127 *in fine*).

Si je cite ce texte, c'est parce qu'il existe entre la situation du Cambodge et du Laos, au point de vue de la succession des États, un certain parallélisme de situation, et que j'estime pouvoir, même à ce stade de la discussion, en tirer certaines conclusions.

Ce texte présente en effet, *a contrario*, un certain intérêt. C'est le traité conclu le 22 octobre 1953 à Paris entre le Laos et la France, et qui dispose en son article 17 (et je répète qu'il s'agit d'une citation que j'ai trouvée dans un auteur — qui est donc M. de Muralt — se référant lui-même à *La Documentation française, notes et études*

*documentaires*, 5 décembre 1953, n° 1811, Textes diplomatiques CXXXV, Série Outremer LXI, p. 2):

> « La République française reconnaît et déclare que le Royaume-Uni du Laos est un État pleinement indépendant et souverain. En conséquence, il est substitué à la République française dans tous les droits et obligations résultant de tous traités internationaux, ou conventions particulières, contractés par celle-ci au nom du Royaume du Laos ou de l'Indochine française antérieurement à la présente convention. »

Sous la seule réserve que de toute manière les tiers co-contractants devraient donner leur accord à de pareils transferts de droit ou d'obligations, il reste que la France et le Laos n'ont point considéré que la succession du Laos à la France pour les traités, même conclus au nom du Laos ou de l'Indochine française, allait de soi, puisque aussi bien ces deux États ont eu recours à un texte formel.

Comme il n'existe à notre connaissance aucun traité analogue entre la France et le Cambodge, on pourrait peut-être en conclure, eu égard au parallélisme des situations, que le Cambodge et la France ont estimé qu'en ce qui concerne les traités conclus par la France et auxquels le Cambodge pouvait être intéressé, les questions juridiques touchant à la succession des États ne pouvaient être résolues qu'en appliquant les règles générales du droit international coutumier relatives à cette matière.

En tout état de cause, ce traité ne vise que les traités internationaux et les conventions particulières contractées par la France *au nom* du Royaume du Laos ou de l'Indochine française.

Or, nous allons rappeler dans un instant, comme Me Hyde l'a déjà fait, que le traité de 1937 n'est pas conclu au nom du Laos ou de l'Indochine française.

Il y a donc lieu d'examiner le traité invoqué lui-même, pour déterminer si le Cambodge a succédé aux droits que la France puisait dans ce traité.

Si l'on examine ce traité qualifié, on le sait, de « Traité d'amitié, de commerce et de navigation entre la Thaïlande et la France », on voit que l'article premier établit un principe général. Je me permets de le lire, il est extrêmement bref: « Il y aura paix constante et amitié perpétuelle entre le Royaume de Thaïlande et la République française. » L'article 16 prévoit la faculté d'établir des consuls; l'article 21 contient une référence à l'acte général de 1928; l'article 22 contient un rappel d'un certain nombre de traités antérieurs, les articles 23 et 24 sont relatifs à la durée du traité et à l'échange des ratifications et pour tout le surplus, il s'agit d'un traité de navigation et de commerce comme son titre l'indique (et, ajouterons-nous, d'un traité d'établissement, car il contient des clauses importantes quant à l'établissement des ressortisants des deux États contractants, à leur statut personnel, au régime de leurs biens, etc.).

Si la Cour le permet, je voudrais bien rappeler une dernière fois ce texte de l'article 21, déjà lu par Me Hyde en anglais et traduit depuis lors, il est bref également; l'article 21 dispose donc:

> « Conformément aux principes énoncés dans le Pacte de la Société des Nations, les Hautes Parties contractantes conviennent d'appliquer les dispositions de l'Acte général pour le règlement

pacifique des différends internationaux, adopté le 26 septembre 1928 par l'Assemblée de la Société des Nations, au règlement des questions litigieuses qui surgiraient entre elles dans l'avenir et qui ne pourraient être résolues par la voie diplomatique. »

La Cour le sait déjà, la Thaïlande soutient que le Cambodge ne succède pas aux droits que la France a pu acquérir par application de cet article vis-à-vis de la Thaïlande.

A notre sens il ne peut être question que le Cambodge, après la conquête de son indépendance, y succède, parce qu'il s'agit de dispositions conclues *intuitu personae*, en considération de la personne du co-contractant, et que la Thaïlande n'a certes pas entendu se lier pour l'avenir avec les protectorats de la France ou les colonies qui pourraient accéder à l'indépendance.

La Partie adverse n'est d'ailleurs pas loin de reconnaître le bien-fondé de cette thèse, puisque le Gouvernement cambodgien, au paragraphe 32, page 165 **(I)** de ses observations, soutient que:

« La clause du règlement juridictionnel obligatoire inscrite dans le traité de 1937 n'est pas invoquée par le Cambodge comme clause générale. Elle est invoquée pour assurer la solution d'un différend relatif à une question réglée par le traité. »

Autrement dit, le Cambodge ne succéderait point à la France d'une façon générale pour tous les différends, mais parce qu'il existe un lien nécessaire entre l'article 21 et l'article 22 et plus particulièrement la partie de l'article 22 confirmative des traités de frontières de 1904 et 1907. Il y aurait donc entre l'article 21 et cette partie de l'article 22 une sorte d'interdépendance conceptuelle.

Cette thèse ne nous paraît pas pouvoir être retenue, car il n'existe pas à notre sens de lien logique entre toutes les dispositions du traité de 1937.

L'article 21, d'une part, se relie plus particulièrement à l'article premier, dont je vous ai donné lecture, et s'inscrit dans le cadre des objectifs proprement politiques visés au préambule du traité. D'autre part, l'article 21 ne se réfère pas explicitement aux litiges nés de l'application du traité.

De son côté, l'article 22, paragraphe premier, ne nous paraît pas être une disposition créant des droits nouveaux. C'est, Me Hyde vous l'a montré, une clause de sauvegarde de certains traités antérieurs et notamment des traités de 1904 et 1907 relatifs aux frontières. Cette clause de sauvegarde a été inscrite dans le traité parce que les parties, voulant simplifier la situation juridique existant entre elles, ont abrogé les traités antérieurs, sauf ceux visés à l'article 22.

Pour démontrer la relation, à son sens nécessaire, qui existerait entre l'article 21 et l'article 22 du traité, le Gouvernement cambodgien invoque *in fine* du paragraphe 32 de ses observations sur les exceptions préliminaires ce qui suit:

« La Thaïlande reconnaît que le Cambodge est successeur de la France en ce qui concerne les traités relatifs à la définition et à la délimitation des frontières. Elle ne peut exclure arbitrairement du jeu de tels traités les dispositions qu'ils renferment quant au règlement juridictionnel obligatoire, dans la mesure où ce règlement est accessoire à la définition et à la délimitation des frontières. »

Sans doute, le Gouvernement thaï pourrait-il considérer, et il y a fait allusion loyalement dans ses exceptions préliminaires au paragraphe 40, qu'étant lié par les traités de 1904 et 1907, pour ce qui concerne les frontières, il pourrait être un jour expédient pour les gouvernements intéressés de recourir à des procédés *techniques* de démarcation sur le terrain de la frontière qui, dans certaines de ses parties, n'avait fait l'objet que d'une définition de principe par référence, en l'espèce, à la ligne de partage des eaux (article 1 du traité du 13 février 1904; paragraphe 4 de la requête cambodgienne).

Mais cela ne signifie pas, à notre sens, que doive être maintenue au profit du Cambodge une clause de règlement pacifique qui a un caractère *politique* au premier chef, précisément parce qu'elle a été conclue *intuitu personae* avec un État déterminé, dans un contexte politique déterminé, à une époque déterminée.

*[Audience publique du 11 avril 1961, matin]*

Monsieur le Président, Messieurs de la Cour, je vous remercie de me donner la parole et de me permettre de continuer ainsi la démonstration que j'avais commencée hier à propos de l'absence d'interdépendance entre les articles 21 et 22 du traité de 1937.

Nous estimons, de ce côté de la barre, qu'il y a si peu interdépendance nécessaire entre ces deux articles que si, d'aventure, le traité avait dû être dénoncé conformément à l'article 23, les frontières telles qu'elles résultaient des traités de 1904 et de 1907, rappelés eux-mêmes à l'article 22 du traité de 1937, n'auraient certes pas pu être discutées, parce que les traités de 1904 et de 1907, rappelés à l'article 22, créaient une situation objective destinée à subsister aussi longtemps qu'un traité postérieur ne serait pas venu la modifier, alors que, certainement, l'article 21, qui crée une procédure de règlement pacifique des litiges, ne serait pas demeuré en vigueur. On peut d'ailleurs tirer de l'article 23 du traité, qui est relatif à la dénonciation de ce traité, un autre argument: c'est que si l'une des parties qui sont en nom au traité l'avait dénoncé, on peut se demander quel eût alors été le sort des droits que le Cambodge prétend en tirer. Le Cambodge eût-il pu prétendre que dès son accession à l'indépendance il se trouvait investi de droits autonomes en vertu du traité, par le jeu du principe de la succession des États, et que la dénonciation du traité par la France n'eût eu aucune incidence sur ses droits à lui, Cambodge, quant au règlement pacifique prévu par l'article 21, ou encore qu'en cas de dénonciation du traité par la Thaïlande, celle-ci eût dû notifier au Cambodge son intention de le dénoncer?

Nous croyons ainsi avoir fait par l'absurde la démonstration qu'il ne peut être question de considérer qu'un traité de ce genre, ou plus exactement qu'une disposition comme celle prévue à l'article 21, à raison de son caractère purement politique, strictement personnel, puisse être considérée comme s'étendant au-delà du champ contractuel délimité au départ par les Parties.

Le Gouvernement cambodgien se rend tellement bien compte, à notre sens, du caractère éminemment discutable de sa position, si on l'analyse à la lumière du principe de droit international relatif à la succession des États, que dans un bref passage des observations, au paragraphe 33, il défend la thèse selon laquelle la France, en 1937, n'a agi que notamment

comme représentant du Cambodge et que, par conséquent, les principes en matière de succession des États ne sont pas en jeu en l'espèce.

Pour pouvoir affirmer qu'un État protecteur traite avec un État tiers comme représentant de son protectorat, et ce en vue de stipuler en faveur de ce protectorat, il faudrait, à notre sens, que le texte du traité fût tout à fait clair à cet égard.

Et ici je me permettrai, Monsieur le Président, Messieurs de la Cour, de vous rappeler à cet égard l'enseignement du professeur Rousseau, dans ce maître-livre qu'il a consacré aux traités, publié en 1944, sous le titre *Les principes généraux du droit international public*. Page 381, au paragraphe 248, le professeur Rousseau rappelle, à propos des colonies — mais nous verrons dans un instant que ce principe s'applique également *mutatis mutandis* aux protectorats — que le principe général est l'inapplication des traités aux colonies, sauf clause contraire. Et, sous le paragraphe 249, le professeur Rousseau examine quels sont les procédés techniques qui ont été mis en œuvre, et il cite à cet égard plus particulièrement la pratique de la France, pour étendre le bénéfice des traités aux colonies. Ces procédés sont au nombre de trois. Il peut y avoir extension du traité aux colonies par une déclaration formelle intervenue au moment de la signature, de la ratification ou de l'adhésion; il peut y avoir application de plein droit du traité à l'ensemble du territoire métropolitain et colonial, avec faculté pour les États contractants d'exclure l'extension du traité aux colonies, et il peut y avoir — troisième procédé — application pure et simple du traité à l'ensemble des territoires métropolitains et coloniaux des États contractants, avec cependant cette réserve indiquée *in fine* page 386 et qui vient confirmer l'ensemble des réserves qui sont déjà introduites à propos des deux procédés techniques précédents, que « quel que soit le procédé technique utilisé, il laisse intact le principe de l'inapplication du traité aux colonies dans le silence du droit conventionnel, principe qui domine toute la matière et auquel il ne peut être dérogé qu'en vertu d'une clause formelle préalable ».

En appliquant ces principes, définis à propos d'extension des traités aux colonies, aux territoires sous protectorat ou sous mandat, Rousseau, paragraphe 250 de son ouvrage, note que

> « En dehors des cas où les traités internationaux sont conclus soit au nom de l'État protégé par la puissance protectrice, soit pour le compte de l'État sous mandat par la puissance mandataire — ce qui est une hypothèse qui ne nous intéresse pas —, il est possible que les traités conclus par l'État protecteur ou mandataire en son nom propre soient étendus à l'État protégé ou à l'État sous mandat dans des conditions analogues à celles qui viennent d'être indiquées pour les possessions coloniales. »

Il faut donc, si on se réfère à cette doctrine, soit que le traité indique dans son intitulé qu'il est conclu notamment au nom du protectorat, soit que l'on ait eu recours à un des procédés techniques que je viens d'énumérer pour étendre l'application du traité à ce protectorat, procédé technique qui tout de même prévoit toujours l'insertion d'une clause formelle à cet égard. Des exemples sont donnés à cet égard par le professeur Rousseau. Il répète, dans un autre passage de son ouvrage, au paragraphe 201, qu'en ce qui concerne les États protégés, il faut que le préambule du traité porte l'indication de l'État au nom duquel on traite,

et il donne dans un autre paragraphe de l'ouvrage, paragraphe 86, page 180, une série d'exemples où l'on voit la France conclure des traités notamment au nom du Maroc ou de la Tunisie en indiquant clairement dans le préambule du traité qu'elle agit au nom de ces États. Or, dans le traité qui est soumis à la Cour à l'heure actuelle, le traité de 1937, il suffit de lire l'intitulé pour constater qu'il n'y est pas question du Cambodge et que la France y apparaît comme traitant pour elle-même et, d'autre part, aucun des procédés techniques indiqués par le professeur Rousseau à propos des colonies et dont l'extension est prévue par lui aux protectorats et aux territoires sous mandat n'a été utilisé. Bien au contraire, l'article 22, qui à cet égard ne fait que reprendre la pratique constante d'ailleurs de la France pour la plupart de ses traités, indique, en son second alinéa, que le traité ne s'étend pas *ipso facto* aux territoires sous protectorat, sous mandat et aux colonies, et le second paragraphe de l'article 22 que je me permets de relire à cet égard est le suivant:

> « Les dispositions du présent traité pourront être ultérieurement étendues en tout ou en partie aux colonies et possessions françaises, ainsi qu'aux pays placés sous le protectorat ou le mandat de la France, par une déclaration concertée entre les deux gouvernements. »

Comment imaginer par ailleurs que le Gouvernement français ait pu songer au moment de la conclusion du traité qu'il stipulait des droits au profit du Cambodge dont il n'envisageait certes pas la sécession, et que la Thaïlande ait entendu accepter une formule du règlement obligatoire de conflits selon les procédures prévues par l'acte général, avec un État qui, à l'époque, n'avait pas d'existence internationale ?

C'est, pensons-nous, vouloir forcer le sens des textes et surtout vouloir donner à un échange de volontés intervenu en 1937, entre la France et la Thaïlande seule, dans des conditions particulières, une portée qu'il n'a pas pu avoir.

Nous pensons donc que la distinction entre les conséquences à tirer de la succession des États ou du principe de la succession des États et du principe de la représentation apparaît dans l'espèce comme techniquement exacte, mais ne créant aucune espèce de différences quant aux conséquences, et les objections majeures que nous avons formulées précédemment nous paraissent jouer quelle que soit la qualification donnée à la situation juridique créée ensuite de l'accession du Cambodge à l'indépendance.

Par ailleurs, il nous paraît d'une façon générale, et plus particulièrement dans le cas qui nous intéresse, extrêmement douteux qu'un ex-protectorat, après son indépendance, accepte *ipso facto* de considérer qu'il est lié par les traités purement politiques conclus par la puissance protectrice. Et s'il n'est pas lié par de pareils traités, s'il n'en assume pas les obligations, de quel droit pourrait-il, en principe, prétendre en tirer avantage et y puiser des droits?

A notre avis, par conséquent, le principe de la relativité des traités et celui de leur interprétation restrictive excluent que l'on puisse étendre au Cambodge le bénéfice de l'article 21 du traité de 1937.

Sans doute, le Gouvernement cambodgien invoque-t-il un argument de texte: savoir la déclaration faite par le premier plénipotentiaire français, au moment de la signature de l'accord de règlement franco-

siamois du 17 novembre 1946, déclaration citée dans les observations du Gouvernement cambodgien au paragraphe 33.

Cette déclaration est ainsi libellée:

> « En signant l'accord de règlement franco-siamois en date de ce jour, j'ai l'honneur de déclarer d'ordre de mon Gouvernement qu'il reprend possession des territoires indochinois visés à l'article 1, alinéa 2, de cet accord au nom des Gouvernements cambodgien et laotien. »

A notre avis, il serait extrêmement hasardeux de tirer une conclusion de ce texte en faveur de la thèse cambodgienne.

En effet, s'il apparaît qu'après 1945, et ce à raison des bouleversements politiques qui se sont produits pendant la guerre, le Gouvernement français a tenu à citer les Gouvernements des protectorats du Laos et du Cambodge — et effectivement partie des territoires récupérés sont inclus dans ces États —, cela signifie-t-il que par un coup de baguette magique, cette seule déclaration à laquelle le Gouvernement thaïlandais n'avait d'ailleurs rien à redire, puisqu'il s'agissait de questions de frontières (pour lesquelles joue la succession des États) et qu'il n'avait pas à discuter des rapports entre la France et ses protectorats, ait pu avoir pour effet, rétroactivement, de faire du Cambodge une partie au traité de 1937?

Bien au contraire, dans l'article 2 de l'accord de règlement franco-siamois du 17 novembre 1946, également cité par le Gouvernement cambodgien, il est prévu « *que les rapports entre les deux pays se trouveront de nouveau régis par le traité du 7 décembre 1937* » sans qu'il y soit question, et pour cause, du Cambodge.

D'autre part, dans les remarques de l'agent du Gouvernement siamois sur la note, les observations et l'appendice présentées le 22 mai 1947 par l'agent du Gouvernement français, jointes à la lettre du 29 mai 1947 de l'agent du Gouvernement siamois au président de la Commission de négociation (lettre n° 3/2490) citée par le Gouvernement cambodgien à la page 58 **(I)** de son mémoire, on lit:

> « De plus, les réserves faites par l'agent du Gouvernement français concernant les « revendications » du Cambodge et du Laos ne semblent également pas pertinentes. Comme l'accord de règlement de 1946 n'est intervenu qu'entre le Siam et la France, des revendications faites au nom des tiers, qui pourraient ne pas profiter de leur satisfaction, sont inadmissibles. Cet argument n'implique pas, cependant, que le Gouvernement siamois a des objections, à savoir des rapports directs avec le Laos et le Cambodge libres et indépendants. Au contraire, le Gouvernement siamois est prêt à les accueillir dans la famille des nations. »

Pour autant, par conséquent, que l'accord de règlement de 1946 se référait au traité de 1937, il apparaît des deux textes cités que les deux parties, lors des négociations de 1946 et 1947, ont considéré qu'elles seules étaient parties à l'accord de règlement de 1946, et par voie de conséquence, au traité de 1937.

Monsieur le Président, Messieurs de la Cour, je crois m'être acquitté de la tâche qui m'était dévolue en tant que conseil du Gouvernement thaïlandais, qui consistait, après l'analyse des textes qui avait été faite par Me Hyde, à m'attacher plus particulièrement à montrer que,

ni par le jeu du principe de la succession de l'État, ni par le jeu des principes en matière de représentation d'un État par un autre, l'on ne peut prétendre que le Cambodge a pu tirer certains droits de l'article 21 du traité de 1937 et succède à la France quant aux droits compris dans l'article 21, et par conséquent quant aux droits à un règlement pacifique des conflits selon les méthodes et dans les termes prévus par l'acte général de 1928.

Je suis arrivé au moment même où il me faut résumer l'ensemble de l'argumentation de la Thaïlande, et je crois que la meilleure méthode pour les conseils de la Thaïlande consiste à s'en tenir au texte. Nous avions conclu dans nos exceptions préliminaires, au paragraphe 46, par une série de conclusions rédigées d'ailleurs en anglais, et je crois que pour l'unité de la pensée il vaut mieux que nous les laissions en anglais. Nous n'y apportons que des modifications tout à fait mineures consistant dans la suppression du paragraphe C (1) et l'addition des paragraphes C (3) et C (4) selon une nouvelle numérotation d'ailleurs provoquée par la suppression du paragraphe C (1). Comme il s'agit d'un texte anglais, je me permettrai, après la traduction qui vient d'être faite des quelques mots que je viens de vous dire, de demander à sir Frank Soskice de relire ces conclusions qui se substitueront à celles qui sont indiquées au paragraphe 46 de nos exceptions préliminaires.

Je vous remercie pour votre attention.

Sir Frank SOSKICE: Mr. President and Members of the Court.

The Conclusions in their amended form will be as follows and, with the permission of the Court, perhaps I should read them:

Paragraph (A) will be as it is at present; paragraph (B) will be as it is at present; paragraph (C) will read:

(i) that Cambodia is not a party to the Franco-Siamese Treaty of Friendship, Commerce and Navigation of 7 December 1937, nor has she succeeded to any of the rights of France thereunder;

(ii) that consequently the said Treaty does not constitute an agreement of the Parties to submit the said dispute to the jurisdiction of the Court;

(iii) that Cambodia is not a party to the Franco-Siamese Settlement Agreement of 17 November 1946, nor has she succeeded to any of the rights of France thereunder;

(iv) that consequently the said Agreement does not constitute an agreement of the Parties to submit the said dispute to the jurisdiction of the Court.

## 5. DÉCLARATION DE S. EXC. M. TRUONG CANG

(AGENT DU GOUVERNEMENT DU CAMBODGE)
A L'AUDIENCE PUBLIQUE DU 11 AVRIL 1961, MATIN

Monsieur le Président, Messieurs de la Cour.

J'ai l'honneur de représenter devant la Cour le Gouvernement royal du Cambodge.

Avant de prendre la parole à titre de plaidoiries, je demande humblement au nom du Gouvernement royal du Cambodge et au nom de toute la délégation cambodgienne ici présente la permission de saluer respectueusement MM. les Membres de la Cour et plus particulièrement ceux qui viennent d'être appelés en son sein.

A mes côtés, M. Dean Acheson, membre du barreau de la Cour suprême des États-Unis, MM. Roger Pinto et M. Paul Reuter, tous deux professeurs à la faculté de droit de l'Université de Paris, ont bien voulu accepter d'être nos conseils.

La Cour me permettra de rappeler très brièvement l'origine et la cause du différend dont elle est saisie.

Malgré les protestations réitérées, les démarches et réclamations diplomatiques du Cambodge, le Royaume de Thaïlande persiste, depuis 1949, à faire acte d'occupation sur une parcelle du territoire cambodgien, sise dans la province de Kompong-Thom, où se trouvent les ruines d'un saint monastère, le temple de Préah Vihéar, lieu sacré de pélerinage et de culte pour la population cambodgienne de nos jours encore.

Bien plus, en 1954, la Thaïlande, en violation de la Charte des Nations Unies, a introduit sur cette parcelle, relevant de la souveraineté du Cambodge, des éléments de ses forces armées. Le Cambodge s'est abstenu de répondre par la force à cette grave violation de son intégrité territoriale. Mais les recours diplomatiques engagés avec la Thaïlande n'ont donné aucun résultat. Pour assurer le respect de ses droits et obtenir du Royaume de Thaïlande qu'il remplisse ses obligations internationales, le Cambodge a été ainsi amené à saisir la Cour.

La Thaïlande a soulevé deux exceptions préliminaires que ses avocats viennent de développer à la barre. Nous demandons à la Cour de rejeter ces deux exceptions. Nous prions la Cour de dire et juger qu'elle est compétente pour statuer sur le différend porté devant elle, le 6 octobre 1959, par la requête introductive d'instance du Cambodge.

M. Dean Acheson présentera à la Cour les principes généraux qui commandent, à notre très humble avis, la solution de cette compétence. Les professeurs Roger Pinto et Paul Reuter réfuteront, dans le détail, la thèse thaïlandaise.

La Cour me permettra, en terminant ces brèves observations, de rappeler que la politique constante du Cambodge est de recourir, comme il l'a déjà fait, sans aucune exception, aux moyens de règlement pacifiques prévus par la Charte des Nations Unies. En application de l'article 36, paragraphe 3, de la Charte, le Cambodge, après avoir recouru en vain aux négociations diplomatiques et même à des tentatives de conciliation, soumet ainsi un différend d'ordre juridique à la Cour

internationale de Justice conformément aux dispositions du Statut de la Cour. Le Gouvernement royal du Cambodge considère cette affaire comme étant de la plus haute importance, non seulement en ce qui concerne les légitimes intérêts de son pays, mais, sur un plan plus élevé, pour se convaincre lui-même de l'efficacité des institutions de règlement pacifique établies par la Charte des Nations Unies, et ce faisant, il ne croit pas avoir commis un acte peu amical envers la Thaïlande.

Je vous prie, Monsieur le Président, Messieurs de la Cour, de bien vouloir donner maintenant la parole à M. Dean Acheson.

## 6. ARGUMENT OF Mr. DEAN ACHESON

(COUNSEL FOR THE GOVERNMENT OF CAMBODIA)
AT THE PUBLIC HEARINGS OF 11 APRIL 1961

*[Public hearing of 11 April 1961, morning]*

Mr. President, Members of the Court.

At this stage of the proceedings, as the distinguished Agents for both of the Parties before the Court have agreed, we are dealing, not with the merits of this cause, but with objections raised by the Government of Thailand to the jurisdiction of the Court. I shall address my arguments to the first of these objections, which have to do with the declaration of May 1950, and my colleague Dr. Pinto will do the same; my colleague Dr. Reuter will address himself in part to the second objection, which has to do with the Treaty of 1937.

Now, if the Court please, Thailand says, in paragraph 4 of its Objections, that it sought in complete good faith to file with the Secretary-General of the United Nations its consent to the compulsory jurisdiction of this Court. And, indeed, it did file a paper with the Secretary-General which led that official to believe that Thailand had succeeded in its purpose.

However, Thailand now believes that it failed in its purpose because of the inept use of an English word. And it believes also that a decision by this Court, rendered some years—nine years—after it filed its declaration, has contributed to its doubt that this Court has jurisdiction of the cause. Were it not for this doubt, Thailand states in paragraph 3 of its Preliminary Objections, it "would approach an investigation of the merits willingly and with confidence".

One cannot altogether escape the thought that, if the Government of Thailand, instead of asking this Court to resolve its doubts about jurisdiction, had confirmed the intent which so plainly appears in the declaration of 1950 that it submitted to the jurisdiction of the Court, then we would get on much more quickly with that willing and confident approach to the merits. And indeed, this thought is strengthened by the apparent fact that Thailand's concern about the jurisdiction of this Court is, except for this particular cause, rather a theoretical matter, for the declaration of 1950 has already expired some eleven months ago, and no case was filed either by or against Thailand before that expiration.

However that may be, the preliminary questions have been raised; the jurisdiction of the Court has been called in question, and that question must be decided before progress can be made to a decision on the merits.

Thailand has a long and honourable history of accepting compulsory international judicial jurisdiction. Many of us in my own country wish that our own record had been as unqualified.

May I briefly run over the documents which evidence Thailand's consent to the jurisdiction of the Permanent Court, the predecessor of this Court, and then of this Court itself? They begin in September 1929,

when Thailand filed a document which is of such importance that I think it is worth reading again. That document said:

> "On behalf of the Siamese Government, I recognize, subject to ratification, in relation to any other Member or State which accepts the same obligation, that is to say, on the basis of reciprocity, the jurisdiction of the Court as compulsory *ipso facto* and without any special convention, in conformity with Article 36, paragraph 2, of the Statute of the Court, for a period of ten years, in all disputes as to which no other means of pacific settlement is agreed upon between the Parties."

This declaration came into effect on 7 May 1930 with the filing of the necessary ratification with the Secretary-General of the League of Nations.

Then ten years expired, and by another letter dated 4 May 1940 the following declaration was transmitted to the Secretary-General of the League of Nations:

> "I hereby renew for a period of 10 years from the 7th May, 1940 the declaration of the 20th September, 1929, accepting the compulsory jurisdiction of the Permanent Court of International Justice in conformity with Article 36, paragraph 2 of the Statute of the Court within the limits of and subject to the conditions and reservations set forth in the said declaration."

Then, ten years later, another document was filed, and this, if the Court please, is the document with which we are principally concerned at this point in the proceedings. This document was dated 20 May 1950 —a significant date—and was addressed to the Secretary-General of the United Nations. In that declaration the Thai Government declared:

> "I have the honour to inform you that by a declaration dated September 20, 1929 His Majesty's Government had accepted the compulsory jurisdiction of the Permanent Court of International Justice in conformity with Article 36, paragraph 2 of the Statute for a period of ten years on condition of reciprocity."

The declaration continued:

> "That declaration has been renewed on May 3, 1940 for another period of ten years."

And then comes this very significant paragraph:

> "In accordance with the provisions of Article 36, paragraph 4 of the Statute of the International Court of Justice, I have now the honour to inform you that His Majesty's Government hereby renew the declaration above mentioned for a further period of ten years as from May 3, 1950 with the limits and subject to the same conditions and reservations as set forth in the first declaration of September 20, 1929."

Now the Court will note that the operative paragraph of this declaration, the last paragraph, begins with these words: "In accordance with the provisions of Article 36, paragraph 4 of the Statute of the International Court of Justice...". We note that in making this declaration Thailand was referring to *this* Court and not to any other court.

We must look therefore at paragraph 4 of Article 36 of the Statute of *this* Court for further light on what Thailand had in mind. That paragraph tells us exactly what Thailand had in mind, for the paragraph says:

> "Such declarations shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the parties to the Statute and to the Registrar of the Court."

Now, it says "such declarations", but what declarations? To find out what declarations are referred to in paragraph 4 we turn to the preceding paragraphs, 2 and 3, and these paragraphs read as follows:

> "The States parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of this Court in all legal disputes..."

of a type then described. And paragraph 3 goes on to say that this acceptance may be unconditional, or it may be conditional.

It would therefore seem, if the Court please, entirely clear that, in the communication of 20 May 1950, Thailand believed that it was depositing with the Secretary-General of the United Nations a declaration falling within paragraphs 2 and 3 of Article 36 of the Statute of this Court, consenting to the compulsory jurisdiction of the Court. And indeed, there is no argument about Thailand's intention to accept the jurisdiction of this Court, since the Government of Thailand and its learned Counsel readily concede that. The intent of Thailand is therefore established beyond all question. Learned Counsel do not question intent; learned Counsel question only whether that intent was carried out.

Let us stay on the matter of intent for a few minutes. Cambodia fully accepts Thailand's assertions that this declaration was made in good faith. There is no reason to doubt this at all, and we earnestly trust that this Court will accept the declaration in the same way and will give it the effect which it was intended to have.

And therefore one may ask, why is it that Thailand now believes that the achievement of this lofty purpose was frustrated? The explanation seems to lie in Thailand's doubt about the English word "renew". And why does the use of this word cause trouble? Because we are told that the prior declaration had expired—that is, the declaration of 1929 as renewed in 1940 had expired—and that something which has expired cannot be renewed. One, so it is said, can only "renew" something which is in existence. And a decision of this Court, the decision in *Israel* v. *Bulgaria*, is called upon to sustain the argument that the declaration of 1940 renewing that of 1929 had ceased to have effect when the Permanent Court of International Justice, to which it referred, had ceased to exist. However, it seems quite unnecessary to charge this Court through its decision with having caused the expiration of the declaration of 1929, because that declaration had already expired by its own terms. The renewal of 1940 was only to go until 6 May 1950. The declaration we are now talking about was dated 20 May—two weeks had expired since the prior declaration ceased to be in full force and effect. So we have no need to turn to any decision of this Court to establish the fact that the prior declaration had ceased to exist.

Mr. President and Members of the Court: let us ask again what it is that Thailand was attempting to do when it filed its declaration of May 1950. I suggest, if the Court please, that it was trying, and trying earnestly, and trying in good faith, to accept the compulsory jurisdiction of this Court; and in doing so it quite properly referred to its long and proud record of having accepted the compulsory jurisdiction of the predecessor court to this one. It referred to its prior acceptances for the purpose of incorporating in the document of 1950, for the purpose of incorporating by reference, what it referred to as the "limits, conditions and reservations" set forth in the declaration of 1929. In other words, if the Court please, it revived what, upon any view of the situation, had lapsed; that is, it revived the obligation; the obligation which it had first assumed in 1929 and had attempted to continue right along, but which unhappily had lapsed at least for a period of two weeks and possibly for a period of four years. It sought to revive that obligation, the obligation to consent to the compulsory jurisdiction of this Court, and it made that clear by its references in the document of 1950.

But the Government of Thailand and its learned Counsel now have doubts that Thailand's use of the word "renew" was a correct use under the circumstances. A declaration which has lapsed, so it is argued, is "incapable of renewal". In other words, the meaning of the English word "to renew" can only be to continue life or continue effectiveness; it cannot mean, so it is said, to revive something which has become ineffective. But a turn to the dictionary disposes of this argument very quickly, for the dictionary tells us that among the meanings, the common meanings, of the word "renew" are to "make new again", to "re-establish", to "rebuild", to "revive". There are many dictionaries which confirm what I have said. I hesitate, if the Court please, to refer to an American dictionary, since, perhaps, that may be regarded as referring to a related but different tongue. There are, however, English dictionaries, for example, the *Odham's Dictionary of the English Language* (1946), the *VIII Oxford English Dictionary* (1941), and *Chambers's Twentieth Century Dictionary* (1901), all of which give the meanings of the word which I have now used.

But going beyond the dictionary to established English usage, it seems particularly strange to me to hear the argument made at this particular time of year that the word "renew" cannot mean to revive that which has lapsed. This week, if the Court please, follows closely upon Easter. Throughout the world in many religions this is the festival of the renewal of life. What was dead has become alive again. Spring is the symbol of resurrection. Over two millennia ago the Roman poet Horace spoke of this miracle of Spring in the seventh ode of his Fourth Book and that ode has been translated by the distinguished English poet Housman, in which he uses the word "renew" in the sense which I am now pressing upon the Court, and this is what he says:

> "The snows have fled away, leaves on the shaws
> And grasses in the mead renew their birth,
> The river to the river-bed withdraws,
> And altered is the fashion of the earth."
> (Housman, *More Poems* (1936).)

Thailand's declaration of 1950 was in the English language. Perhaps one of the greatest authorities, certainly the two greatest authorities,

on the use of the English language are the King James Version of the Bible and Shakespeare. Over and over again we find in the King James Version of the Bible the use of the word "renew" to mean "create", to "make new", to "revive". For instance, in the 51st Psalm, the psalmist, after confessing his manifold sins and his fall from grace, cries:

> "Hide thy face from my sins, and blot out all mine iniquities. Create in me a clean heart, O God; and renew a right spirit within me."

The prayer is to make something new which was dead. And again in the 8th verse of the 15th Chapter of Second Chronicles, it is said that:

> "When Asa heard the words, and the prophecy of Oded the prophet, he took courage, and put away the abominable idols out of all the land of Judah and Benjamin, and out of the cities which he had taken from Mount Ephraim, and renewed the altar of the Lord."

Now, he renewed the altar which had been destroyed.

Particularly in the Epistles of St. Paul we find the use of the word "renew" in this sense. And so in the 12th Chapter of the Epistle to the Romans, St. Paul says:

> "And be not conformed to this world; but be ye transformed by the renewing of your mind...".

This is a re-creation. And in the 4th Chapter of the Epistle to the Ephesians, he says:

> "That ye put off concerning the former conversation the old man, which is corrupt according to the deceitful lusts;
> And be renewed in the spirit of your mind."

And again, writing to the Colossians, in the 3rd Chapter, after warning them against the wickedness of the life in which they had walked, he says:

> "Lie not to one another, seeing that ye have put off the old man with his deeds;
> And have put on the new man, which is renewed in knowledge after the image of him that created him...".

Shakespeare himself uses this word in a context which makes the meaning which I urge indisputably clear. This use appears in the second Act of *Othello* in the first Scene, when Cassio, hearing of Othello's return to Cyprus, makes a prayer as follows:

> "Great Jove, Othello guard,
> And swell his sail with thine own powerful breath,
> That he may bless this bay with his tall ship...
> Give renew'd fire to our extincted spirits,
> And bring all Cyprus comfort!"

"Renew" is here used to rekindle something which has gone out: "Give renew'd fire to our extincted spirits."

Nor do we have to turn only to the Scriptures and the poets to find this use. It is also used in the language of international law. For example, France and Paraguay executed a Treaty in 1862 by which

they "renewed" *(renouvelé)* a treaty which they expressly recognized as having expired more than a year previously. This is the Convention concluded at Asunción on 9 August 1862. De Clerq, *Recueil des Traités de la France*, Vol. VIII, page 503.

Moreover, other countries besides Thailand have used the word "renew" to mean revive in order to bring back to life an expired declaration accepting the compulsory jurisdiction of this Court.

Honduras made a declaration on 2 January 1948, effective for six years from 10 February 1948. *I.C.J. Yearbook 1947-1948*, page 129. This declaration was not renewed while it was still in force, and consequently expired on 9 February 1954.

But on 24 May 1954, more than three months after the expiration, Honduras deposited a declaration "renewing" from that date its declaration of 1948. 190 *U.N.T.S.*, page 377. Honduras used the Spanish word *"renueva"*, which the Secretary-General translated as "renews". And it will be noted that Honduras did not even attempt to date this renewal back to the expiration of the other declaration, but was perfectly content to leave a gap in the period of its submission to the compulsory jurisdiction of this Court. And yet it has occurred to no one that Honduras took a quixotic and quite impossible act.

Similarly, if the Court please, Estonia, in 1928, filed a document in accordance with the Statute of the prior Court stating that its prior declaration, which had expired some time before, "is deemed to be renewed". Publications of the P.C.I.J., 4th *Annual Report*, Series E, No. 4, page 422.

We submit, therefore, that from the etymological point of view Thailand's doubts are quite without foundation.

Mr. President, Members of the Court, may I now invite the Court to consider with me the operative paragraph of the declaration of 1950, that is, the last paragraph. If we read it by spelling out all the implications and ellipses in that paragraph, if we do that, I submit to the Court that it would read as follows: "In accordance with the provisions of Article 36, paragraph 4, of the Statute of the International Court of Justice (which provides for depositing with you, Mr. Secretary-General, declarations described in paragraphs 2 and 3 of the same article), I am depositing this declaration (which in the language of paragraph 2 is one recognizing 'as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court') which revives and re-establishes as to the International Court of Justice the obligations of the declaration of 20 September 1929, for a further period of ten years from 3 May 1950, with the same limitations and subject to the same conditions and reservations."

This, if the Court please, is what the words actually mean. It is not artistic; but it is clear. Indeed, what else could the declaration of Thailand have meant or been intended to mean? Plainly, Thailand did not intend a futile act. It did not intend to continue its submission to the compulsory jurisdiction of the Permanent Court, which had then been dead for four years. But it did intend, clearly intend, to subject itself to the compulsory jurisdiction of *some* court, and it identified *that* court as *this* Court. It specifically declares that it is filing the declaration of consent under the very article and paragraph of *this* Court's Statute which provides that "States parties to the present

Statute may at any time" file declarations "that they recognize as compulsory *ipso facto* and without special agreement ... the jurisdiction of this Court". It makes this declaration by referring to and incorporating by reference an earlier obligation to accept the terms and conditions of that obligation.

It is difficult to conceive of a more clear demonstration of the intention of a State to accept the compulsory jurisdiction of this Court and it would, indeed, be a perverse technicality, I submit, which would frustrate so manifest a demonstration of sovereign will. Fortunately, both this Court and its predecessor have expounded the law of their jurisdiction as having been based squarely on consent of the State sought to be brought before it. This Court has been equally clear that consent is evidenced by the intent of the State in question. It is not a matter of form. If the intention to consent to jurisdiction is manifest, then jurisdiction attaches.

But learned Counsel does not agree. In his opening statement he said: "Will does not suffice unless the necessary formalities are observed." This statement and another similar to it appear on pages 12 and 15[1] of the transcript of yesterday's argument.

I submit, if the Court please, that consent is not a matter of formalities. I submit that consent is evidenced by the plain and ordinary meaning of words, or indeed of acts. Consent is not hedged about by traps of formality for the unwary or unskilful, like a putting green on a golf course.

Here I bespeak the indulgence of the Court if I venture to refer to rules of international law which this Court itself has been principally effective in promulgating. While this Court, of course, is fully familiar with these rules, since it promulgated them itself, it may be of assistance to it to have views of Counsel as to how they apply in our present case. For instance, in *The Interpretation of Peace Treaties* case, this Court declared:

> "The consent of States, parties to a dispute, is the basis of the Court's jurisdiction in contentious cases." *I.C.J. Reports 1950*, page 71.

It is equally clear that it is the fact of consent, and not any particular formula, which establishes the jurisdiction of the Court. A document, if a document exists, simply constitutes evidence of the intent and evidence of the fact of consent. If that fact is established by other means, then a document may not be needed at all. No particular form is necessary for the expression of consent; any form which the party or parties may choose is adequate providing that it makes the fact of consent clear. In the *Corfu Channel* case this Court held, and I quote from its Judgment:

> "While the consent of the parties confers jurisdiction on the Court, neither the Statute nor the Rules require that this consent should be expressed in any particular form." *I.C.J. Reports 1947-1948*, page 27.

And in the *Mavrommatis* case the Permanent Court, in rejecting an objection to its jurisdiction which it found to be formalistic, declared, and I quote from its Judgment:

[1] See pp. 14-15 above.

> "The Court, whose jurisdiction is international, is not bound to attach to matters of form the same degree of importance which they might possess in municipal law." P.C.I.J., Series A, No. 2, page 34.

The doctrine of this and similar holdings by the Permanent Court is well described by Judge Hudson in *The Permanent Court of International Justice 1920-1942* on pages 410 and 411.

The natural and ordinary meaning of the words used by Thailand in its declaration of 1950 are clear. The only word whose meaning is disputed is "renew" and we have seen that Thailand's contention that to be able of renewal an obligation must be currently in force is entirely without merit.

We may respectfully enquire of Thailand whether it can show any meaning which its declaration of 1950 could have had other than that of acceptance of the jurisdiction of this Court for a period of ten years. Thailand clearly does not deny that as a matter of substance its declaration of 1950 expressed its consent to the jurisdiction of this Court.

Mr. President, Members of the Court. The principles which we have been discussing relating to the jurisdiction of this Court are an application of broader principles which are equally well established in international law. The rule that it is consent which is of the essence in establishing jurisdiction, and that substance rather than form is crucial in ascertaining whether consent has in fact been given, is in harmony with the more general doctrine that international instruments are to be applied in accordance with their manifest purpose and intent and so as to give effect to the objectives for which they were concluded, if those can be ascertained. Vattel puts it this way:

> *"The motive of the law, or of the treaty*, that is to say, the purpose which the parties had in mind, is one of the surest means of fixing its true sense, and careful attention should be paid to it whenever there is a question either of explaining an obscure, equivocal, or undetermined passage in a law or treaty, or of applying it to a particular case. *When once the purpose which has led the speaker to act is clearly known his words must be interpreted and applied in the light of that purpose only. Otherwise he would be made to speak and act contrary to his intention and to the object he had in view."* (*The Law of Nations*, Book II, Chapter 17, Engl. transl. Carnegie Institution, 1916.)

The list of weighty international authorities which could be cited for the same proposition is all but endless. I shall confine myself to mentioning the lucid statement in Crandall (*Treaties, Their Making and Enforcement*, pp. 371-377, 2nd Ed., 1916).

The Court will permit me to mention in passing that the jurisprudence of the highest courts of my own country as to the construction and application of international instruments is in entire accord with these principles. The rule of interpreting and applying a treaty according to its purpose was, for example, stated and followed in *Santovincenzo* v. *Egan* (*United States Reports*, Volume 284, pp. 30, 37 (1931)).

In view of these considerations, it is not surprising to find that, if the Court must choose between an application of an international instrument which would make it effective and an application which would make it totally void and of no effect, it will invariably choose the former

unless the language of the instrument absolutely requires a different result. It follows necessarily from a consideration of the purpose behind an instrument, that it would be altogether extraordinary for a State to execute an instrument with the intent that it should have no effect whatever. Thailand has expressly denied that it had any such intent in making the declaration of 1950. Thailand has insisted that the declaration was made in good faith and with the intent that it be effective.

As Arbitrator Lardy said in *The Island of Timor* case in 1914:

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

And to quote Vattel again:

> "It is not 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 a treaty null and void cannot be admitted...* [I]t 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 effects and not prove meaningless and void...*" *The Law of Nations*, Book II, Ch. 17, sec. 283.

This language of Vattel was, I might add, adopted and applied by the Supreme Court of the United States in the case of *Geofroy* v. *Riggs* (*United States Reports*, Vol. 133, pp. 258, 270 (1890)) and it is followed generally by the courts of the United States.

The same principle has been applied by this Court. By way of example only I mention the *Corfu Channel* case, *I.C.J. Reports 1949* at page 24, and the *Reparation for Injuries* case, *I.C.J. Reports 1949* at pages 178-184.

The argument advanced by Thailand today presents a stark challenge to this salutary principle. Thailand would have this Court interpret and apply a solemn international instrument, undertaken in good faith, in such a way as to deny it any effect whatever and leave it a total nullity. Cambodia urges that the Court give the declaration effect, and give it the clear and evident effect which was intended and which is shown by the natural and ordinary meaning of the words employed. In those circumstances there is no need to consider rules designed for the interpretation of instruments whose meaning and language is less than clear. But if those rules are considered, they lend additional support to the conclusion that the 1950 declaration was effective to vest this Court with jurisdiction of the present case.

Both of Thailand's objections to the jurisdiction of this Court are sought to be founded on this Court's decision in *Israel* v. *Bulgaria*. Yet that decision, I respectfully submit, does not bear upon any question presented here.

The decision in that case lends, I submit, no support whatever to the argument of Thailand. Thailand's problem is this: it is to overcome, if possible, the filing of a declaration in 1950, *after* it had become a Member of the United Nations, the plain purpose and intent of which was to accept the compulsory jurisdiction of a court, and specifically referring to the Statute of *this* Court.

With Bulgaria it was wholly different. Bulgaria had filed nothing, it had referred to nothing, it had expressed no intention whatever of accepting the compulsory jurisdiction of this Court; in fact, it had shown unmistakably the intention *not* to accept the jurisdiction of this Court. Nevertheless the argument was made, and rejected by this Court, that as a matter of *law*, merely by becoming a Member of the United Nations, Bulgaria had revived, and made applicable to this Court, a declaration of 1921, thirty-four years before, accepting indefinitely the compulsory jurisdiction of another court, the Permanent Court of International Justice.

This Court held that no such rule of law existed, and that the jurisdiction of this Court rested upon the consent of the parties, and that, regardless of what Bulgaria had done thirty-four years before, it had not in 1955, on joining the United Nations, expressed any consent to accept the compulsory jurisdiction of this Court.

The alleged rule of law, which the Court rejected, was sought to be derived from Article 36, paragraph 5, of the Statute of this Court, which reads as follows:

> "Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run, in accordance with their terms."

Now this Court held that paragraph applicable only to those nations which by signing the Charter of the United Nations at its beginning became parties to the Statute of this Court on 15 December 1946. This Court believed and said that these parties clearly *intended* by the language which they drafted in Article 36 (5) to transfer to this Court their operative acceptances of the jurisdiction of its then existing predecessor. But the Court held that no such intention could be derived on the part of a stranger to the negotiation of the Statute, in respect to a declaration made years before and a dead letter for a decade during which that nation had not been a party to the Statute of this Court.

There is not a word, if the Court please, in *Israel* v. *Bulgaria* to suggest that Bulgaria, had it so desired, could not have accepted the compulsory jurisdiction of this Court by a declaration filed after it had become a Member. This Bulgaria could have done even had it drafted the declaration by referring to its former acceptance of the old Court's jurisdiction to incorporate applicable provisions, so long as it specified that the declaration was being filed under Article 36 (4) of the Statute of this Court. By such a document it could have reactivated, revived, renewed, and re-established its former declaration of acceptance with the same limits, reservations, and conditions as before, but made applicable to, and filed with and under the procedures of, the International Court of Justice.

This is what Thailand did. It accepted the compulsory jurisdiction of this Court. The issue, if this Court please, perhaps may be somewhat clarified by my submitting that it is not whether the declaration of 1929 was renewed or revived; it is whether the obligation, evidenced by the declaration of 1929, to accept compulsory legal process was revived in

respect of this Court. We are speaking of an obligation, not of a piece of paper. An obligation was referred to in the declaration of 1929. Was that obligation revived, recreated, transferred to this Court by the declaration of 1950? I respectfully submit that both the intention to do that and the accomplishment of that purpose was shown and achieved by the declaration of 1950.

*[Public hearing of 11 April 1961, afternoon]*

Mr. President, Members of the Court. When the Court rose this morning, we were considering the bearing of the decision of the Court in *Israel* v. *Bulgaria* upon the issue presented in this case, and I had ventured to suggest that *Israel* v. *Bulgaria* did not mean, and the Court did not say, that Bulgaria could not have, if it had chosen, filed a new declaration after it became a Member of the United Nations accepting the compulsory jurisdiction of this Court. And it could have made that declaration if it had wished to, so far as any language in this Court's decision in *Israel* v. *Bulgaria* is concerned, by referring to its previous declaration and saying that it revived that one by a new act of will, and submitted under the same terms to the jurisdiction of this Court. There is nothing, I urged upon this Court, to the contrary in that decision.

And I should like to go on now to suggest that the difficulties in Thailand's argument, which is based on *Israel* v. *Bulgaria*, are very starkly revealed if we look at the language used by the Government of Thailand in its Objections. If we compare that language with the language used by this Court in *Israel* v. *Bulgaria*, the Court will see, I hope, that there is no correlation between them. For instance, Thailand says in paragraph 5 of its Preliminary Objections that the declaration of 20 September 1929 lapsed on the dissolution of the Permanent Court on 19 April 1946, and then follows this language: "... and thereafter was incapable of renewal". But this Court has never said that a lapsed declaration, the obligation contained in a lapsed declaration, was "incapable of renewal". What this Court said in *Israel* v. *Bulgaria* was very different indeed, and the language of the Court is as follows: "it [that is Article 36, paragraph 5] could not preserve ... declarations [of States not original parties to the Statute] from the lapsing with which they were threatened by the impending dissolution of the Permanent Court". *I.C.J. Reports 1959*, page 138. Now that, of course, is a very different thing altogether. True, Article 36 (5), as this Court said, could not prevent the lapsing of a declaration made under the old Court by a party not an original Member of the United Nations, but that is not the case here; the Court did not say that by a subsequent act of will, by a subsequent declaration, subsequently subjecting itself to the compulsory jurisdiction of this Court, a party could not refer to and adopt both the obligation and the conditions of an earlier declaration.

Cambodia, of course, makes no argument that Thailand's declaration of 20 September 1929 had not lapsed prior to its renewal. The fact is too plain. Thailand's declaration had lapsed at least two weeks before the declaration of 20 May 1950, whatever the bearing of the decision of this Court in *Israel* v. *Bulgaria*. And, of course, the letter which was referred to by learned Counsel, written by the Registrar of this Court to the Foreign Minister of Thailand, has no bearing on this question

whatever. I should like to submit that all that I can gather from that letter was the unusual fallibility of the Registrar of the Court at that time. He seems to have been unable to predict decisions of the Court, which is perhaps understandable, but in addition to that he seems to have been a little confused by the plain language of the declaration. He wrote that it would expire on 2 May, but by its own terms it was not going to expire until 6 May. This is of no importance, and neither one of his statements is of any importance in this argument. In other words, that document has no bearing on this case of any sort whatever. Thailand's declaration of 20 May accepted the jurisdiction of this Court, and through incorporation by reference revived and re-established the obligation of the older document to new life and to new purpose, as containing the terms and conditions of Thailand's acceptance of the compulsory jurisdiction of the Court.

Turning again to the language of the Preliminary Objections, and looking at paragraph 13, we find these words:

> "Any force which the document of May 20, 1950 might have; therefore, was not original but derivative. It depended for its operation upon the survival until 3rd May, 1950 of the renewed declaration of the 20th September, 1929 as an effective instrument capable of being further renewed."

Now this, I respectfully submit, seems to me the most baffling of all of Thailand's arguments. I must confess that I cannot understand what significance survival until 3 May 1950 can possibly have upon the meaning and effect of another document dated seventeen days later. To incorporate by reference, to adopt for a new purpose, and hence to revive the substance of another document is entirely possible depending upon the intent of the draftsman, regardless of whether that document still has legal effect or whether it is merely of historical interest.

Thailand's Objection in paragraph 13 quotes this Court as observing in *Israel* v. *Bulgaria* that:

> "... it is one thing to preserve an existing undertaking by changing its subject-matter; it is quite another to revive an undertaking which has already been extinguished".

As my colleague Professor Pinto will show, this Court in this passage was not stating a general principle of law, but was making a distinction which it believed was material in discerning the intention of the authors of Article 36, paragraph 5, of the Statute of this Court, a section which, so far as I can see, has no bearing upon any issue before the Court in this case. On any view of the situation Thailand was in 1950, in the very words of this Court, reviving "an undertaking which ... [had] already been extinguished". Its declaration of 20 September 1929 had been extinguished on 6 May 1950. Thailand knew this to be the fact, and therefore filed a new declaration with a new official, referring to the statute of a new Court, directing that such new declaration accepting the jurisdiction of the new Court should be filed with that official, who was the Secretary-General of the United Nations. The form which the language took was to incorporate by reference the language of submission and the terms and conditions of submission contained in the document drafted twenty-one years before for a similar purpose but with a different court. Thailand revived its old obligation, but to a new Court.

Thailand complains that the language used was not "apt" to do this. Why it was not apt, we are not told. It certainly was not apt for any other purpose. This was the only purpose which Thailand was seeking to achieve. Surely there must be some statable reason for frustrating so lofty a purpose, so plainly and so concededly pursued, in language capable of no other rational interpretation.

There are passages in Thailand's Preliminary Objections which hint at a reason of sorts. These passages suggest that in one respect Thailand, in May 1950, may have been under a misapprehension regarding the date of the lapsing of its declaration of 20 September 1929. In paragraphs 9 through 11, Thailand asserts that at the time of making its 1950 declaration it *believed* that its 1929 declaration had remained in force after 1946. Only later, so it is said, when this Court rendered its opinion in *Israel* v. *Bulgaria*, did Thailand discover that in the Court's view it had lapsed in 1946.

Thailand nevertheless has not argued in so many words that the declaration of 1950 was vitiated and should be held null and void because of its belief, which later proved to be unfounded, that it, that is, Thailand, had been subject to the compulsory jurisdiction of this Court until some time early in May 1950. However, this is what Thailand's argument amounts to as a matter of analysis. But the Government of Thailand's failure so to argue expressly is quite understandable, for such a misapprehension could not by any rational process be thought to vitiate, or even cast doubt upon, Thai consent to the compulsory jurisdiction of this Court. Indeed, every act of Thailand leads to the opposite conclusion; that is, that had Thailand been aware that after 1946 the status of its acceptance was in doubt, it would have hastened to remove the doubt.

We venture to suggest, in all courtesy, that Thailand might wish to enlighten the Court on how it would have acted differently, had it construed paragraph 5 of Article 36 of the Statute of this Court as the Court itself did nine years later in *Israel* v. *Bulgaria*. Would Thailand have refrained from accepting the compulsory jurisdiction of this Court? We have already suggested that every indication is to the opposite, a view confirmed by Thailand's evident and just pride in its long record of submission to such jurisdiction of the highest international courts.

Paragraphs 10 and 13 of Thailand's Preliminary Objections suggest that the sole change in Thailand's conduct would have been a change in the language of its declaration of acceptance. It would have filed, perhaps, a declaration more artistic in form from the professional point of view—a declaration which in form as well as in substance would have been what paragraph 13 refers to as an "original declaration", rather than one which revived the obligation of an old declaration and made it applicable to the jurisdiction of this Court. But it could not have added to the "good faith" of the declaration of 20 May 1950, nor would the intent of Thailand have shone more clearly through the words or given them any greater internal illumination.

As for the words themselves, they are, as we have shown, good enough, which means plain enough, for the purposes of expressing the intent. Here no narrow or technical rules lie in wait to frustrate intent, even if somewhat awkwardly expressed. The conception of an "original declaration" is not found in the Statute; that phrase "original decla-

ration" is not found in the Statute of this Court. Article 36, paragraph 2, states with the utmost simplicity that "States parties to the present Statute may at any time declare that they recognize" the compulsory jurisdiction of this Court. Thailand has done just this, in good faith and in plain, effective words.

The authorities, we submit, are clear that an instrument is not impaired merely because the party making it was under a misapprehension of the legal situation by failure to anticipate a Judgment of this Court. It must be further shown that an error was made such that, if the party making it had not done so, that party would not have acted as it did. In other words, there must have been an essential, material, decisive or controlling error, which was not the case here.

My colleagues will deal further with this subject.

I am most grateful for the patient and courteous attention to my argument of this illustrious Court.

## 7. PLAIDOIRIE DE M. ROGER PINTO

(CONSEIL DU GOUVERNEMENT DU CAMBODGE)
AUX AUDIENCES PUBLIQUES DES 11 ET 12 AVRIL 1961

*[Audience publique du 11 avril 1961, après-midi]*

Monsieur le Président, Messieurs de la Cour.

En prenant la parole devant vous sur la première exception préliminaire soulevée par la Thaïlande, après la plaidoirie de M. Dean Acheson, j'ai l'impression de ne pouvoir apporter à la Cour que des éléments d'appréciation secondaires. Et pourtant, par déférence pour nos honorables adversaires, il nous faut aller au fond des choses, et j'espère convaincre la Cour que l'argumentation thaïlandaise se heurte à trois objections décisives. J'examinerai en trois parties de cet exposé ces objections.

Premièrement: l'arrêt rendu par la Cour dans l'affaire *Israël c. Bulgarie* ne constitue pas un précédent qui commande, sans distinction aucune et de façon en quelque sorte mécanique, la décision de la Cour sur la première exception d'incompétence soulevée par la Thaïlande.

Deuxièmement: la déclaration de 1950 de la Thaïlande ne peut être considérée comme un acte de procédure destiné à prolonger l'existence d'un instrument antérieur dont la validité n'a pas encore pris fin.

Troisièmement: les conditions dans lesquelles la déclaration de 1950 a été faite ne sont pas de nature à infirmer le consentement donné par la Thaïlande à la juridiction de la Cour.

### I

Quelle est donc, Monsieur le Président, Messieurs de la Cour, la portée du précédent invoqué dans l'affaire *Israël c. Bulgarie*? Et, au moment même où je prononce ces paroles, je suis bien près de m'arrêter effrayé. J'ai l'impression de me trouver dans la situation de cet avocat anglais du moyen-âge plaidant devant la Cour du Parlement sur la portée d'un statut. « Ne commentez pas le statut », lui dit le juge, « nous le connaissons mieux que vous, c'est nous qui l'avons fait. » Ici, notre statut, c'est un arrêt rendu par cette Cour il y a moins d'une année. Et cependant, je me vois obligé de suivre la Thaïlande sur le terrain qu'elle a choisi et de tenter d'interpréter à mon tour un arrêt rendu par la Cour il y a si peu de mois. En invoquant l'autorité du précédent dans l'affaire *Israël c. Bulgarie*, la Thaïlande en tire deux conséquences juridiques tout à fait distinctes. D'une part, elle constate que sa déclaration du 20 septembre 1929, renouvelée le 3 mai 1940, est devenue caduque lors de la dissolution de la Cour permanente, mais, d'autre part, la Thaïlande prétend tirer de cet arrêt un principe juridique selon lequel, s'il est possible de maintenir un engagement existant en en modifiant l'objet, il ne l'est pas de faire revivre un engagement déjà éteint.

1) J'examinerai immédiatement cette seconde et prétendue conséquence de l'arrêt. Et je crois pouvoir montrer à la Cour que rien dans l'arrêt ne permet de dégager un tel principe. M. Dean Acheson a évoqué déjà devant vous ce passage du paragraphe 13 des exceptions préliminaires de la Thaïlande. Le Gouvernement de Thaïlande y déclare, comme la Cour l'a dit dans l'arrêt rendu dans l'affaire *Israël c. Bulgarie*, page 145:

> « ... autre chose est maintenir un engagement existant en en modifiant l'objet, autre chose faire revivre un engagement déjà éteint ».

Sir Frank Soskice a insisté sur l'importance vitale pour la démonstration thaïlandaise de cet extrait de l'arrêt. Mais les observations de la Thaïlande ne nous fournissent qu'un extrait détaché de son contexte. Cet extrait détaché de son contexte vous est présenté comme l'énoncé d'un principe juridique fondamental. Je crois qu'il est indispensable de citer l'ensemble du paragraphe dont cette formule est détachée par nos honorables adversaires pour en comprendre le sens exact. Ce paragraphe est ainsi conçu dans l'arrêt de 1959:

> « ... l'intention bien certaine qui a inspiré l'article 36, paragraphe 5, a été de continuer ce qui existait, de maintenir les acceptations existantes, d'éviter que la création d'une Cour nouvelle ne rendît caduc un progrès accompli; à cette intention de maintien, de continuité, on ne peut substituer celle de redonner force de droit à des engagements expirés; autre chose est maintenir un engagement existant... ».

La Cour, comme elle vient de l'expliquer, a donc simplement constaté « l'intention bien certaine » qui a inspiré l'article 36, paragraphe 5. Cette intention était de continuer ce qui existait. Il s'agit — et le texte est sans ambiguïté aucune — de l'intention des auteurs du Statut. La Cour, dans la phrase qui précède la citation thaïlandaise, l'exprime clairement. A cette intention de maintien de continuité on ne peut substituer celle de redonner force de droit à des engagements expirés. C'est l'intention des auteurs du Statut qui a dicté cette conclusion à la Cour. Il va de soi que l'intention qui a inspiré les auteurs de l'article 36, paragraphe 5, du Statut ne peut servir à interpréter la déclaration thaïlandaise de 1950. L'intention qui a inspiré cette déclaration thaïlandaise de 1950 doit être recherchée en toute indépendance dans l'acte lui-même et dans les circonstances de son acceptation.

Je puis donc conclure que l'autorité du précédent *Israël c. Bulgarie*, invoqué sur ce point précis par la Thaïlande, est sans pertinence, donc sans effet juridique.

2) La situation est différente en ce qui concerne la caducité de la déclaration thaïlandaise lors de la dissolution de la Cour permanente. Appliqués d'une façon quasi automatique, sans tenir compte des circonstances particulières à chacune des affaires dont la Cour a été successivement saisie, les principes posés par l'arrêt dans l'affaire *Israël c. Bulgarie* pourraient en effet conduire à constater que la déclaration thaïlandaise de 1929, renouvelée en 1940, est devenue caduque en 1946.

Et pourtant, l'attitude constante, l'attitude non ambiguë de la Thaïlande prouve que cet État s'est considéré comme lié par la décla-

ration de 1929 renouvelée en 1940. La Thaïlande, selon ses propres termes, a « accepté » — c'est le mot que je trouve au paragraphe 10 des exceptions préliminaires —, la Thaïlande a « accepté » une interprétation de l'article 36, paragraphe 5, qui confirmait sa reconnaissance de la juridiction obligatoire de la Cour. La Thaïlande a accepté cette interprétation. Elle ne l'a pas contestée. Elle ne l'a pas combattue. Cette interprétation a été maintenue par elle pendant quatorze ans, jusqu'au mois de mai 1960. Il nous semble que cette continuité dans l'interprétation de cette disposition du Statut lie la Thaïlande. Elle lui est opposable. A propos d'un acte juridique d'une importance plus grave encore, puisqu'il s'agissait d'une sentence internationale, la Cour, dans son arrêt du 18 novembre 1960 dans l'affaire du *Nicaragua c. le Honduras*, a pu s'exprimer ainsi, et je cite à la page 213 du *Recueil*:

> « De l'avis de la Cour, le Nicaragua a, par ses déclarations expresses et par son comportement, reconnu le caractère valable de la sentence et il n'est plus en droit de revenir sur cette reconnaissance pour contester la validité de la sentence. Le fait que le Nicaragua n'ait émis de doute quant à la validité de la sentence que plusieurs années après avoir pris connaissance de son texte complet confirme la conclusion à laquelle la Cour est parvenue. »

Il s'agissait, là encore, d'un acte juridique dont la portée, dont la valeur était contestée.

Est-ce qu'il est possible, Monsieur le Président, Messieurs de la Cour, d'expliquer en termes de droit, à partir de votre jurisprudence même, une telle situation? Je le crois, car la Cour a admis, dans le passé, que des États, d'un commun accord, donnent à son Statut une portée ne correspondant pas nécessairement à l'interprétation que la Cour, elle, saisie d'un différend, aurait pu donner par voie de décision contentieuse. Je fais allusion, par exemple, à l'affaire relative à *Certains emprunts norvégiens*. La Cour, dans son arrêt de 1957, *Recueil*, page 27, s'est exprimée ainsi:

> « Dans ces conditions, la Cour se trouve en présence d'une disposition que les deux Parties au différend considèrent comme exprimant leur volonté commune quant à sa compétence. La Cour ne se tient donc pas pour appelée à entrer dans un examen de cette réserve à la lumière de considérations qui ne sont pas liées aux données du procès. Sans préjuger la question, elle applique la réserve telle qu'elle est, et telle que les Parties la reconnaissent. »

Sans doute, la Cour n'admettrait pas que les Parties mettent en œuvre d'un commun accord, ou bien qu'un État adopte unilatéralement une interprétation du Statut qui porterait atteinte au caractère judiciaire de son institution. Et la Cour l'a dit de la façon la plus nette dans son avis consultatif du 23 mai 1956 relatif aux *Jugements du tribunal administratif de l'O. I. T.* A la page 77 du *Recueil*, la Cour s'exprime ainsi:

> « La Cour est un corps judiciaire et elle doit rester fidèle aux exigences de son caractère judiciaire. »

Mais, Monsieur le Président, Messieurs de la Cour, en l'espèce l'interprétation de l'article 36, paragraphe 5, qui a été acceptée — c'est elle qui nous le dit —, l'interprétation de l'article 36, paragraphe 5,

qui a été acceptée par la Thaïlande ne fait nullement échec, bien au contraire, aux exigences propres à un corps judiciaire. La conception que la Thaïlande s'est faite en 1946 du Statut de la Cour — même si elle était erronée — a produit à cette époque des effets juridiques valables. Cette conception, peut-on dire, n'était pas contraire à des dispositions que je me permettrai d'appeler d'ordre public, du Statut de la Cour. Cette interprétation du Statut était au surplus conforme à la volonté exprimée par la Thaïlande en 1950, lorsqu'elle a renouvelé son obligation. Ainsi donc, à la croyance en la validité de la déclaration de 1929, renouvelée en 1940, s'ajoutait en 1950 le consentement non équivoque à la juridiction de la Cour.

Cette attitude de la Thaïlande s'est prolongée après même le prononcé de l'arrêt du 26 mai 1959 dans l'affaire *Israël c. Bulgarie*. La Thaïlande n'a tiré aucune conséquence du cas ainsi jugé pour modifier sa position vis-à-vis de la Cour. La Thaïlande aurait pu, par exemple, notifier au Secrétaire général de l'Organisation des Nations Unies que sa déclaration d'acceptation de la juridiction obligatoire de la Cour était devenue caduque à la suite de l'arrêt. La Thaïlande n'en a rien fait.

## II

Monsieur le Président, Messieurs de la Cour, aujourd'hui la Thaïlande vient soutenir cependant que sa déclaration du 20 mai 1950 ne possède pas d'existence propre. Ceci m'amène au deuxième point de mes observations au cours duquel j'essaierai de déterminer quelle est la nature juridique exacte de la déclaration thaïlandaise de 1950. Pour nos adversaires cette déclaration vise uniquement à renouveler la déclaration du 20 septembre 1929. Cette argumentation tend à donner au verbe anglais « renouveler » une certaine acception juridique, une acception juridique déterminée, une acception juridique univoque que ce terme ne possède ni dans la langue commune, ni dans le vocabulaire technique du droit. Pour la langue commune, M. Dean Acheson en a illustré le sens par plusieurs citations. Ce que je voudrais dire ici, c'est que le terme « renouveler » n'apparaît pas comme un concept, comme une catégorie définie par le droit. Il s'agit d'un mot du langage commun, employé pour désigner des opérations juridiques très diverses.

En premier lieu, renouveler un acte peut signifier prolonger l'existence de cet acte. Le renouvellement présente alors le caractère d'un acte de procédure, opérant reconduction pure et simple de l'acte originaire. Dans ce cas, en effet, l'inexistence ou la nullité de l'acte originaire peut priver d'effet juridique l'acte de renouvellement.

En second lieu, renouveler un acte peut signifier remettre en vigueur un acte qui a pris fin. Dans ce cas, la caducité de l'acte antérieur est sans effet sur la validité de l'acte de renouvellement. Car cet acte de renouvellement a pour but précisément de faire revivre un acte qui a cessé ses effets — un acte qui est devenu caduc.

Enfin, dans une troisième acception, renouveler un acte peut signifier établir un acte nouveau, en prenant pour base un acte ancien et à plus forte raison dans cette dernière acception, seule la validité de l'acte nouveau est susceptible d'être mise en cause.

1) En premier lieu, « renouveler », donc, c'est dans certains cas prolonger l'existence d'un acte juridique. Un exemple de cet emploi du terme « renouveler » nous est donné par un accord relatif à l'application

provisoire des projets de conventions douanières internationales sur le tourisme, les véhicules routiers commerciaux et sur le transport international des marchandises par la route, accord signé à Genève, le 16 juin 1949, et qui est publié au *Recueil des Traités des Nations Unies* (vol. 45, p. 149).

L'article III de cet accord dispose:

> « 1. Le présent accord entrera en vigueur le 1er janvier 1950.
> 3. Il demeurera en vigueur pendant une durée de trois ans. Toutefois, à moins que les gouvernements contractants n'en conviennent autrement, il sera considéré au terme de cette période comme renouvelé pour une nouvelle période d'un an et ainsi de suite. »

La Cour me permettra de citer un document qui n'est pas un accord international mais qui a été rédigé par les juristes éminents qui sont membres de l'Institut de droit international. La résolution adoptée en 1959 à la session de Neuchâtel de l'Institut nous fournit un second exemple d'emploi du terme « renouveler » dans le sens de « prolonger ». La résolution 1959 s'exprime ainsi dans son paragraphe 3:

> « Les déclarations acceptant la juridiction de la Cour internationale de Justice en vertu de l'article 36, par. 2, du Statut de la Cour devraient prévoir également qu'à l'expiration de chaque période, elles seront tacitement renouvelées pour une nouvelle période d'au moins cinq années. »

Il est clair que la déclaration thaïlandaise du 20 mai 1950 ne constitue pas un simple acte de procédure, destiné à prolonger l'existence d'une déclaration antérieure. Et à cet égard je voudrais attirer l'attention de la Cour sur les observations présentées par sir Frank Soskice qui tendraient à faire considérer (c'est à la page 21 du compte rendu provisoire de l'audience [1]) que le Cambodge dans ses observations, également au paragraphe 21, aurait admis la nullité de la déclaration thaïlandaise de 1950. Sir Frank Soskice s'est exprimé ainsi:

> « C'est, pour employer le langage du paragraphe 21 des observations cambodgiennes, un renouvellement pur et simple de la déclaration de 1929. [« C'est », c'est-à-dire la déclaration thaïlandaise de 1950.] Le Gouvernement du Cambodge a exposé la position avec une exactitude entière dans ce paragraphe en disant que la nullité de la lettre de 1950 résulte de ce qu'elle prolonge les déclarations de 1929 et de 1940. »

Naturellement le Gouvernement du Cambodge n'a rien dit de tel au paragraphe 21 de ses observations. Au paragraphe 21 de ses observations, je suis obligé de constater que le Gouvernement du Cambodge a dit exactement tout le contraire. Je me permets de citer la phrase déterminante, au paragraphe 21, page 160 **(I)** des observations du Cambodge:

> « Ces constatations permettent déjà d'établir, contrairement à la thèse soutenue par la Thaïlande, que la déclaration de 1950 ne peut être considérée » [et non pas « peut être considérée » — *ne peut être considérée*] « comme le renouvellement pur et simple des déclarations de 1929 et de 1940. »

[1] Voir p. 18 ci-dessus.

Et pourquoi? D'une part les déclarations antérieures de la Thaïlande, celle de 1929 et celle de 1940, n'ont pas prévu de prolongation. Il aurait été possible de prévoir une telle prolongation et, en effet les déclarations de quelque dix-huit États acceptant la juridiction obligatoire de la Cour contiennent des dispositions qui prolongent la période initiale par tacite reconduction.

Mais ce n'est pas le cas de la Thaïlande. Les trois déclarations thaïlandaises, celle de 1929, celle de 1940, celle de 1950, devaient prendre fin au terme prévu par chacune d'elles. Aucune disposition de ces déclarations n'envisage une notification destinée à prolonger les effets de la déclaration précédente ou même de la déclaration originale. Le renouvellement d'une telle déclaration ne peut donc être que le résultat d'une déclaration nouvelle.

Mais d'autre part, le contenu même de la déclaration de 1950 de la Thaïlande ne permet pas de la qualifier d'acte de procédure exclusivement destiné à prolonger l'existence des déclarations de 1929 ou de 1940.

Il existe en effet une différence significative entre la déclaration de 1940 et celle de 1950. La déclaration de 1940 a été faite, le 3 mai, *avant* l'expiration de la déclaration initiale de 1929. Elle renouvelait cette déclaration à compter du jour même, le 7 mai, où celle-ci devait prendre fin. Ce renouvellement de 1940, antérieur à la caducité de la déclaration initiale, établissait ainsi une continuité absolue entre les périodes considérées. Il pourrait, à la rigueur, être considéré dans une perspective de pur formalisme, comme prolongeant cette déclaration. La Cour nous pardonnera de ne pas approfondir ce point, car ce qui nous intéresse, ce sont les formes de la déclaration de 1950. Or les formes de la déclaration de 1950 ne sont pas du tout les mêmes. Au moment où intervient la déclaration thaïlandaise du 20 mai 1950, la déclaration antérieure de 1940 a déjà pris fin depuis le 6 mai. Et tout à l'heure, Monsieur le Président, Messieurs de la Cour, M. Dean Acheson vous disait que cette lettre du Greffier (et naturellement nous savons bien qu'il ne s'agit ni du Greffier actuel ni de son prédécesseur immédiat), cette lettre du Greffier n'avait aucun effet juridique. Bien sûr, elle n'avait aucun effet juridique. Mais en fait elle avertissait la Thaïlande que sa déclaration allait prendre fin au début de mai, le 2 mai, même un peu avant l'échéance exacte du terme. Et par conséquent, le 20 mai, la Thaïlande ne pouvait pas ignorer que sa déclaration de 1940 avait déjà pris fin par l'échéance du terme. Au moment où par conséquent intervient la déclaration thaïlandaise du 20 mai 1950, la déclaration antérieure a pris fin. La Thaïlande le sait. Il n'est pas question pour elle de prolonger un acte devenu caduc. Tout ce qu'elle peut faire et tout ce qu'elle fait, c'est de le remettre en vigueur.

2) Et en effet le second sens du terme « renouveler » que nous trouvons, non seulement dans les dictionnaires de la langue anglaise mais aussi dans les dictionnaires de la langue française, par exemple dans ce dictionnaire bien connu qu'est le Littré, l'un des sens du verbe renouveler, d'après ce dictionnaire Littré, c'est précisément celui de « donner une nouvelle force », et les exemples donnés par le dictionnaire sont les suivants: « renouveler un édit, renouveler les anciennes ordonnances ... les remettre en vigueur ». [Il s'agissait là de citations.] Tel est d'ailleurs le sens que donne au mot anglais « *renewal* » — renouvellement — le *Dictionnaire de la terminologie du droit international*. Dans ce dictionnaire vous trouverez que « *renewal* » signifie « remise en vigueur ».

Plusieurs exemples tirés d'actes juridiques ont été donnés par M. Dean Acheson de l'emploi du terme « renouveler » dans ce sens. Je ne reviendrai pas sur ces exemples. M. Acheson a cité à la Cour la déclaration du Honduras, celle plus ancienne de l'Estonie. Cela nous permet de dire que la déclaration de 1950, si elle ne constitue pas un acte de simple procédure destiné à prolonger les effets d'un acte toujours en vigueur, doit être considérée comme un acte dont le but est de remettre en vigueur un acte antérieur devenu caduc.

En 1950, je le répète, le Gouvernement de la Thaïlande connaissait cette situation. Il savait qu'à la date de la déclaration du 20 mai 1950, la déclaration de 1929, renouvelée en 1940, était devenue caduque, par l'expiration du délai prévu. Son attention avait été attirée sur ce point par la lettre que j'ai déjà citée.

Certes, à ce moment, le Gouvernement thaïlandais ignorait peut-être — par suite d'une interprétation différente de l'article 36, paragraphe 5, du Statut de la Cour —, le Gouvernement thaïlandais ignorait peut-être la cause de caducité qui devait être formulée par l'arrêt de la Cour dans l'affaire *Israël c. Bulgarie*. Mais ce Gouvernement, je le répète, ne pouvait ignorer la cause de caducité résultant de l'expiration par la survenance du terme de la déclaration de 1929.

Par conséquent, dès 1950, le Gouvernement thaïlandais n'hésitait pas à renouveler une déclaration dont il savait qu'elle était devenue caduque. Et cependant, à ce moment-là, le Gouvernement thaïlandais n'avait aucun doute sur la validité de ce renouvellement. Dans ces conditions, le 20 mai 1950, pour la Thaïlande, il ne s'agissait pas de renouveler une déclaration qu'on pense exister, comme le dit le paragraphe 14 des exceptions préliminaires. Il ne s'agissait pas de maintenir un engagement existant, comme s'expriment également les exceptions préliminaires de la Thaïlande. Cet engagement n'existait plus depuis le début du mois de mai 1950. Il s'agissait le 20 mai 1950 de remettre en vigueur un engagement devenu caduc. Peu importe que cet engagement soit devenu caduc le 6 mai 1950 ou le 19 avril 1946. Il est vrai peut-être que nous entendrons les honorables défenseurs de la Thaïlande contester que l'échéance du terme entraîne caducité de la déclaration. Mais si cela était le cas, ce que je ne puis croire, il suffirait de renvoyer nos honorables contradicteurs à l'arrêt rendu par la Cour dans l'affaire *Nottebohm* (exception préliminaire) qui consacre expressément une telle cause de caducité, et je cite l'arrêt au *Recueil*, page 122:

> « ... Cela étant [dit la Cour], la caducité d'une déclaration par l'échéance, avant le dépôt de la requête, du terme qui lui était fixé entraîne l'impossibilité d'invoquer cette déclaration pour saisir la Cour. »

La nullité de l'acte de remise en vigueur d'un acte frappé de caducité ne peut donc être tirée, c'est me semble-t-il l'évidence même, de cette caducité même. C'est pourtant ce que vient d'affirmer aujourd'hui la Thaïlande.

Mais la Cour me permettra — puisque entraîné par mes adversaires je m'attarde à une analyse formelle de la déclaration de 1950 —, la Cour me permettra peut-être de ne pas m'arrêter à ce point.

Pour nous, cette déclaration n'est pas seulement la remise en vigueur d'une déclaration frappée de caducité. Pour nous, cette déclaration

apparaît également comme un acte nouveau — selon la *troisième acception du terme* « renouveler ».

3) Ce sens du terme « renouveler », c'est le premier, le principal que donne le dictionnaire Littré que je citais tout à l'heure, dans une définition saisissante: « renouveler », nous dit Littré, c'est « rendre nouveau, en substituant une chose nouvelle à une autre de même espèce... », avec l'exemple suivant: « renouveler un texte ». « Renouveler » donc, au sens de la déclaration de 1950, c'était précisément, pour le Gouvernement thaïlandais, prendre, à l'époque, un engagement nouveau.

Monsieur le Président, Messieurs de la Cour, à l'époque où la Thaïlande a formulé sa déclaration de 1950, une autorité des Nations Unies a dû se pencher sur cette déclaration pour déterminer quelle était sa nature juridique. Cette autorité, c'est le Secrétaire général de l'Organisation des Nations Unies. En effet, lorsque le Secrétaire général a reçu le dépôt de la déclaration thaïlandaise de 1950, il a examiné les conditions dans lesquelles il devait procéder à l'enregistrement de cette déclaration, conformément aux termes de l'article 102 de la Charte des Nations Unies. Et l'opinion du département juridique du Secrétariat a été qu'il s'agissait d'une déclaration nouvelle. Je ne voudrais pas rappeler à la Cour — mais je le fais en quelque sorte en raison des exigences du compte rendu — les conditions dans lesquelles le Secrétariat enregistre les accords internationaux. Une note du Secrétariat qui est publiée en tête du premier volume du *Recueil des Traités* explique clairement les conditions de cette publication:

> « Le présent volume », explique cette note, « divisé en deux parties et trois annexes, marque le commencement de la publication du recueil des traités des Nations Unies.
>
> Sa première partie est consacrée aux traités ou accords internationaux conclus par un ou plusieurs membres des Nations Unies postérieurement au 24 octobre 1945, date d'entrée en vigueur de la Charte, et enregistrés soit sur l'initiative d'une partie, soit d'office par le Secrétariat, conformément aux dispositions de l'article 4 du Règlement. »

(Ce règlement c'est le règlement adopté par l'Assemblée générale, sur lequel j'aurai quelque mots à dire dans un instant.) Et la note du Secrétariat poursuit:

> « La portée exacte des termes « traités et accords internationaux » a été discutée. Le Secrétariat a estimé qu'il devait se conformer à cet égard à l'interprétation du terme « accord » qui a été donnée dans le rapport du Comité IV (I) de la Conférence de San Francisco et qui comprend « les engagements unilatéraux de caractère international qui ont été acceptés ».
>
> (II) [le Secrétariat] a considéré que rentraient dans cette catégorie ... les déclarations d'acceptation à la clause facultative de compétence obligatoire de la Cour internationale de Justice faites par les États conformément à l'article 36, paragraphe 2, du Statut de la Cour... »

Donc, en vertu de cette pratique du Secrétariat, il a fallu enregistrer la déclaration de 1950. Cet enregistrement s'est fait conformément aux dispositions du Règlement auquel la note que je viens de présenter à la Cour a fait allusion.

Le Règlement approuvé par l'Assemblée générale le 14 décembre 1946, résolution 97, première session, modifiée par les résolutions 365 de la quatrième session et 484 de la cinquième qui ont été adoptées par l'Assemblée générale le 1er décembre 1949 et le 12 décembre 1950 respectivement, a été publié au *Recueil des Traités*, volume 76 — les articles 1 et 2 de ce Règlement distinguent clairement deux catégories d'accords: les accords nouveaux et les accords prolongés ou modifiés.

C'est ainsi que l'article 2 du Règlement de l'Assemblée générale relatif à la publication et à l'enregistrement des traités dispose:

> « Lorsqu'un traité aura été enregistré au Secrétariat, une déclaration certifiée relative à tout fait ultérieur comportant un changement dans les parties audit traité ou accord, ou modifiant ses termes, sa portée ou son application, sera également enregistrée au Secrétariat. »

Pour mettre en œuvre cette disposition du Règlement de l'Assemblée générale, le Secrétariat a établi dans le *Recueil des Traités* une disposition matérielle et qui permet immédiatement de distinguer les obligations nouvelles des accords anciens, prolongés, renouvelés, modifiés.

Le *Recueil* comporte en effet une première partie destinée à l'enregistrement des obligations nouvelles, et une annexe, l'annexe A, qui concerne les obligations existantes, simplement modifiées. La note du Secrétariat à laquelle j'ai fait allusion tout à l'heure les décrit ainsi:

> « Les deux annexes A et B [l'annexe B concerne les accords qui ne sont pas enregistrés en vertu de l'article 102 mais qui sont publiés] des volumes du *Recueil des Traités* des Nations Unies sont respectivement consacrées à la publication des faits ultérieurs relatifs à un accord ou traité [et naturellement une déclaration unilatérale, comme nous l'avons vu, fait partie des accords ou des traités, des faits ultérieurs relatifs à un accord ou à un traité] enregistré ou classé et inscrit au répertoire. »

Or, Monsieur le Président, Messieurs de la Cour, la déclaration thaïlandaise de 1950 n'a pas été considérée par le département juridique du Secrétariat comme prolongeant les déclarations antérieures. Elle est publiée au volume 65 du *Recueil des Traités* dans sa première partie et non à l'Annexe A. La déclaration thaïlandaise est enregistrée sous un numéro d'ordre nouveau, le n° 844, à la page 157 du volume 65.

Ainsi, le Secrétaire général, dans l'accomplissement d'une mission qui lui est confiée par la Charte, qui lui a été précisée par l'Assemblée générale, a qualifié la déclaration thaïlandaise de déclaration nouvelle. Il l'a enregistrée comme telle. Le Gouvernement de la Thaïlande a considéré à cette époque que cette qualification était exacte. Le Gouvernement de la Thaïlande l'a acceptée sans protestation ni réserve. Je dois dire que cette attitude du Gouvernement de la Thaïlande était parfaitement justifiée.

L'opinion du Secrétaire général est confirmée par la doctrine du droit international. Aucun auteur, à notre connaissance, n'a mis en doute la validité de la déclaration thaïlandaise de 1950. Les travaux de l'Institut de droit international sont à cet égard particulièrement intéressants et révélateurs. Lors de sa session d'Amsterdam de 1957, l'Institut a été saisi du rapport particulièrement remarquable de

M. Wilfred Jenks sur la compétence obligatoire des instances judiciaires et arbitrales internationales.

Pour établir la liste des États liés par la clause facultative de juridiction obligatoire, M. Wilfred Jenks a examiné à cette époque le cas de la *Bulgarie* — la Cour n'avait pas encore rendu son arrêt, puisque l'arrêt date de 1959 —, M. Jenks a examiné le cas de la *Bulgarie* et celui de la *Thaïlande*. Le rapporteur de la commission compétente de l'Institut de droit international a bien inclus la *Bulgarie* dans la liste des États qui n'ont pas souscrit à la clause facultative, pressentant ainsi la décision de la Cour (à la différence de M. le Greffier), mais par contre, M. Jenks a inclus la Thaïlande dans la liste des États qui ont effectivement accepté la juridiction obligatoire de la Cour. C'est dans l'*Annuaire 1957* de l'Institut, volume I, page 51 et page 50, note 1, que l'on trouve ces indications.

*[Audience publique du 12 avril 1961, matin]*

Monsieur le Président, Messieurs de la Cour, j'ai cru pouvoir, hier, en terminant mes observations, citer l'opinion d'un juriste, qui est en même temps en contact quotidien avec les réalités internationales, parce que je n'ignore pas les scrupules de sa méthode scientifique. Je suis donc assuré, lorsque M. Wilfred Jenks, en établissant la liste des États parties à la clause facultative de compétence obligatoire, a classé, d'une part, la Bulgarie comme n'étant pas liée par cette clause, d'autre part, la Thaïlande comme étant liée par cette clause, il ne l'a fait qu'après mûre réflexion.

C'est, je pense, à titre d'opinion doctrinale également que mon très estimé contradicteur, sir Frank Soskice, a fait état de la plaidoirie de Me Rosenne devant cette Cour dans l'affaire *Israël c. Bulgarie*. J'avoue que si j'avais été à la place de sir Frank, j'aurais hésité à invoquer l'opinion de M. Rosenne. Je sais bien que le fondement exclusif, unique en quelque sorte de la thèse thaïlandaise, c'est le précédent apporté par cette affaire *Israël c. Bulgarie*. Mais, sur ce point, le précédent me paraît quelque peu dangereux. Car, après tout, la Cour n'a pas consacré les doctrines qui lui étaient présentées par M. Rosenne.

Ce précédent invoqué par sir Frank me paraît d'autant plus dangereux pour sa thèse que si l'on examine attentivement le but poursuivi par M. Rosenne, en développant l'argumentation qui a été rappelée à la Cour, on s'aperçoit que l'agent du Gouvernement d'Israël s'est appuyé fortement sur la déclaration thaïlandaise de 1950, parce qu'il savait que personne n'en contestait la validité. Pour tout le monde, cette déclaration thaïlandaise de 1950 était pleinement valable. Par contre, la déclaration bulgare de 1921 apparaissait déjà comme quelque peu chancelante. Avec l'habileté de l'avocat, M. Rosenne a voulu lier en quelque sorte ces deux déclarations. Il a voulu infuser dans la branche presque morte de la déclaration bulgare de 1921 la jeune sève de la déclaration thaïlandaise de 1950. Il disait en quelque sorte à la Cour: « Que ces déclarations vivent ensemble ou qu'elles meurent ensemble! » Il plaçait en quelque sorte la Cour devant un dilemme que je puis reconstituer de la façon suivante: « Messieurs de la Cour, vous reconnaissez la validité de la déclaration thaïlandaise de 1950. Tout le monde la reconnaît. Vous ne pouvez pas, dans ces conditions,

vous prononcer *contre* la déclaration bulgare. Ce serait détruire cette déclaration thaïlandaise dont l'existence est incontestable. »

Monsieur le Président, Messieurs de la Cour, il est évident que la Cour ne s'est pas laissée enfermer dans ce dilemme. Elle a examiné la déclaration bulgare sur ses propres mérites, sans d'ailleurs en tirer aucune conséquence quant à la validité de la déclaration thaïlandaise. J'en suis persuadé, la Cour examinera la déclaration thaïlandaise de 1950 sur ses propres mérites.

S'il m'est permis d'évoquer l'opinion dissidente collective, je crois pouvoir dire que l'opinion dissidente collective n'a pas consacré, sur ce point, l'opinion présentée, la suggestion faite par M. Rosenne. L'opinion dissidente collective approuve, certes, l'interprétation donnée par la Thaïlande en 1946 à l'article 36, paragraphe 5, du Statut de la Cour. Elle la trouve parfaitement raisonnable. Mais l'opinion dissidente collective n'en conclut pas, comme le lui proposait M. Rosenne, que la décision de la majorité de la Cour aura pour conséquence et pour effet de frapper de caducité la déclaration thaïlandaise de 1950. Les motifs pertinents de cette opinion se trouvent au *Recueil* de 1959, et je me permettrai de les rappeler à la Cour, ce que je n'aurais pas fait si nos adversaires n'avaient pas cru devoir citer la plaidoirie de M. Rosenne:

> « Tel n'a pas été l'avis de la Thaïlande [en ce qui concerne l'interprétation de l'article 36, paragraphe 5]. Elle s'est considérée comme liée par sa déclaration de 1940. En conséquence, elle n'a pas jugé nécessaire de prendre aucune disposition *avant* l'expiration de toute la période de dix ans énoncée dans sa déclaration de 1940. A l'expiration de cette période, elle a renouvelé son acceptation pour une nouvelle période de dix ans à partir du 3 mai 1950. D'après l'opinion qui limite l'application du paragraphe 5 aux Membres originaires des Nations Unies, l'attitude du Gouvernement de la Thaïlande procédait d'une conception erronée de la situation juridique. Toutefois, cette attitude reposait sur une opinion qui n'a pas été contredite. Au surplus, il est significatif que la mesure prise par la Thaïlande l'ait été indépendamment de toute controverse en cours. » (*C. I. J. Recueil 1959*, pp. 182-183.)

Il n'y a rien dans ces motifs, dont je viens de donner lecture à la Cour, qui permette de dire que l'opinion dissidente collective adoptait les conclusions de M. Rosenne.

D'ailleurs, devant la Cour et sur ce point précis, M. Rosenne avait trouvé un premier contradicteur, dont la Cour a eu l'occasion d'apprécier le talent et la finesse. Mon collègue et ami, M. Pierre Cot, en effet, a saisi, sur le vif, la faille dans le raisonnement présenté par l'agent du Gouvernement d'Israël. Comme tout le monde, M. Pierre Cot reconnaissait, lui aussi, la pleine validité de la déclaration thaïlandaise de 1950. Cette validité serait-elle affectée par un arrêt de la Cour constatant la caducité de la déclaration bulgare de 1921? M. Pierre Cot répond par la négative. Et pour la symétrie, pour l'harmonie des positions respectives des Parties, la Cour me permettra, puisque l'opinion de M. Rosenne a été citée, de rappeler quelle a été sur ce point l'opinion de M. Cot:

> « ... je voudrais [et c'est à la page 175 du compte rendu provisoire] répondre en deux minutes à l'argumentation que mon sa-

vant contradicteur et ami, Me Rosenne, a cru devoir tirer du cas de la Thaïlande ».

[Page 176, maintenant]:

« Mon brillant contradicteur craint que si vous acceptiez la thèse bulgare, la déclaration signée par la Thaïlande le 20 mai 1950 dût être tenue pour caduque. Qu'il en soit tout à fait rassuré. Rien de tel ne se produirait. Le 20 mai [1950] la Thaïlande a renouvelé — c'est le mot qui préoccupe Me Rosenne [et préoccupe aussi nos adversaires] — sa déclaration de 1929, laquelle avait déjà été renouvelée pour une période expirant le 7 mai 1950. Et en tout état de cause, même si l'on n'admettait pas la thèse bulgare, la Thaïlande, quand elle a renouvelé sa déclaration en 1950, le 20 mai, n'était plus liée par une clause d'acceptation de la juridiction obligatoire qui était expirée quinze jours auparavant. En sorte que l'acte déposé par la Thaïlande le 20 mai 1950 est en fait une déclaration nouvelle. Et comme c'est à l'intention des parties qu'il faut s'attacher plutôt qu'à la forme, puisque nous sommes dans le domaine conventionnel en matière de déclarations, la Thaïlande est bien liée à la juridiction obligatoire de la Cour internationale. »

Mais, Monsieur le Président, Messieurs de la Cour, peu après le prononcé de votre arrêt de 1959, M. Rosenne devait trouver un second contradicteur, et j'ose dire d'égale valeur. Dans une étude qui a été publiée en 1960, l'auteur examine les déclarations d'acceptation de la juridiction obligatoire de la Cour. Il n'affirme nulle part l'invalidité, la caducité de la déclaration thaïlandaise de 1950 comme conséquence de votre arrêt de 1959, que cet auteur avait pourtant des raisons de bien connaître.

Par contre, il soutient une thèse diamétralement opposée à celle de sir Frank Soskice, en ce qui concerne la validité formelle de la déclaration thaïlandaise de 1950.

La Cour a peut-être remarqué — cela a été, en tout cas, l'impression de celui à qui vous avez bien voulu donner la parole —, la Cour a peut-être remarqué avec quelle nuance péjorative, dans la voix et dans l'expression, sir Frank a évoqué la déclaration thaïlandaise de 1950. Cette déclaration émane pourtant du représentant qualifié de ce pays pour agir dans les relations internationales, le ministre des Affaires étrangères.

Pour sir Frank, c'est une simple lettre. Tel est le mot qu'il emploie exclusivement pour la désigner. Ce n'est même plus un document, mais, pourrait-on dire, un papier sans forme. La lettre du 20 mai 1950 n'est pas une déclaration d'acceptation pour lui. Il ne s'agit pas, et je cite ici le compte rendu 61/2 (traduction), page 17:

« il ne s'agit pas d'une déclaration qui s'insère exactement dans les dispositions du paragraphe 2 de l'article 36 du Statut ».

Eh bien! l'auteur auquel je viens de faire allusion a émis, à la page 62 de son ouvrage, une opinion absolument contraire: « En la forme », écrit-il, « l'instrument de renouvellement constitue une nouvelle déclaration qui devrait être déposée entre les mains du Secrétaire général, conformément à l'article 36, paragraphe 4, du Statut. »

Quel est cet instrument de renouvellement auquel notre auteur fait allusion?

C'est l'instrument de renouvellement, qu'il appelle renouvellements *stricto sensu*. Parmi eux, il cite immédiatement (en note, la note 3 de la page 62), il cite immédiatement en note la Thaïlande sous la forme suivante (note 3, je lis):

> « ... Le renouvellement des instruments enregistrés au *Recueil des Traités* des Nations Unies n'est pas doté d'un nouveau numéro d'enregistrement. »

C'est la démonstration que j'ai essayé de faire devant la Cour; lorsqu'il s'agit d'un instrument qui est un instrument ancien, le service compétent du Secrétariat se contente de le publier en annexe. Lorsqu'il s'agit d'un document qui est un document concernant un accord ou une déclaration nouvelle, le Secrétariat le publie dans la première partie du *Recueil des Traités* et l'affecte d'un numéro nouveau.

Et la note 3 continue:

> « On remarquera que la déclaration de la Thaïlande a été correctement ré-enregistrée au volume 65 du *Recueil des Traités* des Nations Unies, p. 157. »

C'est M. Rosenne qui parle dans cette étude, qu'il a publiée après son ouvrage magistral sur la Cour internationale de Justice, étude plus courte qu'il a publiée en 1960 et qui est intitulée *Le facteur temps dans la juridiction de la Cour internationale de Justice*, Leyde, 1960. Pour lui, par conséquent, la déclaration thaïlandaise de 1950 c'est, en la forme, une déclaration nouvelle, qui devait être déposée, comme elle l'a été, entre les mains du Secrétaire général des Nations Unies.

Vous voyez que quelquefois les avocats et les auteurs ne sont pas toujours d'accord ensemble. Je crois que nous pouvons nous appuyer sur l'opinion qui a été cette fois plus réfléchie, plus longuement méditée de M. Rosenne, lorsque, en 1960, après l'arrêt de 1959, il ne considère plus que la déclaration thaïlandaise de 1950 soit frappée de caducité, lorsqu'il affirme qu'en la forme il s'agit bien d'une nouvelle déclaration.

Contrairement donc aux conclusions du Gouvernement de Thaïlande, la déclaration de 1950 ni visait pas exclusivement à « renouveler » — et je place le mot ici entre guillemets — la déclaration de 1929, soit pour en prolonger les effets, soit pour la remettre en vigueur, puisque cette déclaration de 1929 reposait sur un statut devenu caduc et s'adressait à une cour dont la dissolution était intervenue. La déclaration de 1950, dans sa forme même, apparaît comme un instrument nouveau. Elle est fondée sur une cause juridique nouvelle: le Statut de la Cour internationale de Justice. Elle observe une procédure nouvelle: la notification prévue par l'article 36, paragraphe 4, du Statut de la Cour, au lieu et place de la Cour permanente.

Sur le terrain choisi par la Thaïlande, celui d'un formalisme rigoureux et, oserai-je dire, d'un formalisme excessif, l'inexistence de la déclaration de 1950 ne peut être constatée, pas même sa simple nullité. Mais je voudrais montrer à la Cour que le terrain choisi par la Thaïlande ne correspond pas aux réalités du droit international. La validité de la déclaration de 1950 dépend essentiellement de la volonté clairement exprimée par la Thaïlande d'accepter la juridiction obligatoire de la

Cour internationale de Justice. Ce sera l'objet, si la Cour le permet, de la troisième partie de mes observations.

## III

Pour fonder la juridiction de la Cour, le consentement clair et non équivoque donné par la Thaïlande est décisif.

> « La Cour permanente, tout comme depuis la Cour internationale de Justice, a écarté toutes les exceptions qui lui sont apparues comme dictées par le désir d'éluder, sous le couvert d'objections de caractère technique, un engagement dont la bonne foi imposait le respect. »

C'est ce qu'a pu écrire un observateur attentif et pénétrant de votre jurisprudence, le professeur Charles de Visscher, dans *Théories et réalités en droit international public*, 3me édition, page 457.

Nous savons que le Gouvernement de Thaïlande n'a pas quant à lui le désir d'éluder l'engagement pris de bonne foi en 1950. Il désire être assuré de la validité de cet engagement. Les exceptions préliminaires de la Thaïlande, comme la plaidoirie de sir Frank, n'expriment nullement une position de principe hostile à la juridiction obligatoire de la Cour. A plusieurs reprises la délégation thaïlandaise a souligné — à juste titre d'ailleurs et nous sommes entièrement d'accord avec elle — que sa déclaration de 1950, reconnaissant la juridiction obligatoire de la Cour, « avait été faite en toute bonne foi ».

C'est précisément sous l'autorité de ce principe de base des relations internationales et du droit international — le principe de la bonne foi — que le Gouvernement cambodgien se placera également pour déterminer la réalité de l'acceptation par la Thaïlande de la juridiction de la Cour.

La réalité de cette acceptation nous apparaît à deux points de vue:

1° la déclaration de la Thaïlande est claire et non équivoque,

2° elle n'est entachée d'aucun vice susceptible de la détruire.

1) Il est constant que la manifestation de volonté de l'État crée l'obligation. Le document qui enregistre cette obligation permet de constater cette volonté. Il en est l'instrument probatoire. La source de l'obligation ne réside pas dans le document, mais dans la déclaration de volonté.

Le Gouvernement de Thaïlande ne conteste pas cette manifestation de volonté qui exprime son consentement à la juridiction de la Cour. Il n'oppose pas à l'intention non ambiguë — qui résulte du libellé même de la déclaration de 1950 — une intention différente qui résulterait de circonstances extérieures à cette déclaration.

La Cour ne se trouve donc pas en présence d'un problème analogue à celui qu'elle a dû résoudre dans l'affaire de l'*Anglo-Iranian Oil Company* du 22 juillet 1952 (*Recueil*, p. 105). Le Gouvernement iranien, lui, invoquait, pour qualifier et pour restreindre la manifestation de volonté exprimée dans sa déclaration d'acceptation de la juridiction obligatoire, le Gouvernement iranien invoquait sa politique générale à l'égard de tels instruments et les intentions énoncées par lui dans la loi interne, dans la loi nationale iranienne autorisant l'acceptation de la compétence

de la Cour. La Cour a reconnu en effet que le texte de la déclaration devait être interprété à la lumière de ces circonstances (*Recueil 1952*, p. 110).

Le Gouvernement de Thaïlande n'invoque aucune considération de cet ordre. Il ne conteste pas son intention et sa volonté d'accepter, à l'époque, la juridiction obligatoire. Je pense que la plaidoirie de M. Dean Acheson en a apporté une démonstration éclatante.

2) Mais, et ce sera le second point de cette dernière partie de mes observations, le Gouvernement thaïlandais ne soutient pas non plus que son acceptation a été donnée dans des conditions de nature à infirmer sa déclaration de volonté — selon la formule employée par la Cour permanente dans l'affaire des *Droits des minorités en Haute-Silésie (Écoles minoritaires)* (arrêt de 1928).

Le Gouvernement thaïlandais soutient pourtant qu'en 1950 il a commis une *erreur* dans l'interprétation du paragraphe 5 de l'article 36 du Statut, — ceci au paragraphe 11 des exceptions préliminaires de la Thaïlande. Je présenterai, à ce sujet, trois observations.

La première question qu'il nous paraît nécessaire de poser devant la Cour, c'est de savoir si un acte entaché d'erreurs, à le supposer entaché d'erreurs, ce qui est la thèse, l'allégation que nous n'acceptons pas de la Thaïlande, la première question donc qu'il nous paraît nécessaire de poser est celle de savoir si un acte entaché d'erreur est nul *ab initio*.

La doctrine du droit international a examiné ce problème, sans le secours d'une jurisprudence bien établie. Elle n'a pu se référer qu'aux principes — tant de droit public que de droit privé — consacrés par les différents systèmes juridiques du monde. Je me permettrai de citer devant la Cour l'ouvrage classique de lord McNair sur le droit des traités, aux pages 131 à 134, qui examine ce point. Depuis, les travaux de la Commission du droit international ont apporté une contribution précieuse à l'étude de ce problème (*Annuaire 1958*, vol. 2, pages 25 et 35). On peut donc essayer de résumer ce qui apparaît comme les éléments d'une théorie de l'erreur en disant que, d'une façon générale, un acte entaché d'erreur n'est pas un acte inexistant. Il n'est même pas frappé de nullité absolue, mais d'une simple nullité relative. Or les conséquences de la nullité relative sont bien connues. L'acte continue à produire ses effets de droit tant qu'il n'a pas été annulé. Si la nullité de l'acte est constatée ou déclarée, cette nullité constatée ou déclarée n'a pas d'effet rétroactif. Elle ne porte pas atteinte aux droits acquis ou aux situations juridiques créées en vertu de l'acte, antérieurement à la constatation de sa nullité.

Je puis me référer ici au projet publié en 1935 par l'Université de Harvard qui dispose dans son article 29, et je m'excuse de traduire directement,

> « qu'un traité entaché d'erreur peut être déclaré ... n'être pas obligatoire entre les parties ».

Le commentaire de cet article montre bien la différence que les auteurs de ce projet faisaient entre la déclaration de nullité avec rétroactif et la simple constatation que l'accord entaché d'erreur ne liait pas les parties.

L'acte entaché d'erreur « est susceptible d'annulation », pour reprendre les termes mêmes employés par le très regretté sir Hersch Lauterpacht

dans son rapport devant la Commission du droit international (A/CN4/63, p. 212).

La déclaration thaïlandaise de 1950 — même si elle était viciée par une erreur, ce que nous contestons — ne peut en tout cas être considérée comme un acte inexistant. Ce serait tout au plus un acte annulable, et la nullité dont la déclaration thaïlandaise serait frappée est une nullité relative. Certes, la Thaïlande aurait pu invoquer cette nullité, par exemple par notification au Secrétaire général des Nations Unies, — mais avant le dépôt de la requête introductive d'instance du Cambodge. Une fois la Cour valablement saisie, l'action unilatérale de l'État défendeur ne peut retirer compétence à la Cour. Il est admis, je me suis permis de le rappeler, que les actes atteints de nullité relative ne peuvent être annulés avec effet rétroactif. Or la requête introductive d'instance du Cambodge est antérieure à la constatation publique et officielle par la Thaïlande de la prétendue nullité de sa déclaration de 1950. La date de cette constatation aurait pu être normalement celle d'une notification de la Thaïlande au Secrétaire général des Nations Unies de la caducité, de la nullité de la déclaration de 1950. Cette déclaration, cette notification, la Thaïlande ne l'a pas faite. On peut donc à la rigueur admettre que la Thaïlande a officiellement constaté la nullité de sa déclaration de 1950 à la date du dépôt de ses exceptions préliminaires en mai 1960.

En droit, pourrait-on dire, il s'agirait en quelque sorte d'une dénonciation, fondée sur une cause de nullité révélée par l'arrêt de 1959. Mais cette dénonciation constatant la nullité de la déclaration de 1950 ne comporterait pas d'effet rétroactif. Sa portée est définie par une jurisprudence constante de la Cour, rappelée dans l'arrêt du 26 novembre 1957 relatif au *Droit de passage sur territoire indien* (exceptions préliminaires, *C. I. J. Recueil 1957*, p. 157), où la Cour s'est exprimée ainsi:

> « C'est une règle de droit généralement acceptée et appliquée dans le passé par la Cour qu'une fois la Cour valablement saisie d'un différend, l'action unilatérale de l'État défendeur, dénonçant tout ou partie de sa déclaration, ne peut retirer compétence à la Cour. Dans l'affaire *Nottebohm*, la Cour a exprimé le principe en ces termes: « Un fait extérieur tel que la caducité ultérieure de la déclaration par échéance du terme ou par dénonciation, ne saurait retirer à la Cour une compétence déjà établie. » (*C. I. J. Recueil 1953*, p. 123). »

Mais, et ce sera là ma seconde observation, même pour l'avenir, la nullité de l'acte entaché d'erreur n'est jamais prononcée de plein droit. Encore faut-il que cette erreur puisse être considérée comme ayant vicié le consentement. Or, à aucun moment le Gouvernement thaïlandais n'expose que l'erreur alléguée par lui a vicié sa déclaration de volonté. Il ne suffit pas en effet de constater l'existence d'une erreur. Pour permettre à la Cour d'examiner la question de savoir si, en droit international, cette erreur — plus particulièrement s'il s'agit d'une erreur de droit — est susceptible d'entraîner l'annulation de l'acte entaché d'erreur, il est nécessaire de rapporter au préalable la preuve que cette erreur a vicié le consentement. En l'espèce, le Gouvernement thaïlandais devrait démontrer que son erreur a été en quelque sorte déterminante. Il devrait démontrer qu'il s'agit d'une de ces « erreurs essentielles », selon l'expression même employée par la Cour dans l'affaire *Nicaragua c. Honduras* dans son arrêt du 18 novembre 1960, page 215: à savoir, si le Gouverne-

ment de Thaïlande avait pu connaître, en 1950, l'interprétation donnée par la Cour à l'article 36, paragraphe 5, du Statut, il n'aurait pas accepté la juridiction obligatoire.

Mais cette preuve administrée ne suffirait même pas. C'est la troisième observation que je me permets de présenter à la Cour. Cette preuve administrée ne suffirait pas encore, car il appartiendrait alors à votre haute juridiction de décider de l'application, en l'espèce, du principe juridique que sir Hersch qualifiait de « primordial » dans son rapport, déjà cité, à la Commission du droit international, et qu'il énonçait ainsi:

> « Nul — individu ou État — ne peut arguer d'une ignorance de la loi pour éluder les conséquences de ses actes. »

L'article 12 du projet de convention sur le droit des traités élaboré dans le cadre des travaux de la Commission du droit international exclut également l'erreur de droit.

Le Gouvernement de Thaïlande nous déclare lui-même que son erreur n'a pas eu pour effet de contraindre la Thaïlande à une déclaration de volonté qu'elle n'aurait pas exprimée si elle avait connu l'erreur. Nous ne sommes donc pas, en tout état de cause, en présence d'une erreur de nature à porter atteinte à la réalité du consentement.

Monsieur le Président, Messieurs de la Cour, au terme de ces observations, il me sera permis de conclure que ni dans la forme ni dans le fond la déclaration thaïlandaise de 1950 n'était entachée d'un vice de nature à l'empêcher de produire ses effets juridiques à la date où le Cambodge a saisi la Cour de sa requête introductive d'instance. Le Gouvernement du Cambodge est sûr en tout cas que son recours ne peut être considéré — pour reprendre le principe énoncé par l'Institut de droit international lors de sa session de Neuchâtel en 1959 — comme un acte peu amical à l'égard de l'État défendeur.

## 8. PLAIDOIRIE DE M. PAUL REUTER

(CONSEIL DU GOUVERNEMENT DU CAMBODGE)
AUX AUDIENCES PUBLIQUES DU 12 AVRIL 1961

*[Audience publique du 12 avril 1961, matin]*

Monsieur le Président, Messieurs les Juges.

Les brèves observations qu'au nom du Gouvernement royal du Cambodge nous avons l'honneur de soumettre respectueusement à la Cour porteront sur deux objets: d'abord et principalement sur les obligations qui pèsent sur la Thaïlande en vertu du traité de 1937, ensuite et en mode de conclusion générale sur quelques aspects théoriques des thèses thaïlandaises relatives à la première exception.

I

Le Gouvernement cambodgien n'a nul besoin d'invoquer les dispositions du traité de 1937, puisque, selon lui, les déclarations d'acceptation de la juridiction de la Cour fondées sur l'article 36 du Statut sont pleinement suffisantes pour justifier sa compétence. Cependant il estime, vu les doutes profondément ressentis avec la plus entière bonne foi par le Gouvernement thaïlandais, qu'il y a intérêt à établir la constance des engagements de ce Gouvernement et la stabilité de sa politique en ce qui concerne les litiges de frontières avec le Cambodge.

Si, comme il espère le faire devant la Cour, le Gouvernement royal du Cambodge établit la réalité des engagements de la Thaïlande, la compétence de la Cour ne pourra que s'en trouver renforcée et, peut-être, les doutes du Gouvernement thaïlandais dissipés.

Qu'il nous soit permis de nous référer à une jurisprudence bien connue de la Cour; celle de la Cour permanente de Justice internationale qui a déclaré dans l'affaire *Compagnie d'Électricité de Sofia et de Bulgarie* (Série A/B, n° 77, p. 76):

> « La multiplicité d'engagements conclus en faveur de la juridiction obligatoire atteste chez les contractants la volonté d'ouvrir de nouvelles voies d'accès à la Cour plutôt que de fermer les anciennes ou de les laisser se neutraliser mutuellement pour aboutir à l'incompétence. »

C'est dans cet esprit que nous allons aborder l'examen du traité de 1937.

L'indiscutable talent de nos distingués adversaires a opposé à notre démonstration des obstacles presque infranchissables. Que la Cour nous pardonne la familiarité d'une comparaison. Certains alpinistes choisissent la saison la plus dure pour tenter la conquête des sommets les plus redoutés par des itinéraires réputés impossibles. On suit leurs tentatives avec l'intérêt que suscite toute prouesse sportive et avec la sympathie que l'on accorde, à l'avance, au courage malheureux. Telle serait notre situation si nous suivions l'itinéraire qui nous est proposé. Mais nous

pensons pouvoir en suivre un autre plus simple et que nous devons exposer à la Cour.

Les problèmes que nous allons rencontrer sont au nombre de trois. Le premier se rapporte au contenu de l'obligation posée par l'article 21. Le second se rapporte à l'organe juridictionnel compétent. Le troisième se rapporte aux États qui bénéficient de cet article 21.

Abordons le premier: quel est le contenu de l'obligation posée par l'article 21 du traité de 1937? Nos distingués contradicteurs ont consacré beaucoup de temps à démontrer d'une manière parfaitement pertinente que la Thaïlande n'était pas partie à l'acte général d'arbitrage. Cette démonstration nous a beaucoup surpris; elle est incontestable, mais pourquoi nos distingués contradicteurs ont-ils voulu l'effectuer? Avec beaucoup de déférence pour leur pensée, nous sommes obligés d'émettre l'hypothèse que, peut-être, ils n'ont pas saisi le mécanisme de l'article 21; ils ne l'ont en tout cas, semble-t-il, pas compris comme le Gouvernement cambodgien le comprend.

Nous demandons à la Cour la permission de nous arrêter un peu sur ce point. Il est très important non seulement parce qu'il concerne le traité de 1937, mais parce qu'il jette peut-être aussi une certaine lumière sur la première exception. Quand un, deux ou plusieurs États veulent instituer des règles juridiques obligatoires, ils ont une première voie très simple qui est de promulguer une loi, de conclure un traité, c'est-à-dire de poser un acte juridique qui simultanément institue la source de l'obligation et en décrit le contenu. Mais il y a une autre voie qui consiste à poser dans un acte juridique le principe de l'obligation, tout en se référant pour la *description* de l'obligation à un autre acte, à un document ou à une source quelconque. Donnons de suite quelques exemples:

On pourrait imaginer que pour résoudre un problème de frontière fluviale, deux États concluent un traité dans lequel ils décideraient que la frontière sera déterminée d'après les principes des codes de Justinien; cette hypothèse ne serait peut-être pas si fantaisiste. La déclaration de Londres de 1909 n'a jamais eu de force obligatoire; on peut imaginer, et il en existe des cas, qu'un État, par un acte juridique interne, décide d'appliquer les règles de la déclaration de Londres à la conduite des hostilités navales. Nous serions tentés d'ajouter ici un troisième exemple qui nous ramène à la première exception. Est-ce qu'un État ne peut pas poser le principe de l'acceptation de la juridiction de la Cour, tout en renvoyant, pour le contenu de cette obligation, à un autre document? Est-ce-que cette hypothèse ne permettrait peut-être pas de jeter une certaine lumière sur les difficultés que rencontrent nos adversaires?

Quoi qu'il en soit, on rencontre bien dans l'article 21 une application de la méthode qui consiste à dissocier le principe de l'obligation et la description de son contenu. Ni la Thaïlande ni la France ne sont liées par cet article 21 à l'acte général; la Thaïlande et la France ont simplement convenu d'appliquer certaines règles pour la description desquelles elles se réfèrent à un texte qui est celui de l'acte général d'arbitrage.

Cependant, un doute subsiste encore. On s'est demandé si cet article 21 n'avait pas une portée purement politique, c'est-à-dire s'il ne contenait pas simplement l'expression d'une directive, d'autres diraient d'une règle programmatique, sans poser une obligation directe. Mais il suffit

de se reporter au texte pour être convaincu; il se réfère bien aux principes énoncés dans le Pacte de la Société des Nations, mais il va plus loin. Il précise: « les Hautes Parties contractantes conviennent d'appliquer *les dispositions* de l'acte général ».

Par conséquent, il s'agit bien d'une obligation juridique; deux observations le confirmeraient s'il était besoin. Il n'est pas surprenant qu'en 1937 les deux États en cause aient accepté ces obligations. Dans le traité précédent — sur lequel nous reviendrons — du 14 février 1925, l'article 2 prévoyait déjà la compétence obligatoire de la Cour permanente de Justice internationale et dans toute une liste de traités dont nous épargnons l'énumération à la Cour, la Thaïlande au cours des années 1937 et 1938 a accepté à l'égard d'autres États des engagements très précis en ce qui concerne la compétence de la Cour permanente de Justice internationale.

Or, les dispositions de l'acte général prévoient la compétence de la Cour permanente de Justice internationale faute d'accord pour recourir à un tribunal arbitral en ce qui concerne tous différends au sujet desquels les parties se contesteraient réciproquement un droit. Ce qui est le cas dans l'espèce actuelle. La compétence de la Cour est ainsi établie. Nous noterons pour terminer que l'accord de règlement franco-siamois du 17 novembre 1946 a eu recours à une commission de conciliation,

> « Par application de l'article 21 du traité franco-siamois du 7 décembre 1937... »

On s'est étonné que l'on n'ait pas recours, à l'époque, à la Cour internationale de Justice, et on a voulu y voir un argument contre la compétence de la Cour; mais du moment que la conciliation avait suffi pour régler le différend, pourquoi aurait-on recouru à la Cour internationale de Justice?

La deuxième question est de savoir quel est l'organe juridictionnel compétent. Le traité de 1937 par les références auxquelles il procède ne vise que la Cour permanente de Justice internationale. Et l'on retrouve alors, mais sur le plan de l'article 37 du Statut de la Cour, tous les problèmes qui viennent d'être débattus pendant plus de deux jours devant vous. On pourrait certes discuter la question de savoir si les principes applicables en ce qui concerne l'article 36 peuvent être transposés sans précaution à l'article 37. Ce problème a été déjà, dans d'autres affaires, discuté devant la Cour. Nous croyons que nous pouvons nous dispenser de l'examiner à nouveau. Dans l'espèce, le problème peut être résolu en faisant appel à deux principes: suivant le premier, c'est l'intention, la volonté des États qui est à la source de la compétence de la Cour; suivant le deuxième, la volonté des États doit être établie en considérant simultanément l'ensemble des actes qui se conditionnent les uns les autres. Ce deuxième principe appelle quelques explications.

Quand plusieurs actes juridiques sont séparés par un bref intervalle de temps, quand il apparaît que dans l'intention des parties ces actes se conditionnent l'un l'autre, quand ils sont, pourrait-on dire, la cause juridique l'un de l'autre, il découle de cette solidarité des conséquences. Dans les cas les plus extrêmes, peut-être faut-il dire que tous ces actes constituent une opération unique, il y aurait ainsi par exemple une notion juridique de l'« instance » juridictionnelle. Mais même dans les

cas moins caractérisés, il faut au moins admettre que ces actes doivent être interprétés l'un à la lumière de l'autre. Or, en présence de quelle situation concrète sommes-nous dans le cas présent?

A la suite d'événements qui se rapportent à la période de guerre et qu'il est inutile de rappeler ici, le traité du 7 décembre 1937 avait cessé d'être en vigueur entre la France et la Thaïlande. Il ne devait être « renouvelé » et rentrer à nouveau en vigueur que par l'accord de règlement franco-siamois du 17 novembre 1946 (article 2):

> « Aussitôt après la signature du présent accord, les relations diplomatiques serons rétablies et les rapports entre les deux pays se trouveront de nouveau régis par le traité du 7 décembre 1937 et par l'arrangement commercial et douanier du 9 décembre 1937. Les parties contractantes communiqueront le présent accord au Conseil de Sécurité et le Siam retirera la plainte qu'il a introduite auprès de lui. La France ne s'opposera plus à l'entrée du Siam aux Nations Unies. »

A l'époque où un consentement exprès est donné pour une remise en vigueur du traité de 1937, la Cour permanente de Justice internationale a disparu et la Cour internationale de Justice a pris sa place La Thaïlande aurait pu à ce moment exclure de l'article 21 les dispositions relatives au règlement judiciaire ou faire une réserve en ce qui concerne la Cour internationale de Justice. Loin de là, sa position est tout à fait précise: l'accord de 1946 se situe dans le cadre des procédures pacifiques de la Charte des Nations Unies, et le Siam qui a posé sa candidature aux Nations Unies obtient de la France la reconnaissance de son aptitude à y rentrer. Le Siam ne pouvait ignorer que, selon la Charte, la Cour internationale de Justice était substituée à la Cour permanente de Justice internationale et que son nouvel engagement conduisait à une nouvelle compétence de la Cour internationale de Justice.

Nous voici en présence du troisième problème: comment les obligations souscrites dans le traité de 1937 peuvent-elles bénéficier au Cambodge? Nos distingués contradicteurs savent que nous ne nous plaçons pas sur le terrain de la succession d'États, mais sur celui de la représentation qui est liée à la notion de protectorat international et suppose donc que l'État protégé a bien la qualité d'un État.

Nous allons raisonner en ce domaine en fonction de quelques principes généraux, mais nous allons raisonner surtout en fonction de la situation particulière du Cambodge et, d'une manière plus précise, en fonction de la situation particulière du Cambodge au regard de la Thaïlande. Nous n'entendons donc nullement, dans les conclusions auxquelles nous arriverons, dégager des règles qui soient valables d'une manière générale pour d'autres situations ou pour d'autres rapports juridiques.

Cette remarque reçoit de suite application. Nous venons de dire que pour qu'il y ait possibilité d'une représentation, il fallait que le Cambodge ait eu la qualité d'État durant la période du protectorat français. Nous avons cru comprendre, avec beaucoup de surprise, qu'hier on soutenait du côté thaïlandais que le Cambodge n'avait pas eu d'existence internationale pendant la période du protectorat. On pourrait, à ce sujet, faire valoir beaucoup d'arguments théoriques ou historiques, mais nous n'avons pas à débattre ici d'un problème aussi vaste. Ce qui nous a surpris, c'est que ce soit la Thaïlande qui soutienne cette thèse, car, en ce qui la concerne, le problème est réglé conventionnellement par un

traité qui n'a jamais été abrogé; le 15 juillet 1867, la France et le Siam ont conclu à Paris un traité « pour régler la position politique et les limites du Cambodge ». (*Recueil de Traités* de De Clercq, tome IX, page 734.)

Selon l'article premier,

> « Sa Majesté le Roi de Siam reconnaît solennellement le protectorat de Sa Majesté l'Empereur des Français sur le Cambodge. »

Mais dans son article 3,

> « Sa Majesté le Roi de Siam renonce, pour lui et ses successeurs, à tout tribut présent ou autre marque de vassalité de la part du Cambodge.
>
> De son côté, Sa Majesté l'Empereur des Français s'engage à ne point s'emparer de ce Royaume pour l'incorporer à ses possessions de Cochinchine. »

Par conséquent, au regard de la Thaïlande, le Cambodge ne pouvait être que sous le régime du protectorat, régime totalement distinct d'un régime d'annexion.

Et la Thaïlande connaît fort bien cette obligation car, comme on l'a rappelé hier à l'audience, son souci a toujours été non seulement de la faire respecter mais d'aller plus loin et d'obtenir l'abolition de cette tutelle du protectorat pour que le Cambodge recouvre sa totale indépendance. Mais il y a encore dans ce traité un dernier article qui présente pour nous un grand intérêt, c'est l'*article 7*:

> « Le Gouvernement français s'engage à faire observer par le Cambodge les stipulations qui précèdent. »

Dès lors, la ligne générale de la politique thaïlandaise est tout à fait claire. Elle a reconnu le protectorat, mais elle ne veut pas d'une annexion et elle s'est fait garantir qu'il n'y aurait pas d'annexion. Et elle tire la conséquence logique de l'existence du protectorat: la France s'engage à faire respecter par le Cambodge des engagements, elle devra donc s'engager non seulement en son propre nom, mais, pour les obligations qui concernent les rapports entre le Cambodge et la Thaïlande, il est normal de considérer que la France s'engage non seulement en son nom mais également au nom du Cambodge. Voilà le schéma général qui définit le statut du protectorat du Cambodge, à l'égard de la Thaïlande tout au moins.

Il découle de ce régime du protectorat que tous les engagements internationaux conclus par la France doivent être examinés attentivement afin d'établir si la France les a conclus en son seul nom, au seul nom du Cambodge, ou bien en son nom et en même temps en celui du Cambodge. De telles questions se posent nécessairement à propos des démarches internationales de l'État protecteur. Certaines procédures poursuivies dans la Cour ont mis ce point bien en lumière.

Dans l'*Affaire relative aux droits des ressortissants des États-Unis d'Amérique au Maroc*, une des parties s'est posée la question de savoir à quel titre agissait l'autre et a soulevé à cet égard une exception préliminaire, et la Cour a finalement demandé à l'État protecteur de répondre sur ce point et de préciser s'il agissait en son nom propre, au nom de l'État protégé ou à ces deux qualités à la fois (Cour internationale de Justice, *Mémoires, Affaire du Maroc*, vol. I, p. 235, et vol. II, p. 431).

D'ailleurs, la Cour a dû examiner ce problème dans certaines questions qui ont été abordées par son arrêt.

Dès lors, la question se pose de savoir à quel titre la France a souscrit les engagements internationaux contenus dans le traité de 1937. On conçoit sans peine que les engagements qu'elle a conclus en son propre nom n'engagent qu'elle, mais il n'en est pas de même de ceux qu'elle a conclus au nom de l'État protégé. Ceux-ci peuvent persister et se maintenir au-delà du protectorat.

Sans doute y a-t-il une condition nécessaire pour que ces engagements obligent l'État protégé? Cette condition est énoncée d'une manière très claire dans l'arrêt relatif aux *Droits des ressortissants des États-Unis au Maroc* (*C.I.J. Recueil 1952*, p. 193):

> « La convention et les déclarations doivent donc être considérées comme des accords passés par la Puissance protectrice dans les limites de ses pouvoirs, accords relatifs aux affaires de l'État protégé et destinés à l'obliger... »

Il faut que les accords soient passés dans les limites des pouvoirs de la Puissance protectrice; mais c'est là une question qui regarde l'État protégé et non les autres États. Elle n'est pas mise ici en cause par le Cambodge. L'État protégé devenu indépendant aurait-il perdu le droit d'invoquer le bénéfice d'un traité conclu en son nom par l'État protecteur, pour le seul motif qu'il assure désormais lui-même la gestion des affaires extérieures? Poser la question, c'est la résoudre.

C'est d'après ces lignes générales qu'il faut rechercher au nom de qui l'accord de 1937, tel qu'il a été renouvelé en 1946, a été conclu.

Certes, l'objet étendu et complexe de l'accord de 1937 porte sur des questions qui, pour certaines, ne concernent que la France agissant en tant que telle. Il s'agit donc de rechercher pour nous quelles sont les dispositions qui engagent à la fois la France et le Cambodge. L'article 22 qui a été cité ici plusieurs fois nous donne à cet égard une double indication. Tout d'abord il fait une mention spéciale pour les questions de frontières; toutes les clauses relatives à ces matières et qui figurent dans les conventions antérieures sont maintenues. Comment sont définies les questions de frontières? Selon l'article 22, il s'agit

> « des clauses relatives à la définition et à la délimitation des frontières, à leur garantie et à la démilitarisation de la frontière du Mékong ».

On remarque que les clauses relatives à la garantie des frontières font l'objet d'une mention spéciale. Il est hors de doute que toutes ces clauses, toutes ces stipulations examinées à la lumière du traité de 1867, ne sont pas prises seulement au nom du Gouvernement français, mais encore au nom du Gouvernement du Cambodge. Il est exclu d'imaginer que par la seule fin du protectorat la Thaïlande puisse refuser au Cambodge le bénéfice de ces dispositions.

Mais l'article 22 contient une autre précision qui explique parfaitement les intentions des parties. Le traité s'applique, sauf dispositions prévues dans des traités antérieurs, aux relations de l'Indochine et du Siam:

« Il est entendu d'ailleurs que le présent traité sera, à la date de sa mise en vigueur, substitué au traité du 14 février 1925 en ce qui concerne les relations de l'Indochine et du Siam. »

Considérons maintenant l'article décisif, l'article 21 qui institue d'une manière générale des procédures de solution pacifique. Ces procédures sont valables pour l'ensemble des matières visées par le traité; l'engagement de recourir aux procédures pacifiques lie donc, selon les cas, la France seule ou bien la France et le Cambodge, suivant que l'engagement principal concerne la France seule, ou la France et le Cambodge.

Repousser cette affirmation serait pénaliser le Cambodge parce qu'il a recouvré la libre gestion de ses affaires extérieures; ce serait donner à la Thaïlande le droit de réduire à néant des engagements qui ne peuvent valoir que parce qu'ils ont été conclus au nom du Cambodge.

Dans la présente affaire, nous sommes incontestablement en présence d'un litige de frontières entre la Thaïlande et le Cambodge.

En tant que tel il tombe sous le coup des dispositions du traité que l'on vient de commenter et qui ont été nécessairement conclues au nom du Cambodge; il s'agit par ailleurs d'une affaire qui touche les relations de la Thaïlande et de l'Indochine, il s'agit d'une affaire de frontière. Comment soutenir notamment que le Cambodge, au nom duquel ont été conclus les engagements concernant la garantie des frontières, ne pourrait pas invoquer le bénéfice des procédures pacifiques qui constituent manifestement une garantie des frontières?

*[Audience publique du 12 avril 1961, après-midi]*

Monsieur le Président, Messieurs les Juges, nous avons exposé ce matin les thèses du Gouvernement cambodgien. A ces thèses, nos distingués adversaires ont opposé certaines objections que nous voudrions maintenant brièvement examiner.

Ces objections sont de deux ordres: les unes sont relatives au texte même du traité de 1937, les autres sont relatives à des faits ou à des événements postérieurs.

Nos distingués adversaires ont exprimé le sentiment que la présentation du traité de 1937, et notamment des deux articles essentiels que nous discutons, l'article 21 et l'article 22, n'était pas parfaitement claire et qu'elle pouvait susciter bien des doutes. Sur ce point, nous ne pouvons que dire notre plein accord.

Ils ont pensé également que la meilleure méthode pour éclairer le sens des dispositions du traité de 1937 était d'examiner les dispositions des traités dont il prend la suite et avec lesquels, d'ailleurs, il se combine. Et sur ce point aussi nous devons être de plein accord avec nos adversaires.

Antérieurement au traité de 1937, nous trouvons d'abord un traité d'amitié, de commerce et de navigation du 14 février 1925.

Quand nous considérons les dispositions de ce traité, nous remarquons d'abord — c'est un point que nous avons déjà signalé — que l'article 2 de ce traité de 1925 prévoit que les parties acceptent la compétence de la Cour permanente de Justice internationale.

Nous voyons également plus loin — et c'est l'article 26 — que ce traité de 1925 ne règle que les rapports de la France, à l'exclusion

de l'Indochine, avec la Thaïlande. En effet, l'article 26 prévoit que le traité de 1925 pourra être étendu dans ses effets à des colonies, à des protectorats, à des territoires sous mandat, mais toujours à l'exclusion de ce qui concerne l'Indochine, et dans sa disposition finale cet article 26 dispose que, en ce qui concerne particulièrement l'Indochine française, il sera négocié le plus rapidement possible une convention spéciale et des arrangements complémentaires.

Nous sommes donc ici, au départ, en présence d'une situation qui est très claire. Le traité de 1925 ne comporte que des engagements au nom de la France et toutes les dispositions qu'il établit ne s'appliquent en tant que telles qu'à la France et à la Thaïlande, à l'exclusion des territoires composites qui forment à l'époque ce que l'on appelle l'Indochine française.

La convention spéciale prévue par l'article 26 du traité du 14 février 1925 a été conclue. C'est la convention de Bangkok, du 25 août 1926, concernant les rapports du Siam et de l'Indochine.

Bien entendu, dans les dispositions de cette convention, certaines engagent la France en tant que telle, car la France figure au titre de l'Indochine pour les territoires qui sont incorporés à l'État français. Mais pour les entités qui ne sont pas incorporées à l'État français, la France stipule certes en son nom comme Puissance protectrice, mais elle stipule aussi, quand il s'agit d'un État et donc du Cambodge, en leur nom.

Or, si nous consultons cette convention du 25 août 1926, nous voyons que l'article premier pose une règle générale, qui est la suivante: toutes les dispositions du traité de 1925 qui ne sont pas incompatibles avec des dispositions particulières du traité de 1926 sont incorporées dans ce traité de 1926. Or, le traité de 1926 ne contient aucune disposition particulière concernant les modes de solution pacifique des litiges. Et ceci implique donc comme conséquence que, dans les rapports spéciaux entre la Thaïlande et les États, ou pays, ou territoires qui composent l'Indochine française, il existe une clause de juridiction qui attribue compétence à la Cour permanente de Justice internationale.

Dès lors, le traité de 1937 s'éclaire. Certes, on ne saurait le donner comme un modèle de rédaction. Ceux qui l'ont préparé ont voulu, pour aller plus vite, fondre en un seul texte les dispositions qui avaient été très logiquement et très clairement séparées dans le passé dans le traité de 1925 d'une part et la convention de 1926 de l'autre. C'est ce qui explique que lorsque l'on se reporte à l'article 22, on trouve une disposition qui fasse mention des règles qui concernent spécialement les rapports de la Thaïlande et de l'Indochine. C'est ce qui permet également de donner sa juste valeur à l'alinéa 2 de l'article 22, à cette clause dite coloniale. Il est bien clair que lorsqu'il est prévu que les dispositions du traité de 1937 pourront être étendues aux colonies et possessions françaises, ainsi qu'aux pays placés sous le protectorat, cela doit s'entendre à l'exclusion des dispositions concernant les territoires d'Indochine, puisque ceux-ci font l'objet, dans le premier alinéa, d'une réserve spéciale. Il nous semble donc que ce recours aux sources du traité de 1937 l'éclaire dans un sens qui montre que lorsque les négociateurs ont pris tout leur temps et ont rédigé correctement les traités, ils ont bien clairement séparé les deux problèmes: celui des rapports entre l'État français en tant que tel et la Thaïlande, et celui de l'État français comme protecteur et au nom de l'État protégé, qui ont fait l'objet de dispositions particulières. En 1937, on a rédigé dans

une certaine hâte — peut-être la saison y est-elle pour quelque chose — un traité dont l'ensemble des dispositions nous semble ainsi parfaitement clair.

En ce qui concerne certains événements ou certaines déclarations postérieures à 1937, il a été fait état d'abord de certaines déclarations échangées devant la Commission de conciliation franco-siamoise établie par le règlement de 1946.

Il s'agit là d'événements anciens, d'événements oubliés, d'événements qu'il faut oublier. Mais si on veut les évoquer il faut bien rappeler le climat dans lequel s'est déroulée cette procédure de conciliation.

Certes, on y a parlé incidemment de problèmes de délimitation de frontières au sens technique du terme. Mais on y a parlé aussi de questions beaucoup plus graves, on y a parlé de véritables revision de frontières. Et les deux États en présence, France et Thaïlande, ont essayé, chacun de son côté, d'amener la Commission à traiter de ces problèmes de revision; chacun de son côté a essayé également d'empêcher la Commission d'examiner les revendications territoriales adverses.

C'est à la lumière de ces considérations qu'il faut commencer par apprécier les déclarations thaïlandaises qui sont rapportées à la page 58 **(I)** du mémoire du Gouvernement du Royaume de Cambodge. Le Gouvernement français qui se trouvait en présence de demandes de revision émanant de la Thaïlande s'est réservé le droit aussi de présenter des demandes de revision au nom du Cambodge et du Laos.

Le Gouvernement de la Thaïlande a voulu répondre à cette demande de revision et il l'a fait par le passage qui vous a été cité. Disons que cette réponse thaïlandaise a surtout une portée politique. Car sur le plan juridique elle n'a pas de pertinence. La Thaïlande affirme que des revendications au nom du Cambodge et au nom du Laos seraient des revendications au nom d'États tiers. Mais ceci est absolument contraire au traité du protectorat. S'il y a des revendications à présenter, il faut bien qu'elles le soient par quelqu'un, et ce ne peut être que par la France. Par conséquent, sur le plan juridique, l'objection thaïlandaise est sans portée, mais sur le plan politique elle a une très grande portée, car le fond de la pensée du Gouvernement thaïlandais, c'est qu'il n'accepte pas des revendications présentées au nom des États sous protectorat, parce qu'il n'est pas certain que les États protégés en profitent, et la fin de sa phrase qui vous a été citée indique bien que le Gouvernement thaïlandais attache le plus grand prix à l'indépendance de ces territoires. Sur ce point, le Gouvernement cambodgien doit dire que la disposition de sa totale indépendance est aussi un objet auquel il attache le plus grand prix, et il prend volontiers acte de ces déclarations de la Thaïlande de 1946 et se réjouit de ce qu'elles soient renouvelées encore aujourd'hui, et il attend avec la confiance de bénéficier des effets de cet accueil dans la famille des nations que cette déclaration lui a promis.

En ce qui concerne le Gouvernement français, il s'est trouvé de son côté en présence d'une revendication siamoise, et il y a répondu. Et c'est le passage qui a été cité à la page 89 **(I)** du mémoire du Gouvernement du Cambodge.

Qu'a fait valoir le Gouvernement français contre une demande de revision? Il a fait valoir que dans les traités originaires les revisions de frontières étaient exclues, puisque les parties étaient tombées d'accord sur le principe des frontières. Jamais les phrases qui ont été lues et qui sont à la page 89 **(I)** n'ont voulu dire qu'un litige qui serait relatif à

une délimitation de la frontière se heurterait aux mêmes objections. Autrement dit le Gouvernement français, instruit peut-être par la première position prise par la Thaïlande, a cherché une justification plus juridique; mais ceci ne porte en rien atteinte à l'efficacité des clauses de compétence juridictionnelle qui se trouvaient dans les accords. Si la question devait être portée dans l'avenir devant la Cour, il est bien clair que soit l'une, soit l'autre des parties ferait sans doute les mêmes objections à l'examen d'un problème de revision, alors qu'elle n'en fait aucune à l'examen d'une question de délimitation.

On a encore fait valoir, et c'est le dernier point sur lequel nous présenterons une brève observation, que dans son attitude vis-à-vis d'un autre État voisin du Cambodge, le Laos, le Gouvernement français avait pris une position contraire aux thèses que le Cambodge soutient actuellement. On a fait état d'un accord entre la France et le Laos — traité d'amitié et d'association — du 22 octobre 1953, que l'on peut trouver dans le recueil *Actualités internationales et diplomatiques 1950-1956* de mon collègue M. Colliard, page 224. On a cité l'article premier, qui dit que le Royaume du Laos « est substitué » dans tous les droits et obligations résultant de tous traités internationaux. Et on a raisonné par *a contrario* en disant: si une telle disposition est nécessaire pour produire les effets qui en découlent, cela prouve bien que ces effets n'existent pas par la vertu propre des engagements antérieurement souscrits.

Eh bien, Monsieur le Président, Messieurs les Juges, nous croyons que c'est là un raisonnement très hasardé, car il s'agit dans ce traité du Laos et la situation du Laos vis-à-vis de la Thaïlande n'a jamais été définie comme la situation du Cambodge.

D'autre part, ce Laos de 1953 est un État. Mais est-ce bien sûr que ce Laos ait été précédé d'un autre État identique? Il y avait bien un royaume de Louang-Prabang, mais le Laos de 1953 a été recomposé à partir d'éléments territoriaux disparates, et il n'est pas certain, nous n'avons pas à prendre position sur ce point, mais il n'est pas certain qu'en ce qui concerne le Laos il n'y ait pas des problèmes de succession d'État qui se posent. Enfin et surtout, ces raisonnements *a contrario* ne prouvent pas grand'chose, pas plus que ne prouverait ici un argument très simple mais que nous ne faisons pas valoir, qui consisterait à dire que puisqu'il n'y a pas eu de traité de ce genre pour le Cambodge, c'est que la situation du Cambodge est meilleure.

Voilà les quelques observations que nous voulions présenter au sujet des objections qui nous ont été proposées.

## II

Et nous en arrivons alors à notre conclusion, à la conclusion générale qui est présentée au nom du Gouvernement royal du Cambodge. Cette conclusion nous ramène à la compétence de la Cour fondée sur l'article 36 et l'acceptation thaïlandaise.

Ce procès est simple. Il est suspendu, pour l'essentiel, à une lettre, la lettre du 20 mai 1950. Cette lettre veut dire quelque chose. Elle ne peut vouloir dire qu'une seule chose: la Thaïlande veut accepter la juridiction de la Cour internationale de Justice. Sur ce point l'accord est unanime.

La Thaïlande s'interroge sur la réalité actuelle de cet engagement et elle devrait, pour que cet engagement soit privé d'effet, démontrer que, bien qu'elle ait voulu ce résultat, elle n'a pas pu le réaliser. Cette démonstration est difficile, car en droit international la volonté des États qui veulent s'obliger est puissante. D'aucuns diront même qu'elle est toute-puissante. Comment détruire cette capacité créatrice de la volonté? Les représentants de la Thaïlande ont, semble-t-il, poursuivi deux voies différentes. Ils ne les ont poussées peut-être ni l'une ni l'autre jusqu'à leur terme. Ils ne les ont peut-être même pas toujours distinguées, bien qu'elles soient contradictoires. Ni l'une ni l'autre de ces voies ne permettent d'atteindre le résultat recherché. Non seulement pour les motifs qui ont été si bien exposés par mes collègues, mais parce que l'une et l'autre de ces voies, poussées à leur terme, sont contraires aux principes généraux du droit international contemporain.

La première de ces voies est celle d'une conception purement psychologique de la volonté. La deuxième est celle d'une conception purement formaliste.

Comment, en suivant le raisonnement de la Thaïlande, en le poursuivant peut-être au-delà de ce qu'elle a exprimé jusqu'à présent, comment aboutit-on à une conception purement psychologique de la volonté? Mais tout simplement sur la base de la théorie de l'erreur comme vice atteignant une manifestation de la volonté. Mais jusqu'où faut-il aller dans cette voie?

Si la déclaration thaïlandaise est viciée par l'erreur, il faut admettre d'abord qu'une erreur de *droit* peut vicier la volonté. Et c'est un premier pas. Dans l'espèce, il faut admettre que l'erreur de droit serait la suivante: si la Thaïlande avait su que son engagement de 1929 était atteint de caducité en 1946, jamais elle n'aurait, en 1950, accepté la juridiction obligatoire de la Cour. Donc, il faut admettre que l'erreur de droit, même propre à l'une seule des parties, même restée secrète, est une cause de nullité, et c'est un deuxième pas.

Mais ce n'est pas suffisant dans l'espèce, car il est bien impossible de prouver que cette erreur de droit a été la cause déterminante de l'engagement de 1950, et alors il faut élargir encore la formule et dire: toute erreur de droit importante est une cause de nullité, et c'est un troisième pas.

On voit donc que l'on pousse l'exigence des qualités psychologiques de la volonté jusqu'à son point extrême; une volonté qui n'est pas totalement éclairée n'oblige pas. Dans l'*Affaire relative à la souveraineté sur certaines parcelles frontalières*, la Cour a rendu le 20 juin 1959 un arrêt qui aborde le problème de l'erreur. Il lui appartient, et il lui appartient à elle seule, de préciser et de développer les formules qu'elle a employées dans cet arrêt. Mais, à notre humble avis, on ne saurait en aucun cas admettre des conséquences aussi extrêmes que celles que nous venons de développer: ce serait la fin de la sécurité dans les engagements internationaux.

Mais il existe une deuxième voie pour priver la déclaration thaïlandaise de son effet et, pour autant qu'il nous semble, c'est peut-être plutôt cette voie-là qui a été retenue. C'est celle d'une conception purement formaliste. La volonté de la Thaïlande était droite et éclairée mais elle a été prise dans un piège, le piège d'un document. La volonté juridique, dans cette conception, n'est pas maîtresse des documents et des signes par lesquels elle s'exprime. Elle en est l'esclave, elle en est la captive. Ces

documents, ces signes ne sont plus des « instruments », ce sont des maîtres. Si la volonté juridique rentre en simple contact avec un mauvais document, avec un document caduc, elle perd toute efficacité. La Thaïlande a, le 20 mai 1950, une volonté bien claire; malheureusement elle fait le mauvais geste, elle effectue le mauvais rite. Sa volonté traverse un circuit documentaire où elle rentre en contact avec le mauvais document. C'est pourquoi son engagement est nul. C'est là une conception très primitive du droit. Certains pourraient même dire, usant d'une expression certes excessive, que c'est une conception « magique » du droit. Sans aller jusque là, une telle analyse fait bon marché des notions fondamentales du droit international moderne. Celui-ci n'est point un droit formaliste. Pour qu'une obligation conventionnelle existe, il faut essentiellement qu'existe une volonté de s'obliger. La Cour nous pardonnera de citer ici une opinion exprimée dans l'*Affaire Ambatielos* au *Recueil 1952*, page 69, un bon texte vaut toujours mieux qu'un mauvais commentaire:

> « La rédaction et la signature d'un accord international sont les actes par lesquels s'énonce la volonté des États contractants; la ratification est l'acte par lequel la volonté ainsi exprimée est confirmée par l'autorité compétente en vue de lui donner force de droit. Tous ces actes concernent la substance même de l'accord international. Mais la constatation de ces actes dans les instruments qui leur donneront un aspect extérieur comporte des opérations matérielles d'écriture, d'impression, de remise d'une partie à l'autre, etc., opérations qui ne contribuent pas à la formation de la volonté des États contractants; le plus souvent, ceux qui ont compétence pour former, exprimer ou confirmer cette volonté ne participent pas à ces opérations matérielles; celles-ci revêtent souvent des formes empruntées à la tradition, suivies scrupuleusement et, par suite, aveuglément par les fonctionnaires chargés de cette besogne matérielle. On ne saurait attribuer aux détails de forme qui se superposent ainsi à l'opération juridique de conclusion du traité une influence déterminante quand il s'agit de discerner, dans le doute, le sens réel de l'accord intervenu, le caractère que les parties ont entendu donner à tel ou tel accord intervenu entre elles. »

Ainsi apparaît la contradiction qu'il y a entre les deux voies extrêmes que nous venons de présenter. Lorsque l'on présente une erreur de droit, qui n'a même pas été déterminante dans l'engagement, comme une cause de nullité, on exige que la volonté juridique, pour être prise en considération, soit examinée dans tous ses arrière-plans intellectuels, et que tout ce qui pourrait ternir sa pureté, sa diaphanéité, la condamne à l'inefficacité. Mais lorsqu'on l'asservit à passer par un labyrinthe de références documentaires, où le moindre contact matériel la fixe et l'immobilise, on lui retire toute autonomie propre pour ne retenir que l'efficacité du rite. Le droit international tient une juste moyenne entre ces extrêmes. Il est nécessairement simple et un peu rustique. Il donne efficacité à la volonté des États telle qu'elle s'exprime en ne pénétrant qu'exceptionnellement dans le cadre, souvent inaccessible, des motivations et des intentions cachées. En revanche, il attache peu de prix aux éléments matériels en tant que tels. Ceux-ci sont parfois des signes de la volonté des États, mais ils ne sont rien en eux-mêmes. Toute autre

conception du droit international rendrait la vie internationale trop incertaine, trop difficile. Elle ne serait pas à la mesure des intérêts dont les États ont la charge.

C'est pour ces motifs que le Gouvernement royal du Cambodge maintient les conclusions qu'il a formulées dans ses observations, page 167 **(I)**, et demande respectueusement à la Cour de lui en adjuger le bénéfice.

## 9. REPLY OF SIR FRANK SOSKICE

(COUNSEL FOR THE GOVERNMENT OF THAILAND)
AT THE PUBLIC HEARINGS OF 14 APRIL 1961

*[Public hearing of 14 April 1961, morning]*

Mr. President and Members of the Court.

It is now my turn to reply on behalf of Thailand to the careful and well-balanced arguments of Counsel for Cambodia, so far as they affect the first preliminary objection. They were a little self-revealing. Counsel for Cambodia concentrated their major effort on the first objection, thereby indicating that it was here that both their hopes and fears were centred. We all, I am sure, enjoyed their learning and eloquence though my own enjoyment was tinged with that degree of disquietude with which an advocate for one party listens to powerful advocates for the other side. I hope I shall not be thought guilty of presumption if I say that by the close of their arguments, my bosom had regained its repose. I am, however, concerned that I cannot hope to match the wealth of literary, scriptural and philological allusion which graced the admirable address of Mr. Dean Acheson. All I can offer is a modest quotation from Virgil, "*Hinc illae lacrimae*". Our opponents' misgivings all stem from the decision of this Court in the *Israel* v. *Bulgaria* case. Hence these tears! That is why we listened to such a moving appeal to this Court, in effect, to disregard that decision. It is that decision which, in my submission, is the main and indeed fatal obstacle in the way of Cambodia. I ask this Court to do no more than apply the clear result of that decision in this case. As a decision of this Court, it is of supreme authority and takes precedence over the views of the Secretary-General of the United Nations, Mr. Rosenne or anybody else's opinion. To argue otherwise is to argue that the law should not be applied, but that, it is submitted, is an approach which should not be countenanced in any court of law, particularly the highest court of law.

Counsel for Cambodia, in their arguments, cited a number of expressions of opinion which bore directly or indirectly upon the question whether Thailand's declarations should be regarded as valid, as representing valid renewals of the 1929 declaration or as constituting, in the case of the 1950 declaration, a new acceptance of the jurisdiction of this Court. I mean, in the course of my argument, to return to some of those expressions of opinion: but, in general, may I at the outset say with regard to them, that with the one exception of the opinion expressed by Mr. Rosenne in 1960, those opinions or indications of opinion were expressed before the date when, in 1959, the decision of this Court was pronounced in the *Israel* v. *Bulgaria* case. It is, I think, generally accepted that it was the prevailing opinion, widely held, before that decision was pronounced, that a renewal of a previous acceptance of the Permanent Court's jurisdiction was valid even in the case of a country not an original party to the Statute. I invite the

Court to infer that if the authors of those opinions, when they expressed them, had had before them the majority judgment of this Court in the *Israel* v. *Bulgaria* case, some, or indeed probably all of those opinions, other than that of Mr. Rosenne, would have been framed in an opposite sense.

When all is said and done, what the Court has to decide is simply a short, sharp, crisp point of law.

This Court has before it three documents and Article 36 of its Statute. The documents are the Thai declarations of 1929, 1940 and 1950. The question is, what legal result in the light of Article 36, paragraph 5, as construed in the *Israel* case, do these documents produce?

The answer is, whatever their legal result may be, if any, it is not that Thailand accepted the jurisdiction of this Court. Whatever does not conduce to the solution of this legal problem is, I submit, irrelevant.

Counsel for Cambodia at times dilated upon what I hope I may uncontroversially describe as the *"ambiance"* of the case. Such matters might or might not have relevance if the Court were concerned with questions of behaviour in which sympathy, approbation or the reverse might play a legitimate part. They are, I submit, totally extraneous to any question at present before the Court and I do not propose to take any time in offering any observations on what Counsel for Cambodia said on these matters. I will go straight to my point of law.

Mr. President and Members of the Court, in presenting my argument, I will take heed of the warning given to me by my learned friend Professor Reuter not to lose my way on the two roads which he so graphically described. I agree with him that it is very difficult to see exactly where they lead. The peril in which I stand of getting lost in them is the greater for the fact that so far as I could recognize them from Professor Reuter's description of them, I have never yet in my life trodden either of those roads. With the permission of the Court, I prefer to follow the path which I mapped out before, direct to the point of law which I submit on the first preliminary objection.

It is, in the first place, I submit, quite crucial to the true understanding of the first preliminary objection raised by Thailand to have fully in mind that under the Statute of this Court, two separate methods of submitting to the compulsory jurisdiction of this Court were provided. One is that contained in Article 36, paragraph 2, and one is that contained in Article 36, paragraph 5. I apologize to the Court for repeating what is trite and obvious. My excuse, however, must be that, if I may say so with deference to the careful arguments of Mr. Dean Acheson and Professor Pinto, it seemed to me that their arguments suggested that the Court should put out of mind the radical distinction between these two methods. Under paragraph 2, a party could accept the compulsory jurisdiction of this Court by making a declaration which complies with the requirements of paragraph 2. Under paragraph 5, a country which was a party to the Court's Statute, when it was originally drawn up, became subject to the compulsory jurisdiction of this Court if it had made a declaration under Article 36 of the Statute of the Permanent Court which was still in force. The basic and fundamental contention in support of Thailand's first preliminary objection is that Thailand elected to use the second and not the first of these two methods; but because of the decision in the *Israel* v. *Bulgaria* case, which for the first time decided the true meaning of

Article 36, paragraph 5, failed by the use of this method to achieve the objective which undoubtedly she desired to achieve of subjecting herself to the compulsory jurisdiction of this Court.

In the second place, may I reply shortly to Mr. Acheson's comment upon what I said in my opening address to the Court to the effect that, even although the will to subject oneself to the jurisdiction of this Court may be present, this cannot take place unless certain formalities are complied with. What I meant was, and what I maintain still to be perfectly correct is, that however much a country may wish to subject itself to the compulsory jurisdiction of this Court, it can only do so by, as it were, passing through the gateway built into paragraphs 2 or 5 of Article 36. The word "formality" in this context is perhaps somewhat dangerous, as it may seem to imply the performance of something of small importance. However much a country wishes to subject itself to the jurisdiction of this Court, and however repeatedly and clearly it may have proclaimed this desire, it still nevertheless can only achieve this desire by taking the steps prescribed by Article 36, paragraph 2, or, in the alternative, Article 36, paragraph 5. Whatever steps it takes and however impelling the motive behind the taking of those steps, they nevertheless have to be individually examined and analysed to see whether they constitute a compliance with the minimum requirements of one or the other of those two paragraphs. To use terms such as the term "formality" simply as a synonym for procedure of lesser and secondary consequence may lead to error; since a formality, being sometimes a matter of minor importance, may nevertheless assume considerable importance if there is a categorical requirement to be found, as in the present case, in some statute or other similar constitutive document which prescribes in terms that a particular end cannot be attained unless a particular formality is observed.

If I may say so with deference to the argument addressed to the Court by Mr. Dean Acheson, there is a danger which lurks in thinking too much upon the lines that the intent is everything and the form and nature of the document entirely subsidiary and unimportant. I accept fully that where there is ambiguity, in resolving that ambiguity in a document intent is a valuable guide, although other considerations may also have to be taken into account for the purpose of resolving the ambiguity. Furthermore, I accept that no precise form is laid down which must be used by a party wishing to make a declaration under Article 36, paragraph 2. Beyond this, I submit, one should not go.

To push the doctrine that intent is the supreme test beyond these limits is to run the risk of indulging in loose thinking. I submit in the first place, that if one examines Article 36, paragraph 2, and the other paragraphs in Article 36, it is undoubtedly the case that there are certain essential minimum requisites which must be complied with before a document can constitute a valid declaration for the purposes of paragraph 2. Perhaps to begin with I should have said that it is apparent from the terms of Article 36 that there must be a document, and that an oral declaration would not be sufficient. This is made plain, for example, by the requirement in paragraph 4 that the Secretary-General shall transmit copies of the declaration to the parties to the Statute and to the Registrar of the Court.

What, then, are the minimum requisites with which the document must comply to constitute a declaration under paragraph 2?

It is, in the first place, to be contrasted with an agreement to refer under paragraph 1. A minimum requirement of such an agreement would be, clearly, that it should specify the case which it has been agreed to refer to the Court. A declaration under paragraph 2 must surely at least include a statement that the party making the declaration recognizes the jurisdiction of this Court as compulsory. Perhaps —though I do not concede this—it is not essential that the declaration should state that the jurisdiction of this Court is accepted as compulsory *ipso facto* and without special agreement. But surely, at least the declaration must state that it is the jurisdiction of *this* Court, and not *some other* court, such as the Permanent Court, which is recognized as compulsory. Furthermore, the declaration must surely state that it accepts this Court's jurisdiction "in relation to any other State accepting the same jurisdiction". Furthermore, the conclusion would seem inevitable from the language of paragraph 2 that the declaration must state in terms whether the jurisdiction of this Court is accepted in relation to the matters specified in sub-paragraphs *(a)* or *(b)* or *(c)* or *(d)*, or more than one of them, or all of the said paragraphs contained in paragraph 2. Moreover, paragraph 3 provides that the declaration may be either unconditional, or on condition of reciprocity on the part of several or certain States, or for a certain time. It must surely be stated in the terms of the declaration which of these alternatives specified in paragraph 3 is to characterize the declaration.

It is therefore, I submit, apparent that there must be a specific minimum content in the declaration, and that a loose and unspecific statement is far from what is contemplated as complying with the requirements of paragraph 2. To say what I have said is in no sense inconsistent with the view, to which I adhere, that no particular form is requisite. Whatever the language employed, however, language must express in its terms, or at least by the very clearest and most unambiguous implication, the various matters to which I have made reference.

The next question, Mr. President and Members of the Court, is whether it could possibly be said that the declaration of 20 May 1950 can be regarded as complying with these minimum requisites. In the first place, does it contain anywhere a statement that Thailand recognizes as compulsory the jurisdiction of *this* Court?

The answer to that initial question is plainly "No". Such a statement is not to be found from the beginning to the end of it. On the contrary, it contains a wholly different statement. It contains a statement that Thailand renews the 1929 and 1940 declarations, both of which are specifically mentioned (although the 1929 declaration is wrongly described as the declaration dated 20 September 1920). It accordingly asserts something which is almost the converse of that which it must assert to be a valid declaration for the purpose of paragraph 2. It further goes on to repeat that the renewal of those earlier declarations is to be subject to the same limits and conditions and reservations as set forth in the declaration of 1929. Had it not been for the *Israel* v. *Bulgaria* decision this would have had the effect of converting the acceptance by Thailand of the jurisdiction of the Permanent Court as so extended into an acceptance of the jurisdiction of this Court because of the application of Article 36, paragraph 5. Nobody at that date, as has been said by me, I am afraid, only too often, realized what the true effect of Article 36, paragraph 5, was. Thailand thus meant to achieve the

result that she was subject to the jurisdiction of this Court by making use of a method which, had Article 36, paragraph 5, meant what was then supposed, would have achieved the result that Thailand was so bound. As it did not have this meaning, Thailand failed of her purpose and in my submission is not, in consequence, today subject, in regard to the present dispute, to the compulsory jurisdiction of this Court.

Mr. Acheson submitted that no particular form is necessary for the expression of the consent which establishes the jurisdiction of this Court (C.R. 61/3, pp. 25-26). He went so far as to suggest that if consent

> "is established by other means, then a document may not be needed at all".

This particular submission is surely plainly wrong, since, as I pointed out, the Secretary-General cannot circulate copies of an oral declaration.

In support of the submission that no particular form is necessary, Mr. Acheson cited the *Corfu Channel Case* and the *Mavrommatis Case*. Neither of those cases, I submit, has any bearing on the question now before the Court. Cambodia now endeavours to establish the Court's jurisdiction by relying upon Article 36, paragraph 2, of the Statute. The Court has therefore to decide what is requisite for the expression of a State's consent under that paragraph—Article 36, paragraph 2. No such question arose in the *Corfu Channel Case* because the Court entertained that case on the basis that its jurisdiction to deal with that particular case had been voluntarily accepted by Albania, the respondent State. This is clearly stated in the Judgment (*I.C.J. Reports 1947-1948*, p. 26). On the next page of the Judgment, the Court, referring to a letter of 2 July 1947 from the Albanian Government, said that letter constituted

> "a voluntary and indisputable acceptance of the Court's jurisdiction".

Then follows the sentence which Mr. Acheson quoted:

> "While the consent of the parties confers jurisdiction on the Court, neither the Statute nor the Rules require that this consent should be expressed in any particular form."

It is clear that this sentence refers to what the Court was then considering—a voluntary consent to submit to the Court's jurisdiction in a particular case. It cannot legitimately be applied to the different subject of consent to be bound by the compulsory jurisdiction of the Court under Article 36, paragraph 2. The Statute expressly provides that such consent is to be expressed by means of a declaration, which must comply with the requirements of Article 36 to which I have previously called attention.

I may here add that the passage in Judge Hudson's book on the Permanent Court, cited by Mr. Acheson, is also dealing only with voluntary consent to submit to the jurisdiction in a particular case, not with the acceptance of the compulsory jurisdiction under Article 36, paragraph 2.

Even less apposite, I venture to submit, was Mr. Acheson's reference to the *Mavrommatis Case*. He quoted the sentence in which the Permanent Court said it was

> "not bound to attach to matters of form the same degree of importance which they might possess in municipal law" (Series A, No. 2, p. 34).

The point then under consideration had nothing to do with the acceptance of the Court's jurisdiction or compliance with the terms of its Statute. The Greek Government, the applicant in that case, sought to found the jurisdiction upon a number of instruments, including one of the protocols to the Treaty of Lausanne of 1923. One of the grounds on which the respondent, the Government of the United Kingdom, challenged the Court's jurisdiction was that that protocol had been ratified after, not before, the date of the application originating the proceedings. It was in the course of rejecting that technicality that the Court used the words which Mr. Acheson quoted. I submit they are quite inapplicable to the present case, because a failure to comply with the requirements of the Statute is not a "matter of form" such as the Permanent Court was then considering.

Mr. Acheson went on to suggest that his alleged principle that no particular form is necessary for the expression of consent to the Court's jurisdiction is an application of the broader principle that international instruments

> "are to be applied in accordance with their manifest purpose and intent and so as to give effect to the objectives for which they were concluded" (C.R., p. 50).

I have already submitted that there must be limitations upon the principle of interpreting a document according to its purpose rather than its words. I would here only add a word about the second part of Mr. Acheson's "broader principle", that an international instrument must be applied so as to make it effective rather than ineffective. Here again, there is no doubt that the principle is sound within proper limits. If there are two possible interpretations of a provision, and one of them would add something to the rest of the instrument in which the provision is contained while the other would add nothing, the former is to be preferred. Of the two cases cited by Mr. Acheson as applications by this Court of his principle, the first is an example of a situation of that kind: *Corfu Channel Case* (*I.C.J. Reports 1949*, pp. 23-24). (It should be noted, however, that in the *Anglo-Iranian Oil Co. Case* the Court refused to apply this rule of interpretation to a declaration under Article 36, paragraph 2: *I.C.J. Reports 1952*, p. 105.) If an instrument imposes upon a body certain duties but does not expressly confer powers which are essential to the performance of those duties, the instrument must be interpreted, not as withholding those powers, but as conferring them by implication. The second case cited by Mr. Acheson is an example of a situation of that kind: *Case of Reparation for Injuries* (*I.C.J. Reports 1949*, pp. 182-183).

The situation in the present case is quite different. The first question which the Court has to decide here is whether the document of 20 May 1950 is a fresh and independent declaration, or a renewal of the declaration of 1929. Upon the language of the document there can, as I have said, in my submission, be only one answer to that question. It is a renewal. If so, then as a matter of law, in consequence of the decision in the case of *Israel* v. *Bulgaria*, the document was ineffective. No process

of interpretation can be invoked to evade this legal consequence. In neither of the cases cited by Mr. Acheson, nor, I venture to add, in any other case or any principle of international law, is it laid down that if a document, upon its natural and ordinary meaning, is rendered ineffective by some rule of law, that natural and ordinary meaning can be abandoned and some other meaning introduced. Indeed, in the *Free Zones Case*, the Permanent Court expressly said that the rule of interpreting clauses of an instrument so as to enable them to have appropriate effects could only be invoked

> "if it does not involve doing violence to their terms" (P.C.I.J., Series A, No. 22, p. 13).

Mr. Acheson and Professor Pinto were at pains to satisfy the Court that the word "renew" in the English language is apt to include the process of bringing into being again something which has lapsed. I have never argued to the contrary. It depends on the context in which the word is used, and undoubtedly it is sometimes used in this sense. My argument was, and is, entirely different. It is that this Court, in the *Israel* v. *Bulgaria* case, held that an acceptance of the jurisdiction of the Permanent Court was incapable of renewal once it had lapsed. The Court said so in the plainest terms in the passage I quoted: and to put it beyond doubt may I quote the whole relevant passage on page 145 of the Judgment, of which I previously only quoted part:

> "... the clear intention which inspired Article 36, paragraph 5, was to continue in being something which was in existence, to preserve existing acceptances, to avoid that the creation of a new Court should frustrate progress already achieved: it is not permissible to substitute for this intention to preserve, to secure continuity, an intention to restore legal force to undertakings which have expired: it is one thing to preserve an existing undertaking by changing its subject-matter; it is quite another to revive an undertaking which has already been extinguished.".

Lower down, on the same page, the Judgment reads:

> "At the time when Bulgaria sought and obtained admission to the United Nations, its acceptance of the compulsory jurisdiction of the Permanent Court had long since lapsed. There is nothing in Article 36, paragraph 5, to indicate any intention to revive an undertaking which is no longer in force."

The Court is, as I read these passages, saying that once an undertaking to accept the jurisdiction of the Permanent Court has lapsed, it is incapable of being revived. That is what I was submitting. Even, therefore, if, in the 1950 declaration, Thailand had used, instead of the word "renew", a word which beyond controversy meant or included "bring back into force something which has lapsed", it would have made no difference—the position would have been the same. That is because this Court has said in the passages quoted that whatever else you can bring back into being, the one thing you cannot, under Article 36, paragraph 5, is a lapsed acceptance of the jurisdiction of the Permanent Court.

Mr. President, Members of the Court, I go further. Even let it be assumed against me that in all I have just submitted I am entirely wrong,

that the Court, in other words, has not said "you cannot under Article 36, paragraph 5, bring back to life a lapsed acceptance", still, I submit, the position remains the same and the first preliminary objection must succeed. Why? Let it be assumed against me that you can renew a lapsed acceptance. What, on this hypothesis, did the 1950 declaration bring back to life? It brought back to life an acceptance of the jurisdiction of the Permanent Court. Has this any legal result? No, none at all. Why none at all? Because it could have legal result only through the application of Article 36, paragraph 5—without this, to revive acceptance of the jurisdiction of a Court which no longer exists can have no legal result. Does, then, Article 36, paragraph 5, apply? No, because this Court has said it does not apply except in the case of original parties to the Statute, and Thailand was not an original party to the Statute. Therefore it follows that the 1950 declaration had no legal result and in particular did not have the legal result of subjecting Thailand to the jurisdiction of this Court.

May I suggest another test? Cambodia's application in this present case was filed in 1959. Let it be supposed that Thailand's declaration of 1940 had been expressed to be valid, not for 10 years as the Court knows it was, but for say 30 years, so that it would have been current on the date when Cambodia filed her application. Would this Court in those assumed circumstances have had jurisdiction to entertain the Cambodian application? Clearly not if the logic in the *Israel* case is applied; because Thailand's declaration of 1940 lapsed on 19 April 1946. If this is so, how on earth could this Court be given jurisdiction by Thailand's renewal in 1950 of that very same declaration of 1940?

My submission is that Counsel for Cambodia did not by their reasoning provide an answer to the reasoning upon which Thailand seeks to base her first preliminary objection. Indeed, I submit that I may fairly say that even if for the purpose of argument the basic contentions which they put forward were all held by this Court to be sound, still, in my submission, it must result that the first preliminary objection succeeds. May I assume, for the purpose of argument, that Counsel for Cambodia were right in what I think I may fairly state were the basic contentions upon which their arguments were founded. I hope I do justice to those arguments if I summarize those basic contentions as follows:

(1) the word "renew" is a word which is apt to include the bringing into effect again of something which has actually lapsed and ceased to have effect;

(2) Thailand at all material times did mean to accept the jurisdiction of this Court;

(3) in interpreting the Thai declaration of 20 May 1950, regard should be had to the intention which underlies this declaration and the nature of the intention should be prominently borne in mind when the actual language used in the declaration is construed;

(4) in the case of documents, particularly documents of an international character, any ambiguity in the language used should be construed in such a way, if possible, as to give the document effect rather than to produce the result that the document is ineffective or meaningless;

(5) in filing the declaration of 20 May 1950, Thailand meant to become subject to the jurisdiction of this Court, and believed that she had so become;

(6) what is important is not the physical paper on which the declaration of 3 May 1940 was written, but the obligation which it enshrines.

I do not say that these were all the Cambodian contentions, but they were, I hope I may say, the major ones.

If all these points were to be decided in favour of Cambodia and against Thailand, it in my submission still necessarily results from the *Israel* v. *Bulgaria* decision that the first preliminary objection raised by Thailand must succeed, for the following reasons:

1. Although Thailand may have made the declaration of 20 May 1950, meaning to subject herself to the jurisdiction of this Court, it is superabundantly plain, upon the language of the declaration itself, that Thailand meant to achieve this result by preserving in being the obligation enshrined in the Thai declarations of 20 September 1929 and 3 May 1940.

2. Those obligations were no other than obligations to submit to the jurisdiction of the Permanent Court.

3. Thailand intended by extending that obligation to produce the result that, owing to the application of Article 36, paragraph 5, of the Statute of the present Court, Thailand was subject to the jurisdiction of this Court, in the erroneous belief shared by all in 1950 that by extending the obligation to submit to the jurisdiction of the Permanent Court, Thailand automatically, owing to Article 36, paragraph 5, subjected itself to the jurisdiction of the present Court.

4. Whatever else the case of *Israel* v. *Bulgaria* decides, it undoubtedly decides that Article 36, paragraph 5, was, for this purpose, only effective as far as original parties to the Statute were concerned. Thailand was not such an original party. As a result, Thailand, much as she may have intended to submit herself to the jurisdiction of this Court, was unable to do so by the method which she deliberately and with intent adopted, namely, by the method of extending the obligations enshrined in the 1929 and 1940 declarations.

Mr. President, Members of the Court, it is submitted that the arguments of Counsel for Cambodia overlook the distinction between the intention with which a party does an act, and the ulterior purposes or motives which he has in mind and which lead him to form that intention. Thailand clearly intended to revive the obligations contained in the 1929 and 1940 declarations, that was what in express terms, by the declaration of 20 May 1950, she set out to do. Her reason, or motive, or purpose for forming this intention and putting it into execution was that she mistakenly thought that by carrying out this act she would subject herself to the jurisdiction of this Court. It was in that regard that she was mistaken, having put an interpretation on Article 36, paragraph 5, which was not accepted by this Court in the case of *Israel* v. *Bulgaria*.

With deference to the arguments of Counsel for Cambodia, it is submitted that these arguments went near, if not the whole way, to inviting the Court to consider solely what is the motive in the mind of a person who executes a written document, disregarding entirely what that person sets out to do by the document. This really amounts to a contention that once you have a document you may disregard its terms and look only into the mind of the person who executed it to ascertain what his general desires in any particular connection may have been.

May I seek to demonstrate this by taking a purely imaginary example, which I intentionally conceive in a rather extreme form, in order to illustrate the point that I seek to make? Our learned opponents in effect (so I submit) argue that once a party clearly evinces a desire to achieve a purpose of a particular kind, the mode and form of the document in which that party seeks to embody the accomplishment of this purpose is for practical purposes immaterial. Let it be supposed that Country A is in fact in dispute with Country B and that Country B is a Member of the United Nations which has filed a declaration under Article 36, paragraph 2, accepting the jurisdiction of this Court. Let it further be assumed that Country A is not a Member of the United Nations but is anxious to place itself in a position in which it can invoke the jurisdiction of this Court against Country B. Assume also that there is no special agreement to refer the dispute under Article 36, paragraph 1. One then has to assume that Country A receives wrong advice in law as to how it may accomplish its desire to place itself in a position to litigate before this Court with Country B. For example, let it be supposed that Country A is advised that by applying to become a Member of the United Nations and being received as such a Member it may, without more, file an application to institute proceedings before this Court against Country B.

Accordingly Country A formally lodges an application to be received as a Member of the United Nations with the Secretary-General, making it perfectly plain, beyond any conceivable doubt, whether by statements included in the letter to the Secretary-General or in other ways, that its prime and indeed sole motive in applying for membership of the United Nations is to place itself in a position to litigate before this Court with Country B. For the purpose of my illustration, I am assuming that it has been made superabundantly clear to everybody that this is its sole purpose in seeking admission to the United Nations. If, nevertheless, Country A does not file a declaration under Article 36, paragraph 2, it is (so it is respectfully submitted) beyond controversy that it would be quite impossible to construe Country A's application for membership to the United Nations as being in substance the equivalent of a declaration accepting the jurisdiction of this Court under Article 36, paragraph 2. If this conclusion is correct, I submit that precisely parallel reasoning is applicable to the present case. Thailand in 1950 also acted under wrong legal advice. The only relevant question is whether that action achieved the result which Thailand desired and, as I have, I hope, sufficiently established, there can be no question that it did not.

I take this example to demonstrate what I submit is the result of applying the contention of Counsel for Cambodia in its fullness if they go to the length of arguing that, providing it is clear what a party means to achieve, it is wholly immaterial what express intention he incorporates in the language of the document by which he means to achieve his purpose.

Mr. Acheson argued that in any event the case of *Israel* v. *Bulgaria* was not applicable and pointed to one additional distinction of fact between the circumstances of that case and the circumstances of the present case, namely, that Bulgaria did not file any further declaration analogous in the circumstances of that case to the declaration of 20 May 1950, filed by Thailand in the present case. Again, I would submit, as I did with regard to the previous distinctions of fact to which attention

was called in the Cambodian Observations on the Thai Preliminary Objections, that this distinction of fact can have no possible effect upon the principle upon which the *Israel* v. *Bulgaria* case was decided. That case decided in terms, as I have previously said, that Article 36, paragraph 5, is not effective to convert an acceptance of the jurisdiction of the Permanent Court into acceptance of the jurisdiction of this Court, except as between countries who were original parties to the Court's Statute. I need, for the purpose of my argument, to have recourse to the decision of the Court in the *Israel* v. *Bulgaria* case for no other purpose than to establish that Article 36, paragraph 5, is to be so construed. Once this is established it follows, I submit, as the night follows the day, that Thailand, by carrying out the intention which she clearly formed and expressed in the declaration of 20 May 1950, could not and did not achieve the ulterior objective which she desired to encompass, namely, of converting the obligations under the 1929 and 1940 declarations into an acceptance of the jurisdiction of this Court.

I would like now to make brief reference to an argument used by Mr. Acheson and Professor Pinto with regard to the circumstance that in any event the declaration of 3 May 1940 expired on 6 May 1950, that is to say, fourteen days before the declaration of 20 May 1950 was made. Incidentally, it is to be borne in mind that the declaration of 20 May 1950 was by its terms expressed to operate from 3 May 1950. But it was said that quite clearly the Thais must have realized or at least have been put on notice that when they filed their declaration in 1950, they were renewing a declaration which had lapsed owing to the effluxion of time and quite independently of the decision in the case of *Israel* v. *Bulgaria*. As I have been at pains to contend, even if it be accepted that the word "renew" is apt to revive a declaration which has lapsed, this does not in any sense invalidate what has always been and still remains the main burden of my argument, that is, that what the Thai Government was purporting to renew was not an acceptance of the jurisdiction of this Court under paragraph 2 of Article 36, but an acceptance of the jurisdiction of the Permanent Court. As I have previously said, let it be assumed against me that the declaration of 20 May 1950 was aptly worded to express an intention to bring into life again the declaration of May 1940, the result, as I have respectfully urged upon the Court, still remains that Thailand did not by so doing succeed in subjecting herself to the jurisdiction of this Court.

Mr. President and Members of the Court, I would like now shortly to examine some of the arguments advanced especially by Professor Pinto.

I was indeed grieved to think that I had incurred his displeasure by referring to the 1950 declaration as a "letter", and even more so by quite unconsciously allowing a disparaging intonation to creep into my voice when I made reference to it. Professor Pinto would, I believe, desire that I should refer to the declaration as a "document" and I willingly assure him that I will use my utmost endeavours to mend my ways in this respect and on all occasions to modulate my voice appropriately.

I hope that I shall not be sowing dissension in the opposite camp by pointing out that Professor Reuter also in his speech characterized the declaration as a "letter". We must both do our best in future to choose

only seemly nomenclature in order to characterize this all-important declaration.

Professor Pinto submitted that the word "renew" might in common speech bear any one of three meanings. As regards the two first of those meanings, the submissions which I have made show that, if either of them is attributed to the word in the Thai declaration of 20 May 1950, that declaration was from the first ineffective. Professor Pinto suggested that the third possible meaning of the word is, as he said, "to substitute something new". He relied upon the following meaning attributed to the word by Littré:

> "to make new, by substituting a new thing for another of the same kind".

Even if this be accepted as a possible meaning of "renew", it is clear that the definition given by Littré is by no means applicable to the facts of the present case. There is no question here of Thailand having substituted in 1950 a new thing for another of the same kind. What Thailand sought to do on 20 May 1950 was to substitute the declaration of that date for the declaration of 1929 which had been renewed in 1940. In other words, Thailand was endeavouring to substitute a new thing, of a new kind, an acceptance of the compulsory jurisdiction of this Court, for another thing of a different kind, an acceptance of the compulsory jurisdiction of the Permanent Court. I say "of a different kind" because, as this Court pointed out in the case of *Israel* v. *Bulgaria* (at p. 143 of the Judgment), the obligation under Article 36 of the Statute of this Court, although no more onerous than the obligation under Article 36 of the Statute of the Permanent Court, is "nevertheless a new obligation". It is quite clear, I submit, that by "a new obligation" the Court meant "a different obligation".

However, it is not really by recourse to dictionaries, and still less by recourse to poets or to the Bible, that the language of the declaration of 20 May 1950 is to be interpreted. It must be interpreted in its context. I submit it is absolutely clear to anyone who reads the document without prepossessions that what its author intended to do was to prolong the life of an existing obligation or, alternatively, to render effective once more an instrument the validity of which had expired. He clearly did not intend to create something new and distinct from the former declaration. He did not refer to that former declaration merely as a statement of limits and conditions to be included in a new obligation then being assumed. He said the Government of Thailand renewed the declaration of 1929. In other words he may have used the word "renew" in either of the first two meanings given by Professor Pinto. It does not matter which, since on either meaning the declaration was ineffective. It is certain that he did not use the word in the third of Professor Pinto's meanings.

One argument used by Professor Pinto was that, although it might follow from the principles laid down by this Court in the case of *Israel* v. *Bulgaria* that the Thai declaration of 1929 lapsed on 19 April 1946, Thailand by her conduct after 19 April 1946 had clearly shown that she considered herself still bound by that declaration and, Professor Pinto went on, Thailand is now bound by the interpretation which she then showed herself to be accepting. "Interpretation" is the word which Professor Pinto used. With respect to him, I submit that it was

not the appropriate word, and to realize this is to see the fallacy upon which this argument rests. Whether the Thai declaration of 1929 continued to be valid after 19 April 1946 is not a question of interpretation, particularly by Thailand, of that declaration. It is a question of the effect in law upon that declaration of the dissolution of the Permanent Court on 19 April 1946. In the case of *Israel* v. *Bulgaria* this Court decided that the legal effect of the dissolution of the Permanent Court was to dissolve and render ineffective any declarations accepting the jurisdiction of that Court made by States which were not original parties to the Statute of this Court. The declaration of Thailand was one of the declarations thus rendered ineffective. That declaration thus died by operation of law. A declaration which has died by operation of law cannot be preserved, or restored to life, merely by a demonstration by the State which made it that that State regards it as still having life. In other words, the operation of law is not diverted by the legal opinions of a single State, particularly the State concerned.

In support of his argument Professor Pinto referred to certain decisions of this Court. The first of these decisions was the decision of 18 November 1960 in the case of *Honduras* v. *Nicaragua* concerning the *Arbitral Award made by the King of Spain*. In that case the Award was made on 23 December 1906, and its validity was first challenged by Nicaragua on 19 March 1912. Between those two dates, as the Court found, "Nicaragua, by express declaration and conduct, recognized the award as valid". The Court held that the consequence of this was that "it is no longer open to Nicaragua to go back on that recognition and to challenge the validity of the award" (*I.C.J. Reports 1960*, p. 213). In my submission, that decision of this Court lends no support whatever to the argument of Professor Pinto. What the Court had there to consider was whether the Award was binding upon Honduras and Nicaragua, or in other words, whether it was such an award as those States had bound themselves by agreement to accept. It has sometimes been said that a State may debar itself by conduct from denying that an instrument has a certain effect. But that is only possible where the effect of the instrument depends upon contract, upon the agreement of the parties. It is an entirely different matter to say that where by operation of law, quite apart from any agreement, a unilateral instrument is invalid, validity can be conferred upon it, in spite of the operation of law, by conduct of the party responsible for it.

Professor Pinto also referred to the case of *Certain Norwegian Loans* (*I.C.J. Reports 1957*, p. 9). That case turned upon a "domestic affairs" reservation in the French declaration accepting the compulsory jurisdiction of this Court. The reservation excluded from the Court's declaration "matters which are essentially within the national jurisdiction as understood by the Government of the French Republic". The passage in the Judgment upon which Professor Pinto relied was apparently the passage at pages 26-27 in which the Court said that it did not feel obliged to consider whether this reservation was compatible with Article 36, paragraph 6, of the Statute, because the validity of the reservation had not been questioned by either party to the proceedings. What the Court actually said was this:

> "In consequence the Court has before it a provision which both the Parties to the dispute regard as an expression of their common

> will relating to the competence of the Court. The Court does not therefore consider that it is called upon to enter into an examination of the reservation in the light of considerations which are not presented by the issues in the proceedings. The Court, without prejudging the question, gives effect to the reservation as it stands and as the Parties recognize it."

This passage really amounts to no more than a statement that the Court was reserving the question of the validity of the reservation without deciding it in that case, since neither party desired to raise it. It certainly contains nothing to suggest that, if the Court had found that as a matter of law the reservation was invalid, it would nevertheless have been prepared to find it effective simply because the State which made it regarded it as effective. The result of such a view would indeed be extraordinary. It would mean that henceforth, in judging whether a purported acceptance of compulsory jurisdiction complied with Article 36 of the Statute, the Court would not have to be guided by any rules of law but only by the opinion, however unreasonable or erroneous, of the State making the declaration.

I therefore submit that Professor Pinto's argument that the Thai declaration of 1929 must be held not to have lapsed on 19 April 1946, because after that date Thailand regarded it as still being effective, is both wrong in principle and quite unsupported by authority. However, Professor Pinto went further than this. Not only did he submit that Thailand might be bound by her opinions; he even suggested that she might be bound by her silence. He complained that even after the Judgment of this Court in the case of *Israel* v. *Bulgaria* had been delivered, Thailand did nothing. She might, he suggested, have informed the Secretary-General then that she gathered that her declaration was in fact no longer effective. It is true that Thailand might have done this. On the other hand, I suggest that there was no particular reason why she should, and certainly no obligation upon her to do so. But if, as I submit, the effect of the Judgment in the case of *Israel* v. *Bulgaria* was to render ineffective the Thai declaration of 20 May 1950, the result was that Thailand, whether silent or not, had not accepted the compulsory jurisdiction of this Court. What Professor Pinto is really submitting is that she did then accept the compulsory jurisdiction by her *silence* in the face of the Judgment. I think I can only say that by no possible construction can silence constitute such a declaration as Article 36 of the Statute requires.

*[Public hearing of 14 April 1961, afternoon]*

Mr. President, Members of the Court, Professor Pinto went on to explain in some detail the way in which the Thai declaration of 1950 was recorded in the United Nations *Treaty Series*. His object in doing so was to show that the Secretary-General looked upon that declaration as a new declaration. The same view seems to have been taken by Professor Sohn in his book *Basic Documents of the United Nations* published in 1956. As to this I need only say that it is for this Court, and not for the Secretary-General or Professor Sohn, to pass judgment upon the nature and effect of that declaration. In our sub-

mission, the Secretary-General and Professor Sohn made a mistake. It is hardly surprising that they did so, for, as we have seen from the letter addressed to the Government of Thailand by a former Registrar of this Court, the topic which we are discussing is a complicated topic, upon which even experts may go astray. But, as I have already pointed out, these misapprehensions are readily understandable in that in general they took place before the decision of this Court was pronounced in the *Israel* v. *Bulgaria* case.

Indeed, it is interesting to observe that, if the Secretary-General regarded the declaration of 20 May 1950 as a new declaration, a different view has been taken by the Registry of this Court. The *Yearbook* of the Court is prepared annually by the Registry, in accordance with the Court's direction of March 1947 to the Registrar. The current acceptances of the compulsory jurisdiction of the Court are printed in each *Yearbook*. The Thai declaration of 1929 has been cited in every edition. In the *Yearbook* of 1959-1960, Thailand's acceptance appears at page 252, and what is there printed is the declaration of 20 September 1929, with a footnote stating that it was renewed on 7 May 1940, and again on 20 May 1950. This is indeed a significant entry. It appeared after the Judgment of the Court in the case of *Israel* v. *Bulgaria* had been delivered (there is a reference to that Judgment at p. 76 of the same *Yearbook*); and it shows that even then the Registry continued to regard the declaration of 20 May 1950 not as a new declaration, but as a mere renewal—or, as I submit, attempted renewal—of that of 1929.

Not only the Registry of this Court, but also Mr. Jenks, on whose support Professor Pinto relied, regard the declaration of 1950 as an effective instrument. What, however, is of greatest significance for our purpose is that, considering the effect of the language which the Government of Thailand actually used, they take that view of the declaration which I submit to be right. They regard it as nothing more than a renewal of the declaration of 1940. So also, incidentally, does Mr. Rosenne, whom Professor Pinto also cited: *vide* page 82 of his book *The Time Factor in the Jurisdiction of the International Court of Justice*. There is no sign that these writers were in terms considering the further question which this Court must now decide, whether such an instrument can have any force in the light of the Court's Judgment in the case of *Israel* v. *Bulgaria*.

Professor Pinto added that when the Thai declaration of 20 May 1950 was recorded as it was in the *Treaty Series*, the Government of Thailand "accepted it without protest or reserve".

It is no doubt true that no protest was made. There seems no particular reason why the Government of Thailand should have scanned every volume of the *Treaty Series* in order to see how its obligations were there recorded. In any case, for the reasons which I have already put forward, I suggest it is impossible to bind the Government of Thailand to any view now, simply upon the ground of their silence on some earlier occasion.

May I refer shortly now to Professor Pinto's observations on my reference to the argument used by Mr. Rosenne in the *Israel* case.

I fear that I cannot have made it perfectly plain why I referred to Mr. Rosenne's argument. I quoted his argument simply in order to point out that this Court, in the *Israel* case, must have had it plainly in mind that at any rate in Mr. Rosenne's submission, if they decided in favour

of the Bulgarian contention, it must logically follow that Thailand's declaration of 1950 was ineffective as an acceptance of the jurisdiction of this Court.

The Judgment of the Judges who formed the majority does not make reference to Mr. Rosenne's argument on this point.

As Professor Pinto indicated, however, the Joint Dissenting Opinion of Judges Sir Hersch Lauterpacht, Mr. Wellington Koo and Sir Percy Spender does make reference to this argument of Mr. Rosenne. On page 182 of the Dissenting Opinion they used language which, in my submission, clearly indicates that they did accept that it would be the consequence of the view of the majority that Thailand would not have accepted the jurisdiction of this Court by the 1950 declaration and referred to this consideration as one of the considerations which made them feel unable to concur in the majority Judgment. Mr. Rosenne's argument on this point, therefore, quite obviously must have been in the mind of all the Judges, and I submit that the only conclusion that can be drawn is that, whereas the dissenting minority felt unable to accept the consequence which they agreed resulted from the majority view, that Thailand was not subject to the jurisdiction of the Court, the majority, on the other hand, in expressing the majority view of the Court, clearly were prepared to accept the consequence which Mr. Rosenne indicated as the necessary logical result of the majority view. In other words, I invite the inference that had the majority Judges, in their Judgment, dealt in terms with Mr. Rosenne's submissions on this point, they would have accepted that his submission that Thailand was not bound was the logical consequence of the view that they were expressing and would have said in terms that they were prepared to accept that consequence of their view. In other words, had it been within the purview of their Judgment to do so, the majority Judges would have decided that Thailand is not subject to the jurisdiction of this Court. Professor Pinto seemed to be under the impression that I was quoting Mr. Rosenne as an authority for the view that Thailand did not accept the jurisdiction of this Court. I was doing nothing of the sort. I was quoting him purely as an advocate in order to lead up to what is authoritative on the matter, namely, the Judgment of this Court.

I hope I shall not be thought to speak in any sense disparagingly of Mr. Rosenne when I say that I prefer to rely on the necessary implication from the majority Judgment of this Court rather than upon Mr. Rosenne's opinion above quoted from his book, if, which I do not concede, Mr. Rosenne meant to imply that Thailand *had* accepted the jurisdiction of this Court. His opinion is not the opinion of a Judge and no doubt many extra-judicial opinions of various sorts on this topic can be quoted. As an example, Professor Sohn in his book on *Basic Instruments of the United Nations*, 1956, listed the Bulgarian declaration of 29 July 1921 as still binding by virtue of Article 36, paragraph 5, of the Statute of this Court. That also is a view which conflicts with that formed by the majority of this Court in the *Israel* case. With great respect to both these learned gentlemen, I cite the decision of the majority of this Court as being of far greater authority than either of the opinions that they have expressed in a contrary sense.

At the conclusion of his speech Professor Pinto discussed the legal position of an act "affected by mistake", to use his own expression (C.R.,

p. 71). He sought to show that such an act is not void, but only voidable, and therefore, is valid until something is done to avoid or to annul it. According to his argument, Thailand did nothing to annul her declaration of 1950 before the Cambodian application was filed, so that that declaration, even if it be affected by mistake, is valid for the purpose of these proceedings.

With respect to his argument, I submit that it rests upon a confusion of two different ideas. A party may perform a legal act which because of misrepresentation or mistake can be avoided. If the party chooses, he can annul it. If he does not, it will remain valid and produce its result. On the other hand, a party supposing a certain state of affairs to exist may perform a legal act which, if that state of affairs in fact existed, would produce a certain result. That state of affairs in fact does not exist, and the legal act performed is in consequence ineffective and can produce no result. It is not then a question of whether that act is void or voidable. It is simply misconceived and ineffective for all purposes and there is nothing to avoid.

A simple illustration will, I hope, make clear the distinction which I am drawing. Supposing A enters into a contract to buy a house from B. He does so in reliance upon an assurance that the house is built of stone. It is in fact build of wood. The result of that may be that A is entitled to have the contract set aside; but if he does not choose to do that, it is a valid contract which B can enforce.

On the other hand, suppose for example that A makes a declaration establishing in favour of the public a right of way over a field. He does so because he believes the field belongs to him, but in fact it belongs to somebody else. In such a case no question arises whether A's legal act in making the declaration is void or voidable. It is simply ineffective. It was designed to produce a certain result on the assumption that a certain state of affairs existed. There in fact exists a different state of affairs, in which it is impossible for A's act to produce any result at all. It cannot be avoided because there is nothing to avoid.

The making of the Thai declaration of 1950 was clearly an act, not of the former kind, but of the latter. It was an act performed on the assumption that Article 36, paragraph 5, of the Statute had converted the 1940 declaration into a valid acceptance by Thailand of the compulsory jurisdiction of this Court. Had that assumption been right, the declaration of 1950 would have had the effect of renewing that acceptance for 10 years, but the true state of affairs, as we now know, was that there had never been a valid acceptance by Thailand of the compulsory jurisdiction of this Court. In that state of affairs the renewal —which is what the declaration was—was simply misconceived. It is not a question of whether it was void or voidable. The state of affairs which in fact existed was such that it was impossible for the act performed by Thailand to produce any result. It was wholly ineffective.

Bearing in mind the distinction which I have drawn, one can see that the authorities upon which Professor Pinto relied are quite irrelevant to the present case. The passage at pages 131-134 of Lord McNair's book *The Law of Treaties* is dealing only with cases of the first of the two kinds which I have mentioned. Lord McNair says nothing about a legal act which in the actual state of affairs—which

is different from the state of affairs which those who performed the act understood to exist—simply cannot produce any result.

Professor Pinto referred to a passage in the Judgment in the case of *Nicaragua* v. *Honduras* as showing that it is necessary to establish an "essential error" in order to vitiate Thailand's consent. It follows from what I have said that no question of the vitiating of consent arises. What has to be decided is whether Thailand has effectively accepted the compulsory jurisdiction under either Article 36, paragraph 2, or Article 36, paragraph 5. The position is that a step was taken in 1950 which, while it would have achieved that result if the circumstances assumed by the Thai Government had existed, could not achieve that result in the circumstances which in fact did exist.

Professor Pinto also referred to a sentence in the late Judge Sir Hersch Lauterpacht's report on the *Law of Treaties*, in Volume 2 of the *Year Book* of the International Law Commission for 1953. Judge Lauterpacht there stated, at page 154, that a person or a State

> "cannot plead ignorance of the law, civil or criminal, as a reason for escaping the consequences of his conduct".

It is hardly necessary to point out that that sentence is dealing with a case in which a State has done something entailing consequences. If so, it cannot escape those consequences by pleading that it acted in ignorance of the law. The point of the argument which I have been presenting, however, is that in 1950 the Thai Government, because of a misapprehension of the circumstances, did something which in the circumstances actually existing could not produce any consequence.

Lastly, Mr. President and Members of the Court, I come to the last of the arguments put forward by our learned opponents, with reference to the first preliminary objection. It is the argument presented by Professor Reuter at the end of his address on Wednesday afternoon. The Court will remember that he taunted us with having taken at one moment an excessively psychological view, and at the next moment a view excessively formalistic.

We were excessively psychological, according to Professor Reuter, when we argued that a mistake of law had vitiated the declaration of 1950. I will not go back to this subject, except to remind the Court once again what our argument really is. The Government of Thailand in 1950 took a mistaken view of the effect of Article 36, paragraph 5—a mistake which at that time was shared by many authorities. In consequence of that mistake, the Government of Thailand, in making their declaration, did something which, on the true effect of Article 36, paragraph 5, was absolutely barren of result. If this is said to be an excessively psychological argument, I can only reply that I do not see where the excess of psychology lies. I would add that since Professor Reuter referred to the case of *Sovereignty over Certain Frontier Land* as a case dealing with the problem of mistake, that that case provides no guidance on the effect of mistake, since the Court, having investigated whether in fact there was a mistake, came to the conclusion that no mistake had been established (*I.C.J. Reports 1959*, p. 227).

In the circumstances, as I have said, the Thai declaration was barren of result. This, apparently, is what Professor Reuter regards as an excessively formalistic argument. For us, he says, the will has become a slave and documents have become masters. Because the wrong

ceremony has been performed the will of Thailand has been frustrated. Certainly, if to do one thing when one ought to have done another is to be described as performing the wrong ceremony, there is some force in this criticism. But let us remember what in fact happened. We have the authority of this Court's Judgment in the case of *Israel* v. *Bulgaria* for saying that an obligation under Article 36 of the Statute of the Permanent Court is not the same obligation as an obligation under Article 36 of the Statute of this Court. Thailand attempted to prolong the former obligation, when she should have accepted the latter. This error, I submit, is not aptly described as the performance of a wrong ceremony: and to insist upon a distinction which the Court itself has drawn is not to commit an excess of formalism.

Professor Reuter quoted a passage from the Opinion of Judge Basdevant in the *Ambatielos Case*. I need hardly say that we entirely accept the whole of what Judge Basdevant was there expressing. He was saying, if I may summarize the passage, that details of form are not to be given any determining influence in the ascertainment of the true meaning of an agreement. That we accept no less than our opponents: but what we do not accept is its relevance to this case. It is not upon any detail of form that we rely. We rely upon the true nature of the document of 20 May 1950, and contend that it was not effective to accept the compulsory jurisdiction of the Court.

That, Mr. President and Members of the Court, brings me to the end of the submissions I would offer in support of the first preliminary objection raised by the Government of Thailand. It remains for me to thank the Court for the consistent patience and courtesy with which they have heard me. I should be grateful, Mr. President, if you would now call on Mr. Hyde to present Thailand's reply on the second preliminary objection.

## 10. REPLY OF Mr. JAMES NEVINS HYDE

(COUNSEL FOR THE GOVERNMENT OF THAILAND)
AT THE PUBLIC HEARING OF 14 APRIL 1961, AFTERNOON

Mr. President, Members of the Court.

I should now like to reply on behalf of Thailand in support of its second preliminary objection.

Whatever path Cambodia chooses, its purpose, its goal, is to invoke Chapter II of the General Act providing for judicial settlement.

Yet our learned opponent has expressed surprise that Counsel for Thailand has paid so much attention to the General Act and attached so much importance to it. It is common ground that neither State is a party to it.

The reasons for this attention are simple. In the first place, this was the only treaty originally pleaded by Cambodia as an alternative to the 1950 declaration as a basis for the Court's jurisdiction. Secondly, my consideration of the careful and detailed methods of the international organizations concerned for recording what States were parties to part, or all, of the General Act, showed that one essential element of the very Treaty itself is the recording of adherences to its various chapters offering a choice of three methods of pacific settlement. Thirdly, I gave some attention to the effect of reservations of adhering States because the obligation for judicial settlement in Article 17 of the General Act is "subject to any reservations".

The path chosen by our opponent is, we are told, a short cut which will render unnecessary such a tedious recital. Consistently with this approach no attention was given by him to all this procedural machinery or to the possible effect of reservations.

Rather, suggests our opponent, the path to Chapter II of the General Act should be the principle of representation of Cambodia by France, so that when the Treaty of Friendship, Commerce and Navigation was signed in 1937, France was representing the then protectorate of Cambodia. Here he rests his case squarely on the last clause of the first paragraph in Article 22 of the 1937 Treaty, and argues that this clause provides the essential link between Cambodia and Thailand. He adds that Cambodia does not rest on the theory of State succession.

Our opponent is free to choose what path he wishes, because on him is the burden of showing that Thailand has consented to be bound by Chapter II of the General Act *vis-à-vis* Cambodia. This, then, is the indirect approach which has been chosen.

Counsel for Thailand found no evidence that either Thailand or France intended in that 1937 Friendship, Commerce and Navigation Treaty or in its predecessor of 1925 as a whole, or as to the respective pacific settlement articles, that these articles be binding on, or for the benefit of, French Indo-China, or binding on Cambodia as one of its countries or "*pays*".

Our opponent points to the last clause of the first paragraph of Article 22. The Article contains boundary guarantees and a saving

clause as to earlier treaties, and then this language relied on reads as follows:

> "It is further agreed that the present Treaty shall, as from the date of its entry into force, replace the Treaty of 14 February 1925, in regard to the relations between Siam and Indo-China, in so far as the provisions thereof are not incompatible with those of the Convention in question and of the Agreements provided for therein."

That reference leads us back to the 1925 Treaty of Friendship, Commerce and Navigation which in its Article 2 also contained a pacific settlement article with a reference to the Permanent Court of International Justice. There are, in Article 27 of that 1925 Treaty, references to the guarantee of the boundary between Siam and French Indo-China and the right of France to protect its "*ressortissants*" in Siam.

Apart from these two types of provisions relating to Indo-China, the language of the article negatives, it is submitted, any broader application of the Treaty through its political provisions.

On this point the language of Article 27 reads:

> "With regard to the provisions concerning French Indo-China other than the clauses relating to the definition and delimitation of frontiers as well as the exercise of the right of French protection in Siam, the High Contracting Parties mutually recognize the right to propose and discuss the maintenance, modification or suppression thereof, at the time of the negotiation of the special Convention and complementary Arrangements provided for under the preceding Article, without it being possible to invoke anything in the present Treaty which is likely to limit discussion or hinder solutions to be adopted."

Thus Thailand and France in this Article declared that subjects, that is to say, topics, "other than" the clauses relating to the definition and delimitation of frontiers as well as the rights of French protection were not involved. This Article, by *including* these two topics, may be taken to *exclude* the pacific settlement obligation contained in Article 2 from application to Indo-China.

On these two subjects France and Thailand did in fact enter into a subsequent Convention on 25 August 1926. Its parties were France and Thailand. In this Convention, unlike the 1937 and 1925 Treaties, the preamble indicated that its purpose was to secure as completely as possible for special relations between Siam and Indo-China the provisions of the 1925 Treaty. The Convention provides for a demilitarized frontier zone and for the treatment of French "*ressortissants*" in Siam. There is no "most-favoured-nations" clause—no "pacific settlement" article. Unlike the 1925 and the 1937 Treaties, this Convention deals with local questions and the protection of individual rights. That presumably was why these topics were assembled in a separate Convention and not included in the 1925 Friendship, Commerce and Navigation Treaty itself.

The distinction between this 1926 Convention and the 1925 and 1937 Treaties is also shown by the Convention's denunciation article. Article 17 of the Convention provides that it has a ten-year life, continuing thereafter on a year-to-year basis but subject to denunciation by France or Thailand on one year's notice. But unlike the 1925 and 1937 Treaties which contain no implication of any right of Indo-China in the act of denunciation, Article 17 of the Convention states in its last clause:

> "It is clearly understood however that denunciation could not have the effect of reviving any of the stipulations that have been abrogated either by previous agreements or by the present Convention."

The other evidence, not mentioned in the Cambodian Observations, but to which our opponent devoted some attention in his statement to the Court, is an 1867 Treaty between Siam and France.

Here the preamble states that the parties, again Siam and France, desire to settle definitively the position of the two States as to the Kingdom of Cambodia. The first Article is a recognition by Siam of the French protectorate over Cambodia. It defines the boundaries between Siam and France and provides in Article VIII:

> "The French Government undertakes to cause the preceding provisions to be observed by Cambodia."

We do not understand our opponent, by his recent reference to this 1867 Treaty, to assert that this could constitute agreement and consent by Thailand that in all treaties between Thailand and France thereafter to be negotiated the parties agree that France shall be acting by and on behalf of Cambodia.

The political status of Cambodia has changed as a result of this 1867 Treaty between Thailand and France. Its first Article was solemn recognition by Thailand of a French protectorate over Cambodia. This Treaty also contained a guarantee by France that Cambodia would not be incorporated into Cochin China (Article IV). Such incorporation never did take place, and the Kingdom of Cambodia was able to retain a certain internal autonomy, but limited by a Convention between France and Cambodia signed at Pnom-Penh on 17 June 1884. After this period Cambodia was no longer referred to as such in treaties, the only territory so indicated being French Indo-China, of which Cambodia was one country of the composite whole. The 1867 Treaty was historically the last between Siam and France relating to Cambodia as such.

Yet this is the evidence on which reliance is placed by our opponent to suggest Thailand's agreement and consent in advance that in general treaties with France, even as to the political obligation of pacific settlement, France acted for itself, and also on behalf of Cambodia.

This is the indirect approach by Cambodia seeking by operation of law to assert the rights of France under Article 21 of its 1937 Treaty with Thailand, and thus invoking the General Act. Unless this position of Cambodia is recognized by the Court, our opponent argues, Cambodia would be penalized and what he considers Thailand's obligations to Cambodia reduced to nothing. This operation of law is termed by our opponent *representation*, not State succession.

We can understand the possible view of our opponent that principles of State succession, and particularly non-succession to political treaties, would not be helpful in his position, especially as applied to Article 21 of the 1937 Treaty.

There are two related situations in which a question can arise; the first is the determination of the degree of capacity in international relations of a protected State. The second is the rights of such a State upon obtaining full independence, and it is with this second situation that we are here concerned.

At this late stage I shall not attempt any conceptual disputation of what label is the more appropriate for the position of Cambodia on the law. Whatever name it bears, the practical, pragmatic result is the same. Cambodia claims the right to come to this Court under the "pacific settlement" article in the 1937 Treaty. Cambodia lacked independent status until 1953. Hence it could not have filed an application here before that time. Thereafter, not on the basis of any subsequent agreement between Cambodia and Thailand, Cambodia now claims the right to proceed under this "pacific settlement" article. It would follow from this position that the Treaty could not be denounced by France or Thailand without Cambodia's consent.

It would involve much research to determine what other States formerly countries of Indo-China might claim similar rights, and so this personal, political Treaty of 1937 would have turned, not by agreement of France and Thailand but by operation of law, into another multilateral pacific settlement treaty.

Whatever the rights of Cambodia by operation of law in the boundary confirmed by Article 22 of the 1937 Treaty, Article 21 of the Treaty raises an entirely different question. It is only proper again to state that no precedent has been brought forward for the proposition that Cambodia could hold Thailand to the political provisions found in Article 21 of the 1937 Treaty.

They are of quite a different character from the boundary guarantees contained in Article 22. Certainly this was the position of the French Government, as M. Lacoste stated it. He said, it will be recalled, that it was out of the question to apply Article 21 to the boundary guarantees of Article 22. He was writing as the representative of France. Our opponent as Counsel for Cambodia, on the other hand, argues that Article 21 is a "*garde-frontière*", that it is directly related to Article 22. This 1937 Treaty is now in force between France and Thailand—but France is not here to state for itself its position on that question.

These, then, are some of the hazards of the path chosen by Cambodia. What State would know, in this period of change, the extent of its political obligations with others? When does a bilateral treaty, by operation of law, become a multilateral treaty? Where can an authoritative record be found of who are the parties to such a treaty?

To conclude, as the first State to invoke the General Act as the basis of this Court's jurisdiction, Cambodia rests firmly on the pacific settlement clause, Article 21, of the 1937 Treaty of Friendship, Commerce and Navigation between Thailand and France. This Cambodia claims the right to do, not as a party to the General Act, not as a party to the 1937 Treaty, but in a "special fashion", if I may use the phrase to be found in the Memorial of Cambodia, paragraph 30.

This special fashion must be operation of law. Whether labelled "representation" or "State succession", Cambodia is here asserting what is a right of France, and France is not a party to this proceeding.

Therefore the Government of Thailand maintains its second preliminary objection, that Cambodia has not shown Thailand's consent to the application in this case of Chapter II of the General Act.

Mr. President, this completes my argument in support of the second preliminary objection. I am grateful to the Court for its courtesy and attention in hearing me.

## 11. REJOINDER OF Mr. DEAN ACHESON

(COUNSEL FOR THE GOVERNMENT OF CAMBODIA)
AT THE PUBLIC HEARING OF 15 APRIL 1961, MORNING

Mr. President, Members of the Court.

My colleagues have left it to me to make the concluding argument on behalf of Cambodia, at the end of which I will ask the Court to call on the distinguished Agent for Cambodia to say a few closing words. My colleagues have not thought it desirable or necessary for them to prolong the argument this morning by repeating, or referring again, to much which has been said before. We all, however, believe that it would be unsafe to leave the Court under the charm of Sir Frank Soskice's last argument.

I was distressed, when he began his argument, to learn from him that I had, even briefly, caused him discomfort. However, it was a great pleasure for me to see that he had almost instantaneously recovered from that discomfort, and returned to the battle with undiminished energy, wit and brilliance. Indeed, I felt, if the Court please, that my own excursion among the poets and the prophets and the saints had become almost pedestrian as I listened to the brilliance with which he added one refinement to another. Indeed, I felt transported, as I listened to him, from the rather prosaic consideration of a dull jurisdictional argument into a world of gossamer conceptions, whose delicacy was only equalled by their frailness.

In the presence of my own distinguished colleagues, I would hesitate greatly to use the word "academic" in regard to anything which has been said; that word is often used by Philistines such as I am to describe very refined discussions which are beyond the reach of ordinary mortals. But I think they will pardon me if I recall an observation made to me years ago by a distinguished President of a University in our country, in which he described discussions which occurred at his own faculty meetings, and he said these discussions were as though one professor said to another, "You hold the sieve, while I milk the barren heifer".

Only one as heartless as an opponent in a litigation would take apart so perfect a thing as my learned opponent's argument to see how it was made. The argument, I submit, might be entitled "Variations on a Theme". The principal theme is, of course, the decision of this Court in *Israel* v. *Bulgaria*. Then there are two subsidiary themes. One concerns the two supposed gateways provided by Article 36 to submission to the compulsory jurisdiction of this Court. Another highly involved theme is with regard to the legal alchemy by which a submission to the Permanent Court can or cannot be transformed into a submission to this Court.

With the Court's permission, I shall begin with the first movement of Counsel's principal theme. Counsel places his whole reliance on *Israel* v. *Bulgaria*. The question, he says, is whether the law should be applied. Surely, anyone who would choose to take the opposite

side of that argument would be most ill-advised. Therefore I hasten to place myself squarely beside learned Counsel on the other side in support of the law. The only difference between us, I believe, will be, what law? And this difference, of course, has existed between advocates ever since there was law, and ever since there were Courts.

The issue of jurisdiction, says learned Counsel, is to be determined by Article 36, paragraph 5. This, he says, is required by the decision of this Court in the case of *Israel* v. *Bulgaria*. But we respectfully submit that this is quite erroneous. In our submission Article 36, paragraph 5, has no bearing whatever upon the issue before this Court. The relevant law, we believe, is to be found in Article 36, but in paragraphs 2, 3 and 4.

Let us examine in more detail the intricate reasoning of learned Counsel. It begins with a statement that under Article 36 there are two gateways into the state of grace, that is, into the compulsory jurisdiction of this Court. This, we submit, is plainly wrong by reason of the very decision on which Counsel lays such great stress, that is, the decision in *Israel* v. *Bulgaria*.

By that decision, it is clear that there are not two gateways. Upon the coming into effect of the Statute of the Court, those signatories who had accepted the compulsory jurisdiction of the predecessor Court entered into the same jurisdiction of this Court through the gateway of Article 36, paragraph 5. Thereupon that gateway closed, and it was no longer available for any State, whether an original signatory or a later adherent. That I take to be the true doctrine of *Israel* v. *Bulgaria*.

Thereafter, the only gateway was through Article 36, paragraphs 2, 3 and 4. About this I cannot see that there can be any doubt. But, argues Counsel, Thailand's declaration of 20 May 1950 cannot, despite Thailand's manifest purpose and intention, pass the guards stationed at the gateway of paragraphs 2, 3 and 4. They are apparently posted there to make entrance as difficult as possible. Perhaps those guards are supposed by learned Counsel to be this Court, which stands, perhaps, in Milton's phrase, "like that two-handed engine at the door, which stands ready to strike once, and strike no more".

But why can the declaration of 1950 not pass these guards? Because, says Counsel, it does not accept the jurisdiction of *this* Court, and *in those words*; nor, he says, does it state all the terms and matters required to be stated in paragraphs 2 and 3 of Article 36.

Let us consider this observation, and let us consider first the question of the terms and other requirements of paragraphs 2 and 3. There can be no question, I submit, that these are stated in the earlier declaration of September 1929, which is a document known to this Court. Surely Counsel does not contend that they (that is, these requirements of sections 2 and 3) cannot be incorporated by reference to some other document, but that they must be copied out laboriously and in full. Perhaps, however, he does mean this by the gloss which he has put on Article 36, paragraph 2, as requiring what he calls a "fresh document". What a "fresh document" is, we are not told, and I find some difficulty in conceiving. Assuming that the document is newly typed and is on new paper, can it not refer to any other document? For instance, can it not say "referring to Article 36, paragraph 4, of the Statute of this Court, I file this declaration", etc.? Or must it copy out all the words of Article 36, paragraph 4? I refuse, if the Court

please, to let even my learned friend make him appear so stern a formalist.

But if the declaration can incorporate the language of the Statute by reference, why can it not incorporate the language of the earlier declaration of September 1929, which contains all the information which Counsel says must be supplied under paragraphs 2 and 3? This is what Thailand did. Every last detail was supplied as meticulously as though it had been copied out in full.

I submit, therefore, if the Court please, that we are not expected to take seriously the objection that Thailand failed to give such important information as that the jurisdiction was accepted on the basis of reciprocity, and without any special convention, and in all disputes in which no other form of pacific settlement is agreed upon between the parties.

All this was made clear in the document referred to, and was incorporated by reference. The point on which Counsel stuck, however, was that—so he alleged—the declaration did not accept the jurisdiction of *this* Court. All it succeeded in doing, so he argued, was to accomplish the astounding result of attempting, quite futilely, to continue submission to the jurisdiction of a court which had long since gone out of business.

Counsel's argument seems to me to be drawn by a three-horse droshky. In the centre is an error of fact, and on either side of it an error of law.

The error of fact concerns what the declaration *said*, and what it *intended* by the words used. It said, and meant, so Counsel argues, that Thailand renewed its acceptance of the jurisdiction of the old Permanent Court, believing that the legal alchemy of paragraph 5 of Article 36 would transform or transfer this obeisance to the past into an acceptance of the present.

The two errors of law which flank this error of fact are two interpretations of the decision in *Israel* v. *Bulgaria*. I shall call these interpretations, for easy reference, the "death-sentence" interpretation and the "rule-against-alchemy" interpretation; the latter is a fall-back position, should the former prove to be as vulnerable as it appears.

Mr. President, Members of the Court, first let us consider the error of fact. What did Thailand say? And what did the words mean? To begin with, and I quote its very words, Thailand said:

> "In accordance with the provisions of Article 36, paragraph 4 of the Statute of the International Court of Justice I have the honour to inform you..."

In using these words, Thailand drew attention to the fact that it was acting under the Statute of *this* Court—and under that very Article and paragraph which referred to depositing declarations accepting the compulsory jurisdiction of *this* Court.

With that introduction, with that preliminary, significant and revealing disclosure of intent, His Majesty's Government made its declaration. And before I state its precise words, may I refer to an observation of learned Counsel yesterday which touched me at a most sensitive point. Counsel suggested—he was too courteous to do more than that—that I might have committed, or almost committed, an offence which I abhor above all others. I had approached, he suggested, loose thinking.

One warning, if the Court please, is enough. I shall now be so strict a verbalist and formalist as to tighten my thinking beyond reproach.

What, therefore, did His Majesty's Government have the honour to inform the Secretary-General of the United Nations? Nothing less than that His Majesty's Government, and I quote its very words:

> *"renewed the declaration above mentioned for a further period of ten years"*.

And what was the declaration above mentioned? Let me quote it also in order to avoid all loose thinking and loose talking. It was to recognize, and these are the very words:

> "in relation to any other Member or State which accepts the same obligation, that is to say on the basis of reciprocity, the jurisdiction of this Court as compulsory *ipso facto* and without any special convention, in conformity with Article 36, paragraph 2 of the Statute of the Court..."

This, if the Court please, is exactly what Thailand said. These are the very words it used. If we are to be verbalists we must start from this point, and the words accept the jurisdiction of this Court without mention of any other court whatever. But, if the Court please, I can already feel the blood pressure of my learned friend beginning to rise. He is thinking that the Article 36, paragraph 2, to which the declaration of 1929 referred, was in the Statute of the Permanent Court and not in the Statute of *this* Court; but to that I have several answers. The first is that it was he, not I, who asked for this excessive attention to the exact words used. In the second place, I would suggest that it is not by chance that the articles and paragraphs mentioned are identical in number and identical in phraseology. This was done by the drafters of the Statute of this Court to make references possible with a minimum of confusion. But what I would say most emphatically is that the intention of the declaration of 1950 is clear beyond any possibility of confusion. The Government of Thailand was referring, as I have previously stated, to the very article and paragraph in the Statute of *this* Court which referred to the filing of declarations accepting the compulsory jurisdiction of *this* Court. Nothing could reveal a clearer intent to accept *this* Court's compulsory jurisdiction.

Therefore, when learned Counsel suggests that the intent of Thailand was to accept the compulsory jurisdiction of *this* Court by means of a sort of carom shot off the compulsory jurisdiction of the Permanent Court, and that it is entrapped by this error in the method used, I say that this is all too intricate and complex for ordinary understanding. The intention was clear, the words were clear, and if this were all that there was to it, it would plainly put an end to the matter.

But as I have suggested before, this error of fact by learned Counsel as to what Thailand said and as to what it intended by what it said is flanked by two errors of law—both growing out of Counsel's interpretation of this Court's decision in *Israel* v. *Bulgaria*. The first interpretation, I suggested, should be called the "death-sentence" interpretation. It is that by its Judgment in *Israel* v. *Bulgaria* this Court held that the obligation of any lapsed declaration was so dead and so decomposed that nothing could revive it. Plainly this is not what this Court decided. It merely decided that a lapsed declaration to accept the compulsory jurisdiction of the Permanent Court was not revived by paragraph 5 of Article 36. In the present case, if the Court please, paragraph 5 appears

to me to be a straw man with which learned Counsel carries on a heroic struggle. But this struggle is irrelevant to his necessities here, for Cambodia makes no claim under paragraph 5 and has beyond all doubt stated that it filed under the paragraphs which learned Counsel concedes are the only ones under which it could have filed, that is paragraph 4 as to the filing and paragraphs 2 and 3 as to the content. Indeed, the "death-sentence" construction goes much too far, for it would obviously prevent renewal of a declaration filed under paragraphs 4 and 2 of *this* Court's Statute if that declaration had been allowed to lapse for as much as a day. This, indeed, is the case of Honduras, which I mentioned in my earlier argument.

Mr. President and Members of the Court. Learned Counsel, I suspect, sets no great store by what I have called the "death-sentence" interpretation of *Israel* v. *Bulgaria*. He counts rather more, I believe, upon the more metaphysical doctrine of the "rule-against-alchemy" interpretation. This rule appears to be that while a declaration to accept the compulsory jurisdiction of this Court—what Counsel has called a fresh declaration—may refer to and adopt terms and conditions of any previous declaration, it may not perform the transformation from the submission to the jurisdiction of the old Court to submission to the jurisdiction of this new Court without uttering words as ritualistic as any contained in the most sacred ceremonies. The words apparently must be even more formal than those of the marriage rite. The declaring State must—so it appears to be argued—declare almost in these words: "I hereby accept the compulsory jurisdiction of the International Court of Justice." And perhaps it must go on in even further detail than this to spell out the requirements of every sub-paragraph of paragraph 2.

However, it seems to me that Counsel's own words belie so harsh and rigid an interpretation. If I have taken them down correctly, and I believe that I have, Counsel says that the jurisdiction of this Court must be accepted either expressly or, and these are his words, "by the very clearest and most unambiguous implication". We on our side, if the Court please, are not to be outdone in strictness or in unambiguity. We believe that the declaration of May 1950 can pass the strictest test. Its purpose and intent were plain, its words were plain. But there is one refinement of Counsel's argument yesterday which I must confess left me puzzled. This was a distinction which he attempted to make between intent on the one hand and what he called "ulterior purposes or motives" on the other. The Court will find this on page 19 of yesterday's transcript[1].

Thailand's intent, I understood him to say, was not to accept the compulsory jurisdiction of this Court, but to renew the declaration of 1929. On the other hand, Thailand's ulterior purpose and motive, he continued, was, to be sure, to accept the compulsory jurisdiction of this Court. But this ulterior motive and purpose he considered as a purely subjective or irrelevant matter which must be left out of consideration in determining the meaning to be given to the document. Now, if the Court please, I must confess my inability to see the dichotomy. If there is any distinction it seems to me to be a distinction without a difference. I suggest that it is a matter of form and not of substance. Not that there is not a point where the intent behind an

[1] See p. 95 above.

act may shade off into unverifiable and indeterminable factors such as motive; for, of course, there is. But Counsel for Thailand have maintained—as, of course, they must maintain to prevail—that intent has nothing to do with the practical and immediate object to be achieved by an act, but is confined to the intent to use the particular language which was in fact used. But if we follow Counsel along this road, we find, no doubt to his surprise, that the words actually used mean exactly what we say that Thailand meant. So one way or another we come out at the same place, which I respectfully submit is that of common sense, a place which the law consistently strives to reach.

Learned Counsel for Thailand have produced many analogies to suggest that dire consequences must result from Thailand's alleged misapprehension that its declaration of 1940 had continued until 1950. None of these analogies, we submit, are very exact or very useful. Let us pose some which, we respectfully submit, are more apt than those suggested, and which indicate that so unimportant a misapprehension or so inartistic a use of language can have no such dire effects.

Here is our first analogy. Suppose that a man whose name is Smith places an advertisement in a newspaper in which he offers himself out for employment. He states that he will accept any employment which meets certain conditions and that his advertisement constitutes an offer which can be accepted by writing to him at a certain address, agreeing to the conditions which he names.

Another man whose name is Jones sees the advertisement and decides to accept Smith's offer. He writes Smith a letter in which he says: "I hereby accept the offer contained in your advertisement of so-and-so, and hereby accept you, Mr. Smith, for employment upon the conditions and terms set out in that advertisement:".

But, alas, in writing this letter he made a fatal flaw—he is careless, and he writes SMYTH instead of SMITH. In the terms used by learned Counsel and found on page 35 of yesterday's transcript[1], he was acting on the "assumption that a certain state of affairs existed", whereas in fact it did not. He thought the man who placed the advertisement was named Smyth.

Now on Thailand's reasoning the contract which one would think was created by this offer and acceptance is absolutely void. It is void for want of an object—there was no Smyth to be hired. If one ventures to suggest that Jones *intended* to hire the man who placed the advertisement, and merely wrote Smyth because he was under the misapprehension that the man's name was Smyth, the inexorable answer given by Counsel is: it may have been Jones's *ulterior motive and purpose* to hire Smith, but his *intent* was to hire Smyth; and since there was no Smyth, the acceptance is absolutely void and there is no contract at all.

Now, if the Court please, I submit that Thailand's intent in 1950 may be described as an intent to "hire Smith". It was to accept the compulsory jurisdiction of this Court. It expressed that intent in a written declaration, expressly made under Article 36, paragraph 2, of the Statute of this Court, and meeting all the requirements imposed by that Article. That was sufficient to vest the Court with jurisdiction.

Or let me suggest another analogy. Suppose a man is in the habit

[1] See p. 103 above.

of buying chickens from a certain merchant every Sunday. One Sunday he says, "give me the same as last Sunday"—or, as I am told by my French colleagues he might have put it, "*je renouvelle ma commande du dimanche dernier*".

Does he expect to get the same bird he got the Sunday before? If so, the merchant has been given a truly impossible command—to resuscitate and recompose the long-eaten chicken of last week. It seems unlikely, however, that the merchant would understand the order to be quite so unattainable.

Or let me suggest another analogy along the same line. Suppose I discover that my subscription to the international edition of *The New York Times* has expired or is about to expire. I write to the newspaper office and I say "Please renew my subscription". Will I get a letter back saying "We regret very much that we cannot find enough copies of last year's papers to renew last year's subscription"? Surely not. Surely not. Common sense says that I am renewing my subscription for the coming year, not for the past year.

Mr. President, Members of the Court, if, in discussing the arguments of learned Counsel, my sense of humour has on occasion overcome my gravity, that does not in any way derogate from the high respect and regard which I hold for learned Counsel and, indeed, it is very high. When Counsel have been at the Bar as long as Sir Frank Soskice and I have been, and I do not mean by that to force him into the company of elderly gentlemen, we understand that the regard which our opponents hold for us rarely extends to our arguments. None of us can transcend the limits of the material with which we have to deal.

It has been an honour and a pleasure for me, Mr. President, to be associated with distinguished Counsel on either side of me in appearing before this Court and I join with them in expressing my gratitude to the Court for its unfailing courtesy and attention.

Mr. President, I would appreciate it if you would now call on the distinguished Agent for Cambodia for our closing words.

## 12. DÉCLARATION DE S. EXC. M. TRUONG CANG

(AGENT DU GOUVERNEMENT DU CAMBODGE)

A L'AUDIENCE PUBLIQUE DU 15 AVRIL 1961, MATIN

Monsieur le Président, Messieurs de la Cour.

Comme M. Dean Acheson l'a indiqué à la Cour, la délégation cambodgienne, pour conclure à la compétence de la Cour, maintient l'argumentation développée à la barre à titre principal et subsidiaire par ses trois conseils.

Il me reste à présenter quelques observations générales.

Monsieur le Président, Messieurs de la Cour, pour un pays comme le Cambodge, le droit international, considéré sous les aspects techniques que soulève un tel procès, pouvait apparaître au premier abord comme un peu lointain. En effet, ce droit a été, en fait, élaboré par des nations qui appartiennent à d'autres spneres de civilisation et de culture que le Cambodge. Mais en prenant contact avec le droit international d'une manière plus approfondie que par les relations diplomatiques, l'homme d'État, le juriste cambodgien n'eprouvent aucune surprise. C'est qu'en effet la famille des nations est une. Les grands principes qui animent et coordonnent les institutions internationales trouvent un écho dans nos vieilles civilisations d'Asie.

Quels sont ces principes que la présente affaire a particulièrement mis en cause?

Il nous semble qu'ils sont au nombre de deux: le principe du respect de la parole donnée et celui de la continuité de l'État.

Le respect de la parole donnée, dans les relations tant publiques que privées, est à la base du droit khmer.

Une formule de nos anciens textes sacrés, recueillie par Adhémar Leclère (*Les Codes cambodgiens*, Paris, 1898, p. 77), disait déjà: « Le roi et les dignitaires ne doivent avoir qu'une seule parole. »

Cette valeur de la parole donnée implique bien entendu que le fond, c'est-à-dire l'intention manifestée et exprimée, l'emporte sur la forme. Dès le XVI^me^ siècle le droit khmer a connu des contrats privés se formant par le seul consentement: la vente, la location, le prêt à usage... (Jean Imbert, *Histoire des Institutions khmères*, Pnom Penh, 1961, pp. 109 et suiv.). Ce n'est donc pas seulement pour les besoins de sa cause, mais par une démarche toute naturelle, que le Cambodge soutient dans la présente affaire le principe de la compétence de la Cour.

Il est un autre principe auquel le droit cambodgien est très attaché, c'est celui de la permanence de l'État. Le droit khmer l'a admis de très bonne heure sur le plan interne, lors du changement de chaque souverain. Mais il en revendique également le bénéfice sur le plan international. Nous sommes un État depuis une haute antiquité. Nous n'avons jamais cessé de l'être. Ni la vassalité que certains États d'Extrême-Orient ont cherché à nous imposer, ni notre participation à l'ancienne Union indochinoise ne nous ont jamais retiré cette qualité. Telle était, pour ne donner qu'un seul exemple, l'opinion exprimée dans le grand *Traité de droit international* d'Oppenheim-Lauterpacht (7^me^ édition, vol. I, par. 94, p. 176).

Sur le plan juridique comme sur celui du simple bon sens nous ne comprenons pas la contradiction suivante:

D'une part, le Siam, en reconnaissant le protectorat, a admis l'obligation où nous étions d'être représentés.

D'autre part, et en même temps, il nous conteste les droits que nous avons pu acquérir par cette représentation.

Nous déplorons qu'on ait pris tant de souci de notre indépendance quand nous n'avions pas l'exercice de nos droits pour faire si peu de cas de ces mêmes droits quand nous sommes devenus indépendants. L'absence à nos côtés dans ce procès de l'État qui exerçait le protectorat rend-elle caducs les engagements qu'il n'a pu prendre qu'en notre nom?

Mais ce procès n'est pas seulement une rencontre avec le droit international sous son expression la plus technique. Il est encore une rencontre avec la plus haute instance chargée de dire ce droit: la Cour internationale de Justice. C'est la première fois, en effet, dans notre histoire que nous abordons la justice internationale; et la Cour comprendra tout ce que cela représente pour un État comme le nôtre. Qu'elle nous permette d'exprimer ici quelques-unes de nos pensées.

Et, d'abord, la gratitude pour la patience et l'attention avec laquelle elle a bien voulu nous entendre, nous et nos conseils; ensuite, la confiance que nous mettons en elle. Certes, personne ne sera surpris de ce que nous éprouvions des sentiments communs à tous les plaideurs, et qu'il est inutile de répéter. Mais nous les éprouvons avec une nuance de gravité, et la Cour doit le savoir.

Le Cambodge ne veut recourir ni à la violence, ni à la menace de la violence. Le Cambodge n'a ni la force que donne un puissant développement industriel, ni celle qui résulte des combinaisons politiques, car sa volonté pacifique est égale à l'égard de tous. Sa situation est donc celle de tous ces peuples qui ont recouvré la libre disposition d'eux-mêmes et qui pensent que le droit est leur seule protection; en se soumettant au jugement de la Cour, le Cambodge tient à dire toute sa foi dans la Charte des Nations Unies et la justice internationale.