B. — PROCÈS-VERBAUX DES SÉANCES TENUES LES 27 ET 28 JUIN ET LE 18 JUILLET 1950

(DEUXIÈME PHASE)

ANNÉE 1950

TREIZIÈME SÉANCE PUBLIQUE [1] (27 VI 50, 11 *h.*)

Présents : MM. BASDEVANT, *Président ;* GUERRERO, *Vice-Président ;* ALVAREZ, HACKWORTH, WINIARSKI, DE VISSCHER, Sir ARNOLD MCNAIR, M. KLAESTAD, BADAWI PACHA, MM. KRYLOV, READ, HSU MO, AZEVEDO, *juges ;* M. HAMBRO, *Greffier.*

Présents également :

M. Ivan KERNO, Secrétaire général adjoint, représentant du Secrétaire général des Nations Unies, assisté de

M. HSUAN-TSUI-LIU, membre de la Division des questions juridiques générales au Secrétariat des Nations Unies.

Les représentants des Gouvernements suivants :

Royaume-Uni : M. G. G. FITZMAURICE, C. M. G., deuxième conseiller juridique au Foreign Office.

États-Unis d'Amérique : l'honorable Benjamin V. COHEN,

assisté de :

M. Leonard C. MEEKER, du service du conseiller juridique du Département d'État.

Le PRÉSIDENT, ouvrant l'audience, indique que la Cour se réunit afin d'entendre les exposés oraux qui seront présentés dans la deuxième phase de l'affaire visant certaines questions de procédure relatives à l'interprétation des traités de paix qui ont été conclus avec la Bulgarie, la Hongrie et la Roumanie.

Par une résolution datée du 22 octobre 1949, l'Assemblée générale des Nations Unies avait décidé de demander à la Cour un avis consultatif à ce sujet. Cette demande comportait quatre questions dont les deux dernières ne devaient être posées à la Cour que sous certaines conditions.

Par son Avis du 30 mars 1950, la Cour a répondu affirmativement aux deux premières questions. D'autre part, le Secrétaire général a informé la Cour que les Gouvernements de la Bulgarie, de la Hongrie et de la Roumanie n'ont pas désigné leurs représentants aux commissions prévues par les traités de paix, dans les trente jours de la date à laquelle la Cour avait rendu son avis.

[1] Quarante-huitième séance de la Cour.

B.—MINUTES OF THE SITTINGS HELD ON JUNE 27th AND 28th AND JULY 18th, 1950

(SECOND PHASE)

YEAR 1950

THIRTEENTH PUBLIC SITTING [1] (27 VI 50, 11 *a.m.*)

Present : President BASDEVANT ; *Vice-President* GUERRERO ; *Judges* ALVAREZ, HACKWORTH, WINIARSKI, DE VISSCHER, Sir ARNOLD MCNAIR, KLAESTAD, BADAWI PASHA, KRYLOV, READ, HSU MO, AZEVEDO ; *Registrar* HAMBRO.

Also present :

Mr. Ivan KERNO, Assistant Secretary-General, representing the Secretary-General of the United Nations, assisted by

Mr. HSUAN-TSUI-LIU, Member of the General Legal Division at the Secretariat of the United Nations.

The Representatives of the following Governments :

United Kingdom : Mr. G. G. FITZMAURICE, C. M. G., Second Legal Adviser of the Foreign Office.

United States of America : the Honourable Benjamin V. COHEN, assisted by :

Mr. Leonard C. MEEKER, of the Office of the Legal Adviser, Department of State.

The PRESIDENT, after declaring the sitting open, said that the Court had met to hear the oral statements which would be submitted in the second phase of the case concerning certain procedural questions relating to the interpretation of the Peace Treaties signed with Bulgaria, Hungary and Romania.

By Resolution dated October 22nd, 1949, the General Assembly of the United Nations had decided to request the Court to give an advisory opinion on this subject. This request consisted of four questions, the last two being put to the Court only under certain conditions.

By its Opinion of March 30th, 1950, the Court had answered the first two questions in the affirmative. On the other hand, the Secretary-General of the United Nations had notified the Court that the Governments of Bulgaria, Hungary and Romania had not designated their representatives to the Commissions under the Treaties of Peace within thirty days from the date when the Court delivered its opinion.

[1] Forty-eighth meeting of the Court.

Le Président, constatant que les conditions prévues dans la résolution du 22 octobre 1949, pour que la Cour ait à examiner les questions III et IV, se trouvent ainsi remplies, prie le GREFFIER de donner lecture des deux questions dont la Cour est actuellement saisie.

Cette lecture faite, le PRÉSIDENT ajoute que les notifications nécessaires ont été adressées aux États intéressés, qui ont été avisés des délais respectivement fixés pour la présentation d'exposés écrits et d'exposés oraux.

Seul le Gouvernement des États-Unis d'Amérique a présenté, dans le délai qui lui était imparti, un exposé écrit ; il a, en outre, annoncé son intention de présenter un exposé oral devant la Cour et s'est fait représenter à cet effet par l'honorable Benjamin V. Cohen, assisté de M. Leonard C. Meeker, attaché au service du conseiller juridique du Département d'État.

Le Gouvernement du Royaume-Uni s'est référé aux observations déjà énoncées par lui, au sujet des questions dont s'occupe aujourd'hui la Cour, dans l'exposé écrit présenté en son nom au cours de la première phase de l'affaire. Il est représenté devant la Cour par M. G. G. Fitzmaurice, deuxième conseiller juridique au Foreign Office, qui présentera un exposé oral.

Le Président constate la présence devant la Cour des représentants du Gouvernement des États-Unis d'Amérique et du Royaume-Uni, ainsi que du représentant du Secrétaire général des Nations Unies, M. Ivan Kerno, Secrétaire général adjoint, assisté de M. Hsuan-Tsui-Liu, Conseiller juridique au Département juridique des Nations Unies. Il donne la parole à M. Ivan Kerno.

M. Ivan KERNO présente l'exposé reproduit en annexe [1].

Le PRÉSIDENT donne la parole au représentant des États-Unis d'Amérique.

L'honorable Benjamin V. COHEN présente l'exposé reproduit en annexe [2].

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

M. COHEN reprend et termine son exposé [3].

Le PRÉSIDENT prie le représentant du Gouvernement du Royaume-Uni de Grande-Bretagne et d'Irlande du Nord de bien vouloir présenter son exposé.

M. G. G. FITZMAURICE présente son exposé, reproduit en annexe [4].

L'audience est levée à 18 h.30.

Le Président de la Cour,
(Signé) BASDEVANT.

Le Greffier de la Cour,
(Signé) E. HAMBRO.

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[1] Voir pp. 335-337.
[2] » » 338-348.
[3] » » 348-361.
[4] » » 362-366.

The conditions laid down in the Resolution of October 22nd, 1949, under which the Court was to examine Questions III and IV were thus fulfilled. He asked the REGISTRAR to read the two questions now before the Court.

After the questions had been read, the PRESIDENT observed that the necessary notifications had been sent to the States concerned, which were informed of the time-limits fixed for the presentation of written and oral statements.

The United States Government alone had presented a written statement within the prescribed time-limit. In addition, it had declared its intention of presenting an oral statement and had designated the Honourable Benjamin V. Cohen, assisted by Mr. Leonard C. Meeker, of the Office of the Legal Department, Department of State, as its representatives for this purpose.

The United Kingdom Government had referred to its observations on the questions now before the Court in the written statement presented in its name during the first phase of the case. This Government was represented before the Court by Mr. G. G. Fitzmaurice, Second Legal Adviser of the Foreign Office, who would present an oral statement.

The President noted that the representatives of the Governments of the United States of America and of the United Kingdom and the representative of the Secretary-General of the United Nations, Mr. Ivan Kerno, Assistant Secretary-General, assisted by Mr. Hsuan-Tsui-Liu, Legal Counsellor, of the Legal Department of the Secretariat of the United Nations, were present in Court. He called upon Mr. Kerno.

Mr. Ivan KERNO presented the statement which is reproduced in the annex [1].

The PRESIDENT called upon the representative of the United States of America.

The Honourable Benjamin V. COHEN presented the statement which is reproduced in the annex [2].

(The sitting was suspended at 12.50 p.m. and resumed at 4 p.m.)

Mr. COHEN continued and concluded his statement [3].

The PRESIDENT called upon the representative of the Government of the United Kingdom of Great Britain and Northern Ireland to present his statement.

Mr. G. G. FITZMAURICE commenced his statement (annex [4]).

The Court rose at 6.30 p.m.

(Signed) BASDEVANT,
President.

(Signed) E. HAMBRO,
Registrar.

[1] See pp. 335-337.
[2] " " 338-348.
[3] " " 348-361.
[4] " " 362-366.

QUATORZIÈME SÉANCE PUBLIQUE [1] (28 VI 50, 10 *h.* 30)

Présents : [Voir treizième séance.]

Le PRÉSIDENT, ouvrant la séance, invite le représentant du Royaume-Uni à poursuivre son exposé.

M. G. G. FITZMAURICE reprend et termine l'exposé reproduit en annexe [2].

Le PRÉSIDENT prononce la clôture de la procédure orale dans l'affaire de l'interprétation des traités de paix avec la Bulgarie, la Hongrie et la Roumanie.

L'audience est levée à 12 h.30.

(Signatures.)

SEIZIÈME SÉANCE PUBLIQUE [3] (18 VII 50, 10 *h.* 30)

Présents : les membres de la Cour mentionnés au procès-verbal de la treizième séance et le Greffier.

Le PRÉSIDENT, ouvrant l'audience, signale que la Cour se réunit aujourd-hui pour prononcer son avis dans la deuxième phase de l'affaire consultative qui a trait à l'interprétation des traités de paix conclus avec la Bulgarie, la Hongrie et la Roumanie. Cet avis fait suite à celui qu'a déjà rendu la Cour dans la même affaire, à la date du 30 mars 1950.

Le Président prie le GREFFIER de donner lecture de la partie pertinente de la résolution, datée du 22 octobre 1949, par laquelle l'Assemblée générale des Nations Unies a demandé un avis consultatif à la Cour.

Cette lecture faite, le PRÉSIDENT rappelle que, conformément à l'article 67 du Statut, le Secrétaire général des Nations Unies ainsi que les représentants des Membres des Nations Unies et autres États directement intéressés ont été dûment prévenus.

La Cour, décidant conformément à l'article 39 du Statut, a choisi, comme devant faire foi, le texte français de l'avis. C'est de ce texte [4] que donne lecture le Président, qui prie, ensuite, le GREFFIER de donner lecture en anglais du dispositif de l'avis.

Le PRÉSIDENT annonce ensuite qu'il va donner lecture de la déclaration jointe à l'avis et faite par M. Krylov, juge [5].

MM. Read et Azevedo, juges, déclarant ne pouvoir se rallier à l'avis de la Cour et se prévalant du droit que leur confère l'article 57 du Statut, ont joint audit avis l'exposé de leurs opinions dissidentes [6].

MM. les juges Read et Azevedo ont fait savoir qu'ils n'avaient pas l'intention de donner lecture de leurs opinions dissidentes.

Le Président prononce la clôture de l'audience.

L'audience est levée à 11 h.15.

(Signatures.)

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[1] Quarante-neuvième séance de la Cour.

[2] Voir pp. 366-379.

[3] Soixantième séance de la Cour.

[4] Voir publications de la Cour, *Recueil des Arrêts, Avis consultatifs et Ordonnances* 1950, pp. 221-230.

[5] *Idem*, p. 230.

[6] » , pp. 231-247 et 248-254.

FOURTEENTH PUBLIC SITTING [1] (28 VI 50, 10.30 *a.m.*)

Present : [See thirteenth sitting.]

In opening the sitting, the PRESIDENT called upon the representative of the Government of the United Kingdom to continue his statement.

Mr. G. G. FITZMAURICE continued and concluded the statement reproduced in the annex [2].

The PRESIDENT declared the closure of the oral proceedings in the case concerning the interpretation of the Peace Treaties with Bulgaria, Hungary and Romania.

The Court rose at 12.30 p.m.

(Signatures.)

SIXTEENTH PUBLIC SITTING [3] (18 VII 50, 10.30 *a.m.*)

Present : the members of the Court mentioned in the minutes of the thirteenth sitting and the Registrar.

In opening the sitting, the PRESIDENT stated that the Court had assembled to deliver the opinion in the second phase of the advisory case concerning the interpretation of the Peace Treaties with Bulgaria, Hungary and Romania. This opinion followed the opinion already delivered by the Court in the same case, on March 30th, 1950.

He called upon the REGISTRAR to read the relevant part of the Resolution of October 22nd, 1949, by which the General Assembly of the United Nations had requested an advisory opinion from the Court.

After the Registrar had read the text, the PRESIDENT recalled that, under Article 67 of the Statute, the Secretary-General of the United Nations and the representatives of the Members of the United Nations and other States directly concerned had been duly notified.

He added that under Article 39 of the Statute, the Court had decided that the French text of the opinion would be authoritative. The President then read this text [4], and requested the REGISTRAR to read the operative clause of the opinion in English.

The PRESIDENT announced that he would read the declaration which Judge Krylov had appended to the opinion [5].

Judges Read and Azevedo, declaring that they were unable to concur in the opinion of the Court and availing themselves of the right conferred upon them by Article 57 of the Statute, appended their dissenting opinions to the opinion of the Court [6].

Judges Read and Azevedo informed the President that they did not wish to read their dissenting opinions.

The president declared the sitting closed.

The Court rose at 11.15 a.m.

(Signatures.)

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[1] Forty-ninth meeting of the Court.

[2] See pp. 366-379.

[3] Sixtieth meeting of the Court.

[4] See publications of the Court, *Reports of Judgments, Advisory Opinions and Orders* 1950, pp. 221-230.

[5] *Idem*, p. 230.

[6] *Idem*, pp. 231-247 and 248-254.

ANNEXES AUX PROCÈS-VERBAUX

EXPOSÉS ORAUX DE JUIN 1950
(DEUXIÈME PHASE)

ANNEXES TO THE MINUTES

ORAL STATEMENTS OF JUNE 1950
(SECOND PHASE)

1. — EXPOSÉ DE M. IVAN S. KERNO

(REPRÉSENTANT DU SECRÉTAIRE GÉNÉRAL DES NATIONS UNIES)
A LA SÉANCE PUBLIQUE DU 27 JUIN 1950, MATIN

Monsieur le Président, Messieurs les Membres de la Cour,

Au cours de la première phase de la procédure concernant l'interprétation des Traités de paix conclus avec la Bulgarie, la Hongrie et la Roumanie, j'ai eu l'occasion de présenter à la Cour, comme représentant du Secrétaire général des Nations Unies, un exposé oral qui consistait surtout en un résumé objectif des points saillants des discussions survenues au sein de l'Assemblée générale. Depuis, comme vous venez de le mentionner, Monsieur le Président, la Cour a donné, à la date du 30 mars 1950, son avis consultatif au sujet des deux premières questions qui lui avaient été posées par l'Assemblée générale dans sa Résolution du 22 octobre 1949. La réponse de la Cour a été affirmative sur ces deux premières questions. Conformément à la Résolution du 22 octobre 1949, le Secrétaire général a fait savoir à la Cour, par un télégramme en date du 2 mai 1950, que, dans les trente jours à partir du 30 mars 1950, les Gouvernements de la Bulgarie, de la Hongrie et de la Roumanie ne lui ont pas fait connaître qu'ils avaient désigné leurs représentants aux commissions prévues par les traités de paix. Le Secrétaire général a confirmé son télégramme par une lettre portant la même date. La Cour est donc appelée à se prononcer sur les questions III et IV de la Résolution du 22 octobre 1949.

Dans mon exposé du 28 février 1950, j'ai indiqué que ce fut le projet commun des délégations de Bolivie, du Canada et des États-Unis d'Amérique [1] qui servit de base à la discussion devant la Commission politique spéciale. La Cour verra dans les procès-verbaux qu'en ce qui concerne le libellé des quatre questions, aucune modification ne fut proposée au cours de la discussion et que c'est le texte primitif de ces quatre questions qui est incorporé dans la Résolution du 22 octobre 1949. En effet, la discussion conserva une allure plutôt générale. Elle ne toucha qu'exceptionnellement aux détails.

[1] Documents A/AC.31/L.1/Rev.1. Dossier, chemise 11.

Il faut cependant remarquer, et je l'ai mentionné dans mon premier exposé, qu'alors que la plupart des délégations étaient disposées en principe à soumettre à la Cour internationale de Justice certaines questions juridiques, plusieurs délégations ont élevé des objections au sujet des questions III et IV. La délégation australienne, notamment, aurait préféré que ces deux questions fussent supprimées et qu'une commission spéciale fît un rapport à l'Assemblée générale sur les difficultés qui resteraient à résoudre une fois que la Cour se serait prononcée sur les deux premières questions. Un amendement présenté à cet effet par la délégation australienne fut cependant repoussé par la Commission politique spéciale. On a aussi exprimé la crainte, au cours de la discussion, que les questions III et IV n'aboutissent indirectement à une revision des traités de paix.

Les objections ainsi formulées par certaines délégations dans la Commission politique spéciale furent partiellement reprises en séance plénière. Étant donné cette situation, le vote de la résolution fut effectué par division. Il donna les résultats suivants :

Question I : 47 pour, 6 contre et 5 abstentions ;
Question II : 46 pour, 5 contre et 7 abstentions ;
Question III : 38 pour, 6 contre et 14 abstentions ;
Question IV : 37 pour, 6 contre et 15 abstentions.

L'ensemble de la résolution fut ensuite adopté par un appel nominal qui donna 47 voix pour, 5 contre et 7 abstentions. On voit donc — et c'est pourquoi je me suis permis de citer ces résultats — que pour les questions III et IV, le nombre des abstentions fut plus considérable. On voit aussi que pour l'ensemble de la résolution, il y eut 5 voix contre et 7 abstentions. Après le vote de l'ensemble de la résolution, une délégation a marqué « quelques doutes au sujet de la formulation juridique et de l'*opportunité de ces questions* », c'est-à-dire les *questions* III et IV. Une autre délégation a estimé qu'elle ne pouvait « s'engager qu'en ce qui concerne la question I ».

Telles sont les quelques remarques que j'ai voulu ajouter à mon premier exposé au sujet des discussions qui se sont déroulées à la Commission politique spéciale et aux séances plénières de l'Assemblée générale.

En ce qui concerne la correspondance diplomatique entre les États en question, le Secrétaire général a communiqué à la Cour à la date du 16 mai 1950 certains documents supplémentaires qu'il avait reçus des Gouvernements du Canada, du Royaume-Uni et des États-Unis d'Amérique. Il s'agit de demandes formulées par ces Gouvernements afin que les Gouvernements de Bulgarie, de Hongrie et de Roumanie procèdent à la nomination de leurs représentants dans les commissions prévues par les traités et qu'une consultation ait lieu pour le choix du troisième membre des commissions.

Les deux questions qui se trouvent maintenant devant la Cour mettent en cause des principes importants de droit international. L'avis consultatif de la Cour aura donc certainement une importance générale considérable. Quant au Secrétaire général des Nations Unies, il suit la procédure de la Cour avec un intérêt particulier. En effet, la question III le concerne spécialement et directement. L'Assemblée générale a indiqué

expressément comme un des considérants de sa résolution et de sa requête à la Cour le fait « qu'il importe que le Secrétaire général dispose d'un avis autorisé concernant l'étendue des pouvoirs que lui confèrent les traités de paix ».

Le Secrétaire général est, comme on le sait, à la tête d'un des organes principaux des Nations Unies. Or, l'Organisation des Nations Unies est basée sur certains buts et principes fondamentaux. Dans toute son activité, le Secrétaire général doit certainement se conformer à ces buts et à ces principes. Ils sont contenus dans le préambule et dans les deux premiers articles de la Charte. « L'ajustement ou le règlement de différends ou de situations, de caractère international », « conformément aux principes de la justice et du droit international » — ces mots figurent dans le premier paragraphe du premier article de la Charte.

Les Traités de paix conclus avec la Bulgarie, la Hongrie et la Roumanie ont confié au Secrétaire général une tâche spéciale. Dans la procédure prévue pour le règlement de tout différend relatif à l'interprétation ou à l'exécution de ces traités, il peut être appelé, le cas échéant, à compléter la composition des commissions prévues « à défaut d'accord .... entre les deux Parties ».

Il n'est pas douteux qu'en ce qui concerne cette tâche spéciale, le Secrétaire général devrait être, de toute façon, guidé et inspiré par les mêmes principes que ceux qui sont à la base de son activité générale conformément à la Charte des Nations Unies. Les préambules des Traités de paix déclarent d'ailleurs que les Puissances alliées et associées d'une part, et, respectivement, la Bulgarie, la Hongrie et la Roumanie d'autre part, « sont désireuses de conclure un traité de paix qui règle, en conformité avec les principes de justice, les questions demeurant en suspens.... » « et qui forme la base de relations amicales entre elles ». Nous retrouvons ici les mêmes idées générales que celles qui sont incorporées dans la Charte des Nations Unies.

Les traités de paix ont prévu que des difficultés pourraient survenir lors de leur interprétation ou de leur exécution. Ils ont institué certaines procédures pour la solution de ces difficultés. Dans le cas concret qui vous occupe, des conceptions et des vues fortement divergentes ont été avancées par les Parties intéressées en ce qui concerne l'applicabilité et l'interprétation de ces dispositions. La Cour a donné son avis sur les deux premières questions et s'apprête maintenant à répondre aux questions III et IV.

Ce deuxième avis présentera évidemment une importance toute particulière pour le Secrétaire général. Je répète que l'essence même de la procédure prévue par les traités de paix exige que l'action éventuelle du Secrétaire général se produise sans que le moindre soupçon de partialité soit possible ; et je répète aussi, et c'est par cette remarque que je voudrais terminer mon exposé, que le Secrétaire général ne pourra définir son attitude qu'à la lumière de l'avis de la Cour et en connaissant pleinement les vues de l'Assemblée générale.

Je vous remercie, Monsieur le Président.

2.—STATEMENT BY Mr. BENJAMIN V. COHEN

(REPRESENTATIVE OF THE UNITED STATES OF AMERICA)
AT THE PUBLIC SITTING OF JUNE 27th, 1950

[*Public sitting of June 27th, morning*]

May it please the Court:

It is a great privilege for me to appear again before this high tribunal to present the view of the United States on the questions on which the General Assembly in its Resolution 294 (IV) of October 21st, 1949, requested an advisory opinion.

At the hearing before this Court, last March, I summarized the proceedings in the Third and Fourth Sessions of the General Assembly to make it clear to the Court that answers to the questions submitted were urgently needed by the Assembly to guide it in the performance of its functions under the Charter. I endeavoured to show why the Assembly desired the Court's guidance in dealing with the important item on its agenda entitled: "The observance in Bulgaria, Hungary and Romania of human rights and fundamental freedoms." This situation had, in the first instance, been brought to the attention of the Assembly because of the widespread concern caused throughout the world by the trials of Cardinal Mindszenty and other Church leaders in these countries.

The resolutions passed by the Assembly at both the Third and Fourth Sessions evinced a desire on the part of the Assembly to have this difficult and disturbing situation explored and adjusted by the orderly procedures for the settlement of disputes provided in the Peace Treaties, assuming, of course, these procedures to be *obligatory*, *applicable* and *available*. Such a disposition of the agenda item seemed to be in accord with the spirit of Article 33 of the Charter, that parties to a dispute should first of all seek a solution by peaceful means of their own choice.

At the hearing last March, this Court heard arguments on the first two questions submitted by the Assembly and on the question of the jurisdiction of the Court to give guidance to the Assembly by way of an advisory opinion on matters of this character relating to non-members of the United Nations without their consent.

In its Advisory Opinion of March 30th, 1950, this Court considered that it had jurisdiction to answer the first two questions and that it was under a duty to do so.

In reference to Question I, the Court was of the opinion that the diplomatic exchanges between Bulgaria, Hungary and Romania on the one hand and certain Allied and Associated Powers signatories to the treaties of peace on the other, concerning the implementation of the human rights clauses contained in the Treaties with Bulgaria, Hungary and Romania, disclose disputes subject to the provisions for the settlement of disputes contained in these treaties of peace.

In reference to Question II, the Court was of the opinion "that the Governments of Bulgaria, Hungary and Romania are obligated to carry out the provisions of those articles referred to in the first question,

which relate to the settlement of disputes, including the provisions for the appointment of their representatives to the treaty commissions".

In brief, the Court has advised the Assembly that the peace treaty procedures for the settlement of disputes are *applicable* and that the parties are *obligated* to carry out these procedures, including the appointment of their representatives to the treaty commissions.

The Court's answers to the first two questions not only make clear that the disputes provisions of the treaties are *applicable* to disputes concerning the observance of the human rights clauses. The Court's answers also make clear that the disputes provisions of the treaties are not, and were not intended to be, optional and voluntary, but *obligatory* and *mandatory*.

It was obviously the hope of the General Assembly that, if the Court's answers to the first two questions were in the affirmative, the parties, in the light of the Court's advice, would forthwith proceed to settle their disputes in accordance with the applicable and obligatory disputes provisions of the treaties. It was undoubtedly that hope which caused the Assembly to direct that the last two questions be submitted to this Court only if, within thirty days after affirmative answers by the Court to the first two questions, the governments concerned have not notified the Secretary-General that they have appointed their representatives to the treaty commission and the Secretary-General has so advised the Court.

But since the Governments of Bulgaria, Hungary and Romania have continued to refuse to carry out the provisions of the treaties regarding the disputes procedures, it now becomes necessary for the Court to consider the last two questions submitted by the Assembly. These questions raise the important practical and legal issue whether the mandatory disputes provisions of the treaties provide a means of settlement and decision which are in fact *available* to fulfil this purpose if the governments concerned fail to carry out the disputes provisions as they have agreed.

Questions III and IV have been read to the Court by the Registrar. These questions raise fundamental issues not only important to guide the Assembly in its immediate problems, but important to guide the United Nations and individual States in their efforts to devise effective and not illusory means for the pacific settlement of disputes. These questions involve a determination whether one party to a treaty containing obligatory procedures for the settlement of disputes has the legal power, by repudiating its obligation to be bound by those procedures, to prevent the other parties to the treaties from having the rights of the parties determined in accordance with those treaty procedures.

The issues involved are of first importance in international law and in the working of the United Nations. By its resolutions, the Assembly has indicated its deep interest in the steps which may be taken to promote and encourage universal respect for, and observance of, human rights and fundamental freedoms. By its resolutions, the Assembly has also indicated its interest in what may be done to make possible the effective application of peaceful settlement procedures previously agreed upon by the parties. The future of the United Nations and the peace of the world may well depend upon the ability of the community of nations to secure human rights and to bring about the use of effective procedures of peaceful settlement.

The Assembly will want to know—when it meets next fall and considers the question, retained on its agenda, of the observance of human rights in Bulgaria, Hungary and Romania—whether the Governments of these countries have *the legal power to frustrate* the carrying out of *the applicable and obligatory treaty procedures* for the settlement of disputes by continuing to refuse to carry out their legal obligation to appoint representatives to the treaty commissions. If the Court advises that the agreed treaty procedures are *available* and that the disputes provisions fairly construed do not enable the defaulting parties to frustrate and defeat the operation of these provisions, the Assembly may wish to continue its efforts to have the treaty disputes, which this Court found to exist in its Advisory Opinion of March 30, settled under the agreed treaty procedures. If, on the other hand, the Court advises, in answering Questions III and IV, that the remedies provided by the peace treaties for settling disputes have been exhausted and are now unavailing, the General Assembly may wish to explore other avenues to facilitate a just settlement.

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

The basic problems raised by Questions III and IV are also of general and wide significance because of the very large number of existing treaties and other international agreements which contain arbitration of settlement clauses similar or analogous to the disputes provisions of the peace treaties. The resolution of these problems can affect deeply the practical effectiveness of existing treaties and agreements as well as the negotiation of future treaties and agreements. The resolution of these problems can influence strongly, for good or evil, the attitude of States towards resort to legal processes in the field of international relations.

It is the view of the United States that the peace treaties, fairly and reasonably construed, give the Governments of Bulgaria, Hungary and Romania neither the legal right nor the legal power to frustrate the operation of the mandatory provisions for the settlement of disputes by refusing to appoint their representatives to the treaty commissions in accordance with their clear treaty obligations.

I turn now to the discussion of the specific questions submitted to this Court by the General Assembly.

Question III.—If one party to a dispute fails to appoint a representative to a treaty commission where that party is obligated to do so; is the Secretary-General of the United Nations authorized to appoint the third member of the Commission upon the request of the other party?

The pertinent provisions of the treaties to which this question relates are in Article 36 of the Bulgarian Treaty, Article 40 of the Hungarian Treaty, and Article 38 of the Romanian Treaty. The provisions of these articles read as follows:

"1. Except where another procedure is specifically provided under any article of the present Treaty, any dispute concerning the interpretation or execution of the Treaty, which is not settled by direct diplomatic negotiations, shall be referred to the Three Heads of Mission.... Any such dispute not resolved by them within a period of two months shall, unless the parties to the dispute mutually agree upon another means of settlement, be referred at the request of either party to the dispute to a Commission composed of one representative of each party and a third member selected by mutual agreement of the two parties from nationals of a third country. Should the two parties fail to agree within a period of one month upon the appointment of a third member, the Secretary-General of the United Nations may be requested by either party to make the appointment."

In its Advisory Opinion of March 30, this Court stated :

"The diplomatic documents presented to the Court show that the United Kingdom and the United States of America on the one hand and Bulgaria, Hungary and Romania on the other, have not succeeded in settling their disputes by direct negotiations. They further show that these disputes were not resolved by the Heads of Mission within the prescribed period of two months. It is a fact that the parties to the disputes have not agreed upon any other means of settlement. It is also a fact that the United Kingdom and the United States of America, after the expiry of the prescribed period, requested that the disputes should be settled by the Commissions mentioned in the Treaties.

This situation led the General Assembly to put Question II so as to obtain guidance for its future action.

The Court finds that all the conditions required for the commencement of the stage of the settlement of disputes by the Commission have been fulfilled.

In view of the fact that the Treaties provide that any disputes shall be referred to a Commission 'at the request of either party', it follows that either party is obligated, at the request of the other party, to co-operate in constituting the Commission, in particular by appointing its representative."

In view of these findings by this Court and the further clear and undeniable fact that the parties have failed to agree within the period prescribed in the treaties upon the appointment of the third member, it necessarily follows from the clear and unequivocal language of the treaties that "the Secretary-General of the United Nations may be requested by either party to make the appointment".

The words of the treaties, Mr. President, give a precise answer to Question III submitted to the Court, and there is no reason to assume that the treaties were not intended to mean what they say. This Court stated in answering Question II : "In view of the fact that the Treaties provide that any dispute shall be referred to a Commission 'at the request of either party', it follows that either party is obligated, at the request of the other party, to co-operate in constituting the Commission." So it may now be said with equal force and equal logic with regard to Question III : in view of the fact that the treaties provide

that "should the two parties fail to agree within a period of one month upon the appointment of a third member, the Secretary-General may be requested by either party to make the appointment", it therefore follows that if one of the parties refuses to co-operate with the other party in an effort to agree upon the appointment of the third member within the prescribed period of one month, "the Secretary-General of the United Nations is authorized to appoint the third member of the Commission upon the request of the other party".

There is nothing in the treaties which suggests that the parties must designate their representatives on the treaty commissions before agreeing among themselves on the third member or, failing such agreement, before requesting the Secretary-General to appoint the third member. The treaties do not provide that the representatives designated by the parties to serve on the treaty commissions shall have anything to do with the selection of the third member. Arbitration clauses not infrequently provide for the selection of a third arbitrator by agreement of the two arbitrators appointed by the parties. But such is not the case here. Selection of the third member under the treaties is to be sought in the first instance "by mutual agreement of the two parties from nationals of a third country". Failing mutual agreement on the third member, either party may request the Secretary-General to make the appointment. It is the parties themselves and not their appointed representatives on the treaty commissions to whom the function of arranging for the appointment of the third member is entrusted.

As this Court stated in its Advisory Opinion of March 30th, 1950, when one party exercises its rights under the treaty to refer a dispute to a treaty commission, the other party is obligated to co-operate in setting up the commission. But as long as the parties co-operate in good faith it is left to them whether they wish to appoint their representatives before or after the selection of the third member.

As a matter of fact, when the United States first exercised its rights under the treaties to request the reference of the disputes to treaty commissions, the United States suggested in its notes of August 1st, 1949, to the three Governments that they join with the United States in naming the treaty commissions. It was only after receiving wholly unsatisfactory replies rejecting any suggestion of co-operation in naming the commissions that the United States announced on January 5th of this year the appointment of its representative to the treaty commissions.

But it is possible under the treaties, for either or both of the parties if they wish, to arrange for the selection of the third member before naming their representatives to the treaty commissions. Knowledge of the identity of the third member might quite legitimately influence the parties in choosing their own representatives. Appointment to the commission of members able to speak the same language and possessing somewhat similar experiences and talents might well facilitate the work of the commission and contribute to mutually satisfactory and constructive results.

Certainly the failure of one of the parties to fulfil its obligation to name its representative to the treaty commission and to co-operate in an effort to agree upon the third member affords no ground for taking away the clear treaty rights of the other party to request the Secretary-General to appoint the third or neutral member.

There is no reason to deny to the Secretary-General the authority which the treaties expressly sought to confer upon him. As chief administrative officer of the United Nations, he was given a vital part to play in the pacific settlement of disputes under the treaties. When the treaties were drawn, the States responsible for their drafting had the confidence to entrust to him the appointment of the third member of the commissions if the parties could not agree among themselves. Aware of their own conflicting ideologies, they gave the authority to name the impartial member of the commission to the Secretary-General, believing that in event of disagreement he could best choose a third neutral member capable of judging and understanding widely divergent points of views.

There is no reason to read into the treaties conditions which the draftsmen wisely omitted from the treaties. They did not require protracted negotiations between the parties to agree upon the third member as a condition to the exercise of the Secretary-General's authority. They did not require the prior appointment of the representatives of the parties as a condition to the appointment by the Secretary-General of the third member. They wisely sought to make possible without prolonged bickering and quarrelling between the parties the appointment by the Secretary-General of a third member whose fairness and non-partisanship would be recognized and accepted by both parties.

In difficult situations where the parties are deeply suspicious of one another and concerned to safeguard their own interests in disputed matters, an appointment by the Secretary-General may well prove to be just the catalyst necessary to induce the parties to name their representatives and to accept the treaty procedures for the settlement of their disputes. Indeed, despite the tension and strong feelings between the parties to the treaties, we venture still to hope that the selection of a third member by the Secretary-General will serve this constructive and useful purpose. Certainly, however, there would be no justification in denying the Secretary-General the authority the treaties confer upon him on the ground that the exercise of his authority would or might ultimately prove to be abortive.

The treaties confer upon the Secretary-General the authority to appoint the third member of a treaty commission when the parties are unable to agree upon the selection of a third member within one month. The language of the treaties is clear. There is no reason in law or in equity why the words of the treaties should not be construed to mean what they say. The United States hopes that the Court will have no difficulty in giving an affirmative answer to Question III. A negative answer would, in our judgment, be a serious blow to the progress of international law in the field of pacific settlement of disputes.

I turn now to Question IV.

Question IV.—Would a Treaty Commission composed of a representative of one party and a third member appointed by the Secretary-General of the United Nations constitute a commission, within the meaning of the relevant treaty articles, competent to make a definitive and binding decision in settlement of a dispute?

It is hoped, as I have just explained, that if this Court answers Question III in the affirmative and the Secretary-General appoints the

neutral member of the commission, all of the parties will appoint their own representatives on the commission as is their clear right and duty to do.

But as it is possible, unfortunately, that the three Governments will continue to refuse to carry out their obligations to appoint their representatives, the General Assembly has requested the guidance of this Court as to the authority of the treaty commissions to proceed without the representatives of the defaulting parties.

In considering Question IV, Mr. President, it is important for the Court to bear in mind that Question IV, like Question III, is based on the assumption that one of the parties continues to refuse to exercise its right and to fulfil its obligation to co-operate in setting up the commission. The General Assembly, I am sure, did not even intend to suggest that two members of the commission could exclude the other member from its deliberations or could proceed to decision if the other member died or became seriously ill or otherwise incapacitated without waiting a reasonable time for the appointment of his successor. The problem on which the General Assembly desires advice is the right of the two members to proceed if one of the parties refuses to exercise its right and to fulfil its duty to appoint its representative.

It is also very important, Mr. President, to bear in mind that Question IV is directed to the *competency* of the two members to make a definitive and binding decision in settlement of a dispute if one of the parties refuses to appoint its representative. An affirmative answer by this Court to Question IV would merely mean that in these circumstances the two members have the jurisdiction and authority to proceed and to make binding and definitive decisions. But an affirmative answer to the question, in our judgment, would not preclude the two commissioners considering objections to their own jurisdiction over the subject matter of the various claims forming the basis of the dispute. Nor would an affirmative answer to the question prevent the two commissioners from adhering to principles analogous to those prescribed for this Court in Article 53 of its Statute, in dealing with cases in which one of the parties fails to appear. An affirmative answer to the question would not exclude a finding by the commissioners that they were unable to obtain the facts necessary to make a decision on the merits. An affirmative answer will simply sustain the authority of the commissioners to decide for themselves what they will or will not decide. An affirmative answer will simply mean that one party to the treaty cannot, by its unilateral and illegal default, divest a duly constituted majority of the commission of the authority conferred upon them by the treaty to make definitive decisions binding upon the parties. See International Law Commission: *Report on Arbitration Procedure*, by Georges Scelle, United Nations General A/CN.4/18 21 March, 1950, pages 25-26, pages 44-46, pages 64-65.

As Professor Scelle stated in his recent *Report on Arbitration Procedure* to the International Law Commission, *supra*, page 65:

> "It may perhaps be objected that the persistent failure of the defaulting government to appear may in practice make it impossible for the hearing to proceed. That is the eternal objection we have already encountered. But the violation of law cannot prevent the laying down of the law whenever this is practicable; and in the

case with which we are concerned, the tribunal has an effective penalty in cases in which it can be applied: that of allowing the opponent of the defaulting government to call for a judgment in favour of its claims, of pronouncing such a judgment and even, in the absence of proposals to this effect by the party concerned, of sentencing the refractory party by default whenever the judge feels sufficiently sure of his ground."

It is also important to bear in mind that the disputes articles of these treaties do not provide that a decision can be reached only through a unanimous opinion concurred in by the representatives of the parties and the neutral third member. On the contrary, the last paragraph of the disputes articles specifically provides:

"The decision of the majority of the members of the Commission shall be the decision of the Commission, and shall be accepted by the parties as definitive and binding."

It is the opinion of the Government of the United States that this treaty clause clearly confers on a majority of the treaty commission the authority to make decisions for the commission which are definitive and binding upon the parties. It is the view of the Government of the United States that, unless it can be shown that a majority of the commission have acted contrary to other provisions of the treaty, or contrary to accepted rules of international law in the light of which the parties may be assumed to have contracted, the authority or competence of a majority of the commission to make definitive decisions, binding on the parties, cannot be questioned.

In the peace treaties, the parties have agreed to accept procedures for the definitive settlement of their treaty disputes. The parties have no more right to withdraw or repudiate their acceptance of these settlement procedures than they have to withdraw or repudiate their acceptance of the treaties themselves. Parties to a treaty accept the law of the treaty. *Le contrat fait la loi*. The treaties are the law between the parties.

I therefore shall first consider Question IV in the light of the applicable treaty provisions and then consider Question IV in the light of the general rules and doctrines of international law governing treaty obligations.

The disputes articles of the treaties were not intended to be optional provisions; they were deliberately formulated to provide an effective, orderly and obligatory procedure for the definitive settlement of disputes.

In its written statement, the Government of the United States has reviewed the negotiations in the Council of Foreign Ministers which indicate that the disputes clauses were not hastily drawn without full knowledge of their implications.

The disputes articles and their implications were also considered by the Paris Peace Conference in the summer of 1946. The Paris Conference recommended that disputes not settled by the Heads of Mission should be referred to the International Court of Justice—to this Court. The Paris Conference rejected a Soviet proposal merely to leave the settlement of disputes to the Heads of Mission acting in concert. Paris Peace Conference, 1946, Selected Documents, Department of State Publication 2868: *Romanian Treaty*, Draft Article 36, United Kingdom-

United States proposal, at page 677, U.S.S.R. proposal at page 678, Report of the Political and Territorial Commission for Romania, C.P. (Plen) Doc 15 at page 733, vote in plenary session at page 819 ; *Bulgarian Treaty*, Draft Article 34, United Kingdom-United States proposal at page 863, U.S.S.R. proposal at page 864, Report of the Political and Territorial Commission for Bulgaria, C.P. (Plen) Doc. 22 at pages 790-910, vote in plenary session at page 996 ; *Hungarian Treaty*, Draft Article 35, United Kingdom-United States proposal at page 1041, U.S.S.R. proposal at page 1042, Report of Political and Territorial Commission for Hungary, C.P. (Plen.) Doc. 27 at pages 1116-1117, vote in plenary session at page 1195. The Council of Foreign Ministers accepted the substance of the Peace Conference recommendation with one important exception : they substituted a treaty commission for the Court.

A careful examination of the procedure for settlement of disputes contained in the disputes articles discloses that, while the draftsmen left the door open for mutual agreement between the parties at all stages, they very carefully and deliberately avoided allowing the procedure at any stage to be stalled or frustrated by the absence of agreement among the parties.

The disputes article begins with the provision that any dispute concerning the interpretation or execution of the treaty which is not settled by direct diplomatic negotiations shall be referred to the Three Heads of Mission. It is important to note that the provision does not require any showing that further efforts at diplomatic negotiation would be unavailing. Whenever one party feels that the possibilities of negotiation are exhausted, that party is at liberty to put the dispute before the Heads of the Three Missions.

The disputes article allows the Heads of Mission two months within which to resolve the dispute. To resolve the dispute they must act in concert, that is, unanimously. But if the Heads of Mission do not resolve the dispute within two months, whether or not they have made serious effort to resolve it, their authority ceases. Unless the parties to the dispute mutually agree on another means of settlement, the disputes article provides without further qualification that the dispute *shall* be referred, at the request of *either party*, to a treaty commission.

The treaty commission is to be composed of a representative of each party and a third member who is to be a national of a third country. If the parties do not agree within one month upon the appointment of the third member, regardless of the reason for the failure to agree, either party may request the Secretary-General to make the appointment.

Of course, without express provision to the contrary, all members of a treaty commission would have a right to participate in the work of the commission if they wished. But the disputes article carefully avoids stating that a treaty commission can meet, do its business, and give its decisions only if all three members attend. On the contrary, the disputes article significantly provides that "the decision of the majority of the members of the commission shall be the decision of the commission, and shall be accepted by the parties as definitive and binding".

I submit, Mr. President, that a careful reading and study of these treaty provisions show beyond a reasonable doubt that they were deliberately drafted to provide procedures of settlement which would

not depend for their effectiveness on any agreement of the parties or on unanimity within the treaty commission. The treaties sought to provide procedures of settlement which could not be blocked by the action or non-action of any one of the parties.

These treaty provisions are obviously designed and were intended to provide for the definitive and obligatory settlement of any disputes that may arise under the treaties between the parties. The several parties are not left free by the treaties to accept or reject the settlement procedures at their own pleasure. The parties are committed in the treaties to definite and final settlement of their disputes by a majority of a treaty commission if other prescribed methods of settlement prove, as they have proved in the instant case, to be unsuccessful.

Draftsmen of treaties cannot provide in detail for every possible contingency or situation that may arise thereunder. Treaty provisions must be interpreted in the light of their known purposes and objectives. International law may find that some conditions must be implied, although not spelled out in treaties, in order to make effective the known purposes and objectives of the treaties. But international law should not, and I contend does not, read into treaties conditions which defeat their very purposes and objectives.

Here the treaties in question provide that the decision of the majority of the members shall be the decision of the commission and shall be accepted by the parties as definitive and binding. If the neutral member and the representative of one of the parties on the commission deliberately sought to exclude the representative of the other party from participating in its proceedings, international law might well say that the majority of the commission in reaching a decision had deprived one of the parties of the rights which the treaty had intended to confer, even though that right was not spelled out in the treaty. But it is quite a different situation where one of the parties refuses to appoint its representative to the commission, and the majority of the members willing and able to act proceed to a decision. To read into the disputes article of the treaty a condition—which certainly is not spelled out in the treaty and which clearly would have been rejected had it been proposed—that a party or its representative may prevent a majority of the commission from reaching a decision by refusing to participate in the commission's deliberations, would be to defeat and destroy the very purpose and objective of the disputes article.

Obviously not only in the instant case but in the future drafting of treaties the application of the rule of law to treaty disputes would be seriously retarded by a ruling that procedures clearly intended to be obligatory could be evaded and defeated by the wilful default of one of the parties. Such a ruling would convert obligatory procedures for settlement into optional procedures contrary to the plain intent of the treaties, and would, for all practical purposes, nullify their effectiveness. For certainly it is not practical or wise to expect the parties to be able to guard against such result by spelling out in all their ugliness conditions indicating the parties' want of confidence in each other's good faith.

A ruling that procedures for the settlement of disputes intended to be obligatory could in fact be evaded by any party with impunity would also seriously affect the will even of otherwise law-abiding States to respect those procedures when they found them inconvenient. It would

encourage the evil notion that States can be expected to observe their treaty obligations only in so far as they consider their observance advantageous.

The parties to the treaties here in question accepted the obligatory jurisdiction of the treaty commissions. Once the conditions required for the commencement of the stage of the settlement of disputes by the commissions have been fulfilled, the parties have no right to repudiate the jurisdiction of the commissions by failure to co-operate in their procedures. The parties have no more right, in our view, to repudiate the obligatory jurisdiction of the treaty commissions than they would have to repudiate the compulsory jurisdiction of this Court had they by their treaties accepted the compulsory jurisdiction of this Court instead of that of the treaty commissions.

The construction of the treaties which we here urge is fully supported by the accepted canons of treaty interpretation and by well-established legal principles.

[*Public sitting of June 27th, 1950, afternoon*]

I shall now endeavour to show that the construction which we have based upon the treaty clauses here in question is fully supported by the accepted canons of treaty interpretation and by well established legal principle. The canons of treaty interpretation which support the construction of the treaties which we urge are not new. They do not seek to impose upon States artificial and unorthodox conceptions of right and wrong. They seek rather to give life and meaning to the regime of law which States by their treaties have obligated themselves to honour and to respect. They are designated to ensure that the just expectation of States which observe their treaty obligations shall not be frustrated and defeated by the arbitrary and illegal acts of States which fail to carry out their obligations.

These classical canons of interpretation were eloquently expressed by the Swiss jurist, Vattel, nearly two hundred years ago in his chapter on the interpretation of treaties in his great treatise on *The Law of Nations*. With your permission, Mr. President, I will quote at some length what Vattel has written, which in my opinion is very pertinent to the solution of the question before us:

> 'Any interpretation that leads to an absurdity should be rejected; or, in other words, we cannot give to a deed a sense that leads to an absurdity, but we must interpret it so as to avoid the absurdity. As it is not to be presumed that a person intends what is absurd, we cannot suppose that the speaker meant that his words should lead to an absurdity. No more can it be presumed that he approached so serious a matter in a trifling spirit; for what is dishonest and unlawful is not to be presumed. By the word *absurd* is meant not only what is *physically* impossible, but also what is *morally* impossible; that is to say, what is so contrary to reason that it cannot be attributed to a man of good sense....
>
> The rule we have just laid down is one of absolute necessity and should be followed even when the text of the law or treaty, considered in itself, contains nothing that is obscure or equivocal;

for it must be observed that uncertainty in the meaning to be given to a law or treaty is not due only to obscurities or to other faults of expression, but is likewise due to the limitations of the human mind, which cannot foresee all cases and all circumstances nor apprehend all the consequences of what is enacted or agreed to, and finally, to the impossibility of entering into so many details. Laws and treaties can only be stated in general terms, and in being applied to particular cases they should be interpreted agreeably to the intention of the legislator or of the contracting parties. In no case can it be presumed that the parties had in mind anything absurd. Consequently, when their expressions, taken in the proper and ordinary sense, lead to absurdities, we must deviate from that sense just so far as is necessary to avoid the absurdity....

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

Vattel's principles of interpretation have been quoted or paraphrased and applied in many decisions of international tribunals, e.g., *Costa Rican Claims*, II, International Arbitrations (Moore, 1898), 1551, 1565 (1862); *Hudson's Bay Company Claims*, I, *id.*, 237, 266 (1869); *The Island of Timor*, Hague Court Reports (Scott, 1916), 355, 384 (1914); *Eastern Extension, Australasia and China Telegraph Company, Ltd.*, 18, A.J.I.L. (1924), 835, 838 (1923); *Cayuga Indian Claims*, 20, A.J.I.L. (1926), 574, 587 (1926); *Polish Postal Service in Danzig*, Permanent Court of International Justice, Advisory Opinion No. 11, May 16, 1925, Series B, No. 11, pages 6-45, at pages 39-40; *The Free Zones of Upper Savoy and the District of Gex*, Permanent Court of International Justice, Order, August 19, 1929, Series A, No. 22 pages 5-51, at pages 13.

These canons of interpretation were employed by the Permanent Court of International Justice in two cases which are particularly illuminating in relation to the issues now before this Court.

In the *Chorzów Factory* case, Judgment No. 8 (jurisdiction), July 26th, 1927, Series A, No. 9, pages 4-44, at page 25, the Permanent Court had to consider whether Article 23, paragraph 1, of the Geneva Convention of May 15th, 1922, between Germany and Poland, which required submission to the decision of the Permanent Court of "differences of opinion, resulting from the interpretation and application of Articles 6

to 22", contemplated differences in regard to reparations claimed for the violation of those articles. Poland contended that the Court had jurisdiction only to consider the naked question whether Articles 6 to 22 of the convention had been correctly applied, but not jurisdiction to proceed to a decision settling the dispute, that is, determining the amount of reparations due. The Permanent Court rejected this contention, saying:

> "The object of these methods of obtaining redress—and that of Article 23 in particular—seems to be to avert the possibility that, in consequence of the existence of a persistent difference of opinion between the contracting Parties as to the interpretation or application of the Convention, the interests, respect for which it is designed to ensure, may be compromised. An interpretation which would confine the Court simply to recording that the Convention had been incorrectly applied or that it had not been applied, without being able to lay down the conditions for the re-establishment of the treaty rights affected, would be contrary to what would, *prima facie*, be the natural object of the clause; for a jurisdiction of this kind, instead of settling a dispute once and for all, would leave open the possibility of further disputes.
>
> This conclusion, which is deduced from the object of a clause like Article 23 and, in general, of any arbitration clause, could only be defeated, either by the employment of terms sufficiently clear to show a contrary intention on the part of the contracting Parties, or by the fact that the Convention had established a special jurisdiction for claims in respect of reparations due for the violation of the provisions in question or had made some other arrangements regarding them."

The reasoning of the Permanent Court in the *Chorzów Factory* case is equally applicable here. Paraphrasing the language of the Permanent Court to make it apply to the present case, it may be said here: An interpretation of the treaty procedures that would simply record that one of the parties had violated its obligation to submit thereto but would not enable the treaty commissions to lay down the conditions for the re-establishment of the treaty rights affected, would be contrary to what would, *prima facie*, be the natural object of the treaty procedures. So, restricting the jurisdiction of the treaty commissions, instead of settling a dispute once and for all, would leave open the possibility of further disputes. The natural object of the treaty procedures could only be defeated by the employment of terms sufficiently clear to show a contrary intention on the part of the contracting parties or by the fact that the treaties had established other arrangements for settling the disputes in question.

Likewise in the *Mosul* case, Advisory Opinion No. 12, November 21st, 1925, Series B, No. 12, pages 6-35, the Permanent Court of International Justice refused to construe a disputes article in a way which would render it ineffective, even though the language of the disputes article was much less clear than the language of the disputes articles here involved. Article 3, paragraph 2, of the Lausanne Treaty provided that in the event of no agreement being reached within nine months between Turkey and Iraq on the frontier separating those two countries, "the dispute shall be referred to the Council of the League of Nations".

The Court was asked to say whether the decision to be taken by the Council was to be "an arbitral award, a recommendation or a simple mediation" (*id.*, at p. 7). Turkey had maintained in the Council that a definitive settlement of the frontier could not be made without its consent. But the Permanent Court found "both from a grammatical and logical point of view as well as from that of the role assigned to that article in the Peace Treaty" (*id.*, at p. 23), that "the intention of the parties was, by means of recourse to the Council, to ensure a definitive and binding solution of the dispute which might arise between them" (*id.*, at p. 19). In that case the Court had to infer from the general context of the disputes article that it was the intention of the parties that the Council was to have the authority to make a definitive and binding decision. In the disputes articles of the peace treaties now before this Court it is expressly provided that the decisions of the treaty commissions shall be definitive and binding.

In the *Mosul* case, moreover, the Permanent Court had to consider whether the Council could make its decision without the concurrence of the interested States. Article 5 of the Covenant of the League of Nations provided that "except where otherwise expressly provided in this Covenant or by the terms of the present Treaty, decisions at any meeting of the Assembly or of the Council shall require the agreement of all members of the League represented at the meeting". The only pertinent exception to this rule in the Covenant was that in paragraph 6 of Article 15, which provided that members of the League would not go to war with any party to a dispute which complied with the recommendations of the Council that are unanimously agreed to by the members other than the parties to the dispute. The Treaty of Lausanne, unlike the present peace treaties, made no express provision for the Council taking action by majority vote. Although the exception provided in paragraph 6 of Article 15 of the Covenant was not literally applicable, the Permanent Court had no difficulty in extending the principle of that article to the *Mosul* case. The Court stated:

> "From a practical standpoint, to require that the representatives of the Parties should accept the Council's decision would be tantamount to giving them a right of veto enabling them to prevent any decision being reached; this would hardly be in conformity with the intention manifested in Article 3, paragraph 2, of the Treaty of Lausanne." (*Id.*, at p. 32.)

I submit, Mr. President, that with equal cogency it may be stated here that from a practical point of view to refuse to recognize the right of a majority of a treaty commission to proceed to decision if one of the parties refuses to appoint its representative would be tantamount to giving a party a right of veto enabling it to prevent any decision being reached by the treaty commission. And this would not be in conformity with the intention clearly manifested in the disputes articles of the peace treaties.

Professor Georges Scelle in his recent scholarly *Report on Arbitration Procedure* to the International Law Commission of the United Nations of which he was recently elected President (United Nations General A/CN4/19, 21st March, 1950, pp. 21-28), considers in an objective manner the legal consequences which should follow from a refusal to fulfil the obligation to resort to arbitration. He states (at p. 23):

"As far as pure juridical logic is concerned, there can be no doubt that a party who has consented to the obligation to submit to arbitration and, above all, to the stipulations for bringing it about by setting up a tribunal, is failing to fulfil an obligation in positive law by refusing to carry out the procedural acts which he has undertaken to perform. Consequently, the party who has carried out his obligations may not be deprived of the juridical guarantees to which he is entitled or of the settlement of the dispute. The solution is one generally adopted in municipal law, and particularly in French law. From the point of view of international law and order the solution should logically be the same. Anarchy is promoted whenever a conventional and constructive juridical principle is left unapplied and whenever an 'international offence' goes unpunished."

After reviewing the considerations based on "political expediency" which have been urged against the "proper juridical solution", Professor Scelle concludes (p. 24):

"These last considerations"—which relate to political expediency —"are not entirely convincing. It is possible to argue that, except when a refusal to co-operate makes it materially impossible to carry out the procedure, the tribunal can continue to function and that the situation is the same as that produced by the withdrawal of one of the judges from an established court. We shall see that in the latter case the solution in our view cannot be in doubt. Thus, if the tribunal can be set up and function without the participation of the representative of the recalcitrant State, its decision will be valid and can be invoked against the abstaining government, which cannot plead nullity, since *nemo auditur propriam turpitudinem allegans*."

I respectfully submit, Mr. President, that the application to the problem now before the Court of accepted canons of treaty interpretation requires the conclusion that obligatory treaty procedures for the definitive settlement of disputes cannot be frustrated by the unlawful refusal of a party to appoint its representative to a treaty commission. The treaty procedures provide for action by a duly constituted majority of a treaty commission. *To recognize the power of a State to frustrate the treaty procedure by refusing to appoint its representative would be to give greater legal effect to its act of default than would be given to the negative vote of its representative on the treaty commission, if appointed.* There is nothing in the treaties or in the principles of international law to require or sanction such a manifestly absurd and inequitable result.

To hold that a State may, by defaulting upon its obligation to appoint a representative to a treaty commission, prevent the other members of a treaty commission from proceeding to decision, would nullify the crucial provisions of the treaty procedures. If a State could prevent definitive settlement by a commission through refusing unlawfully to appoint its representative, the obligatory character of the treaty procedures would be destroyed and the parties would for practical purposes be in the same position as if the treaty contained no provision for the settlement of disputes.

With respect to the problem presented by Questions III and IV, the Court has already determined that the parties to the peace treaties gave their consent to the obligatory settlement of disputes at the time when those treaties were concluded ; the Court has held that they are obligated to appoint their representatives to the treaty commissions. It is thus established authoritatively that the disputes articles of the peace treaties are binding international agreements, and that the consent to arbitral procedures given in them is not subject to revocation at the will of one party alone. It would, therefore, be anomalous and contrary to traditional canons of treaty interpretation to hold that one party's attempt at unilateral revocation of consent through refusal to appoint a representative could be effective to defeat the operation of the arbitral agreement.

I have endeavoured to demonstrate, Mr. President, that an affirmative answer to Question IV is necessary and proper to effectuate the purpose and object of the disputes articles and is in full accord with the general canons of treaty interpretation enunciated by international tribunals and international jurists. I shall now try to show that an affirmative answer is also required by the application of two fundamental principles of law which have long been recognized by national and international tribunals. One of these principles—the principle of waiver—prevents a party which refuses to exercise its right, such as the right to appoint a treaty commissioner, from asserting that the treaty commission cannot proceed without such appointment. The other—the principle that a party may not profit from its own wrong—likewise prevents a party which fails to carry out its obligation to appoint a treaty commissioner from asserting that the treaty commission cannot proceed without such appointment. Whether the power of appointment is regarded as a right or as a duty, the failure of a party to exercise its power of appointment should, under these well-established principles, deprive that party of any right to object to the commission proceeding without the appointment of that party's representative.

I shall first discuss the principle of waiver. *Volenti non fit injuria.* The doctrine of waiver is well established in international law and in the national law of most if not all countries. It may be traced back to many maxims of ancient lineage. *Volenti non fit injuria.* No injury is done to him who consents. In Justinian's Digest (50.17.203) it is stated : "*Quod quis ex culpa sua damnum sentit non intellegitur damnum sentire.*" He who suffers damage through his own fault is not deemed to suffer damage.

A recent and most significant illustration of this doctrine of waiver in the international field is the now accepted practice of the Security Council of the United Nations to make substantive decisions by an affirmative vote of seven members, including the concurring votes of the permanent members *present* and *voting*. The Charter does not refer to members *present* and *voting*. The Charter states that "decisions of the Security Council on all others matters [than procedural matters] shall be made by an affirmative vote of seven members, including the concurring votes of the permanent members". But it has been the uniform practice of the Security Council to consider an abstention from voting by a permanent member as a waiver of its right of veto, and no permanent member has later sought to contest the validity of a vote from which it abstained.

Another illustration of the doctrine of waiver in the international field is found in Article 53 of the Statute of this Court, which was also a

part of the Statute of the Permanent Court of International Justice. When a party accepts the jurisdiction of this Court—whether through having accepted its compulsory jurisdiction generally, or through having agreed in advance to accept its jurisdiction in a particular case or in a particular category of cases, or through voluntarily submitting to its jurisdiction in a particular case—that party has a right to be heard. But, under Article 53 of the Statute, if a party does not avail itself of its right to be heard, it cannot prevent this Court from proceeding to judgment. Once a party has accepted or bound itself to accept the jurisdiction of this Court, it has no right, by abstaining from exercising its rights, to divest this Court of its jurisdiction. Under Article 53, if a party which has accepted the jurisdiction of this Court fails to appear, it is for this Court to satisfy itself whether it has jurisdiction under the Statute and whether the claim of the other party is well founded in fact and in law. See *Minority Schools in Upper Silesia*, Permanent Court of International Justice, Judgment No. 12, April 26, 1928, Series A, No. 15, pages 4-88, at p. 25; *The Corfu Channel* (Preliminary Objection), International Court of Justice, Judgment of March 25, 1948, pages 15-48, at pages 27-29. Moreover, the jurisdiction of this Court to proceed to judgment would not be affected by the fact that if the defaulting party had chosen to exercise its right to defend itself, it might also have had the right under Article 31 of this Court's Statute to choose and *ad hoc* judge.

An agreement to accept the jurisdiction of a treaty commission under the disputes articles of these treaties is in our judgment analogous to an agreement to accept the jurisdiction of this Court. Parties to the treaties have a right to present their case to the treaty commissions just as parties in cases before this Court have the right to present their case to this Court. Parties to the treaties have a right to appoint their representatives on the treaty commissions just as parties before this Court have a right under appropriate circumstances to appoint *ad hoc* judges to sit with this Court. But there is no more justification for permitting a party, by refusing to avail itself of its rights, to defeat the obligatory jurisdiction of a treaty commission than there is for permitting a party under similar circumstances to defeat the jurisdiction of this Court.

It has never been, and it is not now, suggested that any party should be excluded from its right to appoint its representative on a treaty commission. Determination that a majority of a treaty commission may proceed and decide a case referred to it when one party fails or refuses to avail itself of the right to appoint a representative on the commission does not involve the exclusion of that party from the commission. Affirmative answers to Questions III and IV would not exclude Bulgarian, Hungarian and Romanian representatives from the treaty commissions if these three countries decided to appoint representatives at any stage before final decisions by the commissions. The commissions would sit with two members only if and so long as the three countries failed to name their representatives. These three Governments are not denied their right to have their representatives on the commissions. If their representatives are not appointed, it is due to their deliberate abstention and wilful default.

No State can claim that it rights are denied or prejudiced when it refuses to avail itself of the rights which it claims are denied or prejudiced. No State can claim that it is hurt by its own waiver of its rights. A State which has bound itself to accept procedures for the settlement of disputes

cannot claim that its rights to participate in such procedures have been denied or prejudiced when it refuses to avail itself of such rights.

I will now consider, Mr. President, the application to the present case of the well-known doctrine that no one can profit from his own wrong. The failure of the Governments of Bulgaria, Hungary and Romania to appoint their representatives on the treaty commissions is not simply a failure to exercise their rights under the treaties. It is also a failure to carry out their obligations under the treaties, and this Court has so found.

It is a basic principle of jurisprudence that no one can profit from his own wrong. In Justinian's Digest we find this principle expressed in these words: "*Nemo ex suo delicto meliorem suam condicionem facere potest.*" Digest 50.17.134.1. No one can improve his position through his own wrong. The same principle finds expression in the maxim: *Nemo auditur propriam turpitudinem allegans.*

International law has expressed this principle in varying ways. In the *Chorzów Factory* case, the Permanent Court of International Justice stated the doctrine in these terms:

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

This principle has been applied in many situations. A number of cases have held that when a State has contracted an international obligation it cannot plead in defence, against a claim based on such obligation, that its constitution or domestic law prevents the recognition of the claim. Failure to enact domestic legislation to bring domestic law into line with the requirements of an international obligation is no defence against a claim based on the obligation. *German Settlers in Poland*, Permanent Court of International Justice, Series B, No. 6, 36 (1923); *Exchange of Greek and Turkish Populations*, Series B, No. 10, 19-21 (1925); *The Chorzów Factory* (Judgment No. 13, Indemnity), Series A, No. 17, 33 (1928); *The Free Zones of Upper Savoy and the District of Gex* (Order, December 6, 1930), Series A, No. 24, 12 (1930); same (Judgment No. 17), Series A/B, No. 46, 167 (1932); *Greco-Bulgarian "Communities"*, Series B, No. 17, 32 (1930); *Treatment of Polish Nationals in Danzig*, Series A/B, No. 44, 24 (1932).

In the proposed Declaration on rights and duties of States which the International Law Commission submitted to the last session of the General Assembly and which the General Assembly commended as "a notable and substantial contribution towards the progressive development of international law and its codification", the principle that no State should be permitted to profit by its own wrong is clearly recognized. General Assembly Resolution 375 (IV). Article 13 of that declaration provides that: "Every State has the duty to carry out in good faith its obligations arising from treaties and other sources of international law, and it may not invoke provisions in its constitution or in its laws as an excuse for failure to perform this duty." Articles 10 and 11 go

further and impose the duty on other States not to give assistance or recognition to acts which would enable a State to profit by its own wrong. Thus, Article 10 provides that: "Every State has the duty to refrain from giving assistance to any State which is acting in violation of Article 9, or against which the United Nations is taking preventive or enforcement action"; and Article 11 provides that: "Every State has the duty to refrain from recognizing any territorial acquisition by another State action in violation of Article 9." Article 9, which is referred to in the articles I have quoted, provides that: "Every State has the duty to refrain from resorting to war as an instrument of national policy, and to refrain from the threat or use of force against the territorial integrity or political independence of another State or in any other manner inconsistent with international law and order."

There are also a number of States holding that after submission to international arbitration one of the parties cannot by withdrawing its arbitrator frustrate the arbitration. *Colombia* v. *Cauca Co.*, 190 U.S. 524 (1903); *French-Mexican Mixed Claims* [1929-30] Ann. Dig. 424, 425 (1929); *United States-German Mixed Claims*, Sabotage Claims, Decision of the Commission rendered by the Umpire June 15, 1939, VI, Hackworth, *Digest of International Law* (1943), pp. 90-97. As Mérignhac says in his *Traité théorique et pratique de l'arbitrage international* (1895) 276-77, "It is, indeed, impossible to admit that one arbiter through clear bad faith or simple negligence can paralyze the action of the tribunal." This proposition is strongly supported by Professor Georges Scelle in his report to the International Law Commission to which I have already referred, See *Report on Arbitration Procedure* by Georges Scelle, United Nations, General A/CN.4/18, 21 March 1950, pages 32-35; 2, Hyde, *International Law*, (2nd rev. ed., 1945), 1629; Witenberg, *L'Organisation judiciaire, la procédure et les sentences internationales* (1937), 281; III, Phillimore, *Commentaries upon International Law* (2nd ed., 1873), 4. But see III, Calvo, *Le droit international théorique et pratique* (5th ed., 1896), sec. 1768. I shall review briefly the facts in the principal cases which support this proposition.

In Colombia v. *Cauca Co.*, *supra*, the Republic of Colombia and an American Company holding a concession in Colombia agreed to submit a controversy to a special commission. This commission consisted of three arbitrators—one appointed on behalf of Colombia, one on behalf of the company, and the third by agreement between the United States Secretary of State and the Colombian Minister at Washington. The Commission was to reach its decisions by majority vote. The controversy in question was tried before the commission. Toward the end of the proceedings and just prior to the making of the award, the Colombian commissioner announced his resignation. The remaining two commissioners proceeded to make the award. The United States Supreme Court, in an opinion delivered by Mr. Justice Holmes, had no hesitation in holding that the award was valid and that the withdrawal of the Colombian commissioner could not frustrate the arbitration.

In the *French-Mexican Mixed Claims* case, *supra*, a convention of March, 1927, between France and Mexico provided for the arbitration of certain international claims. Subsequently, the Mexican Government took the position that the commission president's functions had already expired, and proposed to the French Government the appointment of a new umpire. The French Government declined to accept

this proposal. Thereafter, the Mexican commissioner absented himself from the commission's proceedings. The President and the French commissioner then proceeded in the name of the commission to dispose of the cases which had already been presented to the commission. They held that the absence of representation of Mexico did not form a juridical obstacle to the making of awards by majority decision.

The case of the *Sabotage Claims* against Germany, *supra*, came before an arbitral tribunal set up to adjudicate certain claims between the United States and Germany following the First World War. The tribunal consisted of an American commissioner, a German commissioner, and an umpire. Hearings were held and an award made in the early 1930's. Subsequently, the American agent moved for a rehearing of the sabotage claims arising from the Black Tom and Kingsland explosions, on the ground that there had been fraud in the original presentation of evidence to the arbitrators. A rehearing was held. After the parties had made their submissions, and while the tribunal was engaged in deciding the issues presented to it, the German commissioner announced his retirement from the commission. The American commissioner prepared an opinion holding that this withdrawal did not oust the jurisdiction of the commission. The umpire, who was Mr. Justice Roberts then on the United States Supreme Court, in a decision rendered June 15th, 1939, gave as the decision of the commission that the commission remained competent to decide the questions before it despite the withdrawal of the German commissioner.

The holding that the withdrawal of an arbitrator does not frustrate the tribunal's work is also familiar in municipal law. *Burtlet* v. *Smith*, 2, Barn, K.B. 412. 94 Eng. Rep. 587 (1734); *Goodman* v. *Savers* 2, Jac. & W. 249, 37 Eng. Rep. 622 (Ch. 1820); in re *Young and Bulman*, 13 C.B. 623, 627, 138 Eng. Rep. 1344-45 (1853); *Toledo S.S. Co.* v. *Zenith Transp. Co.*, 184, Fed. 391. (C.C.A. 6th, 1911); *A.T. & S.F. Ry.* v. *Brotherhood of Loc. Firemen & Eng.*, 26 F (ed.), 413 (C.C.A. 7th, 1928); *Carpenter* v. *Wood*, 1 Met. 409 (Mass. 1840); *Dodge* v. *Brennan*, 58 N.H. 138 (1879), *American Eagle Fire Ins. Co.* v. *N.J. Ins. Co.* 240 N.Y. 398, 148 N.E. 562 (1925); *Widder* v. *Buffalo & L. Huron Ry*, 24 U.C.R. 222 (Upper Canada Queen's Bench 1865); [1861] 1 Dalloz 494 (Fr. Cass. 1860).

The proposition that the withdrawal of an arbitrator from a tribunal does not render the tribunal incompetent to proceed has been maintained in international law even where the arbitrator withdrew before any meeting of the tribunal was held. In the case, for example, of *Lena Goldfields Co., Ltd.* v. *U.S.S.R.* [1929-30], Ann. Dig. 426 (1930), the Soviet Government in a concession agreement had granted to a British company exclusive rights of exploration and mining in certain areas of Soviet territory. The agreement provided that all disputes arising out of the agreement should be decided by a court of arbitration consisting of three members -one to be selected by the Soviet Government, one by the Lena Company, and a third by mutual agreement of the parties. It also provided that it "one of the parties, in the absence of insurmountable obstacles, does not send its arbitrator or if the latter refuses to take part in the Court of Arbitration, then, at the request of the other party, the matter in dispute is settled by the super-arbitrator and the other member of the Court, on condition that such decision is unanimous." In 1929 and 1930, there were various disagreements

between the Soviet Government and the company. The company demanded arbitration, to which the Soviet Government at first agreed. The parties proceeded to appoint their arbitrators, and agreed on the third or "superarbitrator". After the date for the first meeting of the tribunal had been fixed, but before any meeting took place, the Soviet Government refused to participate in the proceedings and contended that the arbitration was cancelled because, the Soviet Government alleged, the company had ceased to finance the undertaking provided for in the concession agreement. The "superarbitrator", together with the arbitrator representing the company, held that the concession agreement was still operative and that the jurisdiction of the arbitral tribunal remained unaffected. Although the agreement in this case made provision for two specified contingencies of non-participation by an arbitrator, the agreement only confirmed a result which, in our judgment, should follow by the application of the principle that one should not profit from his own wrong. These cases which I have reviewed clearly show that a party to an agreement has neither the legal right nor the legal power to frustrate arbitration proceedings by withdrawing its representative.

The principle that a party to a dispute cannot improve its position through its own breach of obligation has obvious application to the situation presented by Questions III and IV now before the Court. The fact that Bulgaria, Hungary and Romania have refused to appoint representatives to the treaty commissions—as they are legally bound to do—should not be held to provide them with any escape from their obligation to accept the treaty procedures for the definitive settlement of treaty disputes. There is no difference in principle between an attempt to frustrate arbitration proceedings, after they have started, by withdrawing an arbitrator, and an attempt to frustrate the commencement of the arbitration procedures, after they have been agreed to, by refusing to appoint an arbitrator. Both are unilateral and illegal efforts to obstruct the carrying out of agreed settlement procedures. While some of the cases dealing with the withdrawal of an arbitrator have stressed the unfairness of permitting partially executed proceedings to be frustrated by the illegal withdrawal of an arbitrator, it is equally unfair in fact and equally untenable in legal principle to permit agreed procedures of settlement to be frustrated by the illegal refusal to name an arbitrator.

Of course, the situation is different if an agreement provides for three arbitrators and the failure to name the third is not the result of default by any of the contracting parties. That was the case in the St. Croix arbitration between the United States and Great Britain under the Jay Treaty (1794), and it was also the case in the statutory arbitration provided for by the Irish Free State Agreement Act of 1922.

In the St. Croix case, under a Treaty dated November 19th, 1794, between Great Britain and the United States, provision was made for the arbitration of a boundary. The arbitration tribunal was to consist of one commissioner named by Great Britain and one by the United States, the two commissioners to agree on the choice of a third. The two national commissioners were appointed, and met together. At this time the two commissioners debated whether, before selecting a third commissioner, they were empowered to appoint a secretary and order a survey to be made. After hearing arguments from counsel, the two

commissioners concluded that they did not, in the absence of the third commissioner, who had not yet been appointed, have authority to act as a commission. Nevertheless, the two national commissioners, in their individual capacities, advised the agents to have a survey made, and this was in fact done. Three days after the two commissioners gave this advice to their agents, the commissioners agreed without difficulty on the choice of a third commissioner, and the commission then proceeded with its work. I, Moore, *International Arbitrations* (1898), 1. 13-14 (1796). In this case, however, neither government declined to appoint its national commissioner, and the two national commissioners experienced no difficulty in selecting a third. Thus, nothing stood in the way of the full commission being constituted.

In the *Irish Free State* case, the Judicial Committee of the Privy Council gave an advisory opinion on July 31, 1924, concerning the effect to be given, under the Irish Free State Agreement Act, 1922 (12, Geo. V. Ch. 4.) to Article 12 of the articles of agreement for a treaty between Great Britain and the Irish Free State. (Command Paper No. 2214 (1924), [1923-24], Ann. Dig. 368 (1924).) The statute purported to give legal effect to the articles of agreement between Great Britain and the Irish Free State. Under Article 12, the boundary between Northern Ireland and the Irish Free State was to be determined by "a commission consisting of three persons, one to be appointed by the Government of the Irish Free State ; one to be appointed by the Government of Northern Ireland and one who shall be the Chairman to be appointed by the British Government". The Judicial Committee was asked whether, in the absence of a commissioner appointed by the Government of Northern Ireland, which was not a party to the articles of agreement, a commission within the meaning of Article 12 of the treaty would be constituted and competent to determine the boundary. The Judicial Committee gave a negative answer. Their opinion was based on the fact that "the Tribunal designated by Article 12 is a statutory tribunal brought into existence by the terms of the article", and that the statute did not authorize the Crown to instruct the Governor of Northern Ireland in default of advice from his own Ministers to make an appointment nor did it authorize the Crown, acting on advice of the Ministers of the United Kingdom, to make the appointment for Northern Ireland. The Judicial Committee, as the highest judicial organ within the British Commonwealth, gave its opinion that the conditions laid down in the statute by Parliament had therefore not been satisfied. The agreement which Parliament had sought by statute to implement, however, was an agreement between the United Kingdom and the Irish Free State; the Government of Northern Ireland was not a party to the agreement and was not by the agreement, therefore, obligated to appoint an arbitrator or to submit to arbitration. This case, therefore, differs basically and radically from a case in international law where States, parties to a treaty, have obligated themselves to submit to arbitration. The Judicial Committee of the Privy Council in effect found no obligation on the Government of Northern Ireland resulting from the agreement to which it was not a party, or from the statute which did not purport to go beyond the agreement, or at least the Judicial Committee so found. The Judicial Committee accordingly held that, in the absence of an arbitrator appointed by the Government of Northern Ireland, the factual situation contemplated did not obtain, and that there was therefore no tribunal.

The case, as I have said, however, is altogether different from that where a State, which is a party to a treaty, defaults upon its obligation to appoint its representative to a treaty commission.

The determination that a treaty commission composed of the representative of one party and a third member appointed by the Secretary-General of the United Nations can decide a dispute, when the other party defaults on its obligations to appoint a representative, does not involve the introduction of any novel or anomalous doctrine into the law. In the municipal law of the great majority of countries, provision is made for the appointment of an arbitrator (often by the court) if one of the parties to a dispute refuses or fails to appoint its arbitrator under an arbitration agreement. This is true in the Commercial arbitration law of 29 out of 43 countries whose law is found summarized in *Commercial Arbitration and the law throughout the World*, a publication prepared by the International Chamber of Commerce (International Chamber of Commerce, Basel, 1949). See also Russell, *Arbitration and Award* (13th ed., 1935), 125; 6, Williston, *Contracts* (rev. ed., 1938), sec. 1920; Sturges, *Commercial Arbitrations and Awards* (1930), secs. 146-47.)

In municipal law, in the absence of statutes, there was an early reluctance on the part of courts to aid in the specific enforcement of arbitration agreements when one party defaulted and declined to proceed with arbitration, though the validity and binding character of the arbitration agreement was recognized and was held to support an action for damages. The theory of this early reluctance was a judicial policy against parties contracting to oust the established courts of jurisdiction. See 6, Williston, *op. cit., supra*, sec. 1919. This rationale, which subsequently yielded to statutory enactments, has of course no relevance in the field of international law, where there are no courts of general jurisdiction to which States can resort without having in some manner obtained a consent to suit from the other party or parties to the dispute. As Mr. Justice Holmes stated in the case of *Colombia* v. *Cauca Co., supra*: "In private matters the courts are open if arbitration fails, but in this case the alternative was a resort to diplomatic demand." Arbitration thus has a special importance in international law, since it is very often the only mode of peaceful and definitive settlement of a dispute open to the parties. (See also International Law Commission: *Report on Arbitration Procedure*, by Georges Scelle, United Nations General A/CN.4/18, 21 March 1950, p. 9.)

In the present case, the Governments of Bulgaria, Hungary and Romania have agreed to accept and be bound by the treaty procedures for the settlement of disputes. In its opinion of March 30, 1950, this Court has advised that these Governments are obligated to co-operate in carrying out those procedures. Those procedures specifically provide that "the decision of the majority of the members of the Commission shall be the decision of the Commission". I submit, Mr. President, that there is no reason in fact or law for recognizing any legal power in these Governments to frustrate the operation of these treaty procedures by failing to exercise their legal right, which is also their legal duty, to appoint their representatives on the treaty commissions. To give them that legal power would be to assist them to profit by their own wrong and to improve their position by their own default.

In conclusion, the Government of the United States submits, Mr. President, that this Court should give affirmative answers to both Questions III and IV. Affirmative answers to these questions will help to rekindle respect for treaty obligations and faith in the rule of law at a time when renewed faith in the rule of law is urgently needed.

This Court has already held that States cannot avoid the consequence and impact of treaty obligations to arbitrate merely by denying that any dispute exists. This Court has already held that States which agree to be bound by treaty procedures for the settlement of disputes are legally bound to co-operate in carrying out those procedures. Negative replies to Questions III and IV would go far to nullify the law-inspiring answers given by this Court to Questions I and II.

Negative replies to Questions III and IV would discourage efforts of States to work out in advance of controversy peaceful and orderly procedures for the adjustment of disputes. For States would know that such agreements could provide no assurance that the procedures for peaceful settlement would be available when the need for their use arose. Law-abiding States would be shackled by obligations which States that are not law-abiding could set at nought at their own arbitrary will.

Negative replies to Questions III and IV would impair the confidence of States in existing international arbitration clauses and agreements. An opinion by this Court that arbitration clauses similar and analogous to the disputes articles in the peace treaties contain an escape hatch beneficial only to defaulting parties might weaken the will even of otherwise law-abiding States to live up to their agreements. Re-negotiation of existing arbitral clauses on a large scale would be necessary to make them work as intended, and the incentive for such re-negotiation may not be present in a disillusioned world.

Moreover, negative replies to Questions III and IV would inevitably create the impression that arbitration clauses are likely to prove illusory unless every possible avenue of escape is specifically mentioned and expressly proscribed. Agreements for the pacific settlement of disputes will not be easy to negotiate if States feel impelled to consider and propound all sorts of possibilities of bad faith on the part of prospective treaty partners.

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

Affirmative answers to Questions III and IV will strengthen the faith of men and nations in the integrity of treaty obligations and in the efficacy of international law and in the reality of international justice.

3.—STATEMENT BY Mr. FITZMAURICE

(REPRESENTING THE UNITED KINGDOM GOVERNMENT)
AT THE PUBLIC SITTINGS OF JUNE 27th AND 28th, 1950

[*Public sitting of June 27th, 1950, afternoon*]

Mr. President, Members of the Court,

Since I last had the honour of standing here, the Court has given its opinion on the first two questions contained in the Resolution of the General Assembly of the United Nations dated 22 October of last year. The Court answered both questions in the affirmative and in fact held that disputes did exist between my Government, amongst other Governments, and the Governments of Bulgaria, Hungaria and Romania, which ought to be settled by means of the procedure laid down in the arbitration clauses of the relevant peace treaties, and that the Governments of those three former enemy countries were under a legal obligation to comply with those arbitration clauses and in particular to appoint their representatives on the arbitral commissions contemplated by those clauses.

According to the Assembly's resolution, if, within one month of these findings on the part of the Court, the three Governments did not notify the Secretary-General of the United Nations of the appointment of their representatives to the treaty commissions, the Court was requested to give a reply to the third and fourth questions contained in the Assembly's resolution. In order to avoid any possibility of a misunderstanding, my Government, together with others of the Allied Governments concerned, drew the attention of the three former enemy Governments to the Opinion of the Court dated 30th March last, and once more urged them to name their respective commissioners, reminding them that the Allied Governments' Commissioners had long since been nominated. The three Governments not only failed to appoint their commissioners, but one or two of them at least replied once more denying that they were under any obligation to make any appointment and again refusing to recognize the competence of the Court. The relevant correspondence is, I think, before the Court, and it is clear that the failure of the three Governments to appoint their commissioners despite the findings of the Court that they are under a legal obligation to do so is deliberate and intentional and not due to any mere error or oversight.

Therefore, Mr. President, the broad issue now before the Court is whether an *impasse* has been reached in which it is materially impossible to apply the arbitration clauses of the peace treaties and to settle these disputes according to the intentions of those clauses or whether, on the other hand, there still exist legal means by which those intentions can nevertheless be carried out despite the failure of the former enemy Governments to co-operate. To put it in another way, the issue is whether it is now necessary—whether there is no alternative but—to acquiesce in the frustration of the arbitration clauses because the three

Governments refuse to apply these clauses, although the Court has found that they are under a legal obligation to do so, or whether, on the other hand, it is possible to avoid such frustration by the application of recognized legal principles.

Such is the main issue before the Court, that is to say whether these clauses are frustrated and impossible of application or not. In the present case, this issue is presented to the Court in the form of the third and fourth questions contained in the Assembly's resolution, and before I address myself specifically to these questions, I should like to make one or two general observations about them.

Although these questions are technically separate questions, they are really different aspects of the same problem, and there is a close connexion between them. The third question asks whether, despite the failure of the former enemies to appoint their commissioners, any other party to the dispute, such as, for instance, the United Kingdom Government, could request the Secretary-General of the United Nations to appoint the so-called third or neutral member of the commission concerned. The fourth question asks whether the two-member commissions thus constituted each consisting of the national commissioner of one of the parties and the third or neutral commissioner appointed by the Secretary-General, would rank under the peace treaties as properly constituted commissions which could give valid and binding decisions.

These questions are inter-connected in two ways. In the first place, there would obviously not be much point in asking the Secretary-General to appoint the third or neutral commissioner, or in the Secretary-General making that appointment, unless the commission could then function on the resulting two-member basis. Consequently, the cardinal issue in this matter lies really in the answer to the fourth question, namely the competence of a two-member commission and its capacity to give a valid decision.

Secondly, both these questions are related to the same problem of over-riding general importance to which I referred in my statement before the Court last March, namely, the utility and obligatory nature of arbitration clauses in treaties.

It must by now be apparent to everyone that the three former enemy Governments have engaged on a deliberate, and I may add, concerted, policy of trying to prevent the application of the arbitration clauses of the peace treaties to the present disputes. Up to the date of the Court's opinion of 30th March last, these Governments could affect to justify this by pretending that no disputes existed. Since that date they have not even that pretext, flimsy though it always was. Faced with the finding of the highest international tribunal that juridically there is a dispute, and that they are under a legal obligation to apply the peace treaty provisions for settling it, they now have recourse to the device of refusing or failing to appoint their commissioners.

On analysis in the light of the Court's finding of last March, the attitude of the former enemy Governments will be seen to amount to a revocation of the consent which they have already given to refer these disputes to the peace treaty commissions. It is, however, a general principle of law, which has been recognized by international tribunals, that consent once given cannot validly be revoked.

Clearly, denial that any dispute exists is not the only method by which it can be attempted to defeat the clear intention of an arbitration clause

such as that which figures in the peace treaties ; and, just as the doctrine advanced by the former enemies over the question of the existence of a dispute was destructive of the whole value and purpose of arbitration clauses, so equally is the process of failing to appoint an arbitrator or commissioner.

The next step in the plan of campaign of these Governments will doubtless be to argue that, because their commissioner has not been appointed, any tribunal which is set up without him will be defective or not validly constituted, and any decision which it purports to give will be a nullity. If this process is juridically admissible, then, of course, it will follow that in practice no arbitration clause of the usual and existing type, such as is to be found in treaties to-day, will have any obligatory force except to the extent to which each of the parties is willing to give it effect when the moment to do so comes by going through the properly appointed procedure. In other words, arbitration clauses will be reduced to merely voluntary instead of compulsory processes of going to arbitration. Yet, as I pointed out in my earlier statement of last March, arbitration clauses which have only a voluntary effect are mere surplusage, since countries can always voluntarily agree to arbitrate a disputed point under a treaty if they wish to do so, and the sole object of an arbitration clause is to make arbitration obligatory.

In these circumstances, it seems to my Government—and we hope that the Court will agree—that the position should not readily be accepted in which it is possible to defeat the intention to arbitrate, and to prevent a decision being rendered, by means of such processes as refusing to nominate an arbitrator or commissioner ; because, if that is possible, it in effect reduces what is intended to be a compulsory clause for arbitration into a mere voluntary proceeding of going to arbitration, if, when the time comes, the parties (that is to say both of them) think that they are ready and willing to do so, which was certainly never the intention of the original clause.

Accordingly, we think that, if it is at all possible, the present arbitration clauses should be given a meaning and effect which will avoid this result, and I venture to suggest that this conclusion equally follows logically from the views which the Court itself expressed in its opinion of 30th March last. In stating that the parties were under an obligation to co-operate in constituting the treaty commissions, in particular by appointing their representatives, the Court added : "otherwise, the method of settlement by commissions provided for in the treaties would completely fail in its purpose." I respectfully submit that exactly the same principle is applicable to the questions now before the Court. The method of settlement provided for in the treaties would equally fail completely in its purpose if refusal to carry out what the Court has found to be a clear obligation to appoint a commissioner has the effect that no commission can be constituted and no decision can be rendered.

While direct authority on this subject is unfortunately lacking, the general attitude of international tribunals is indicated by the view which they have frequently taken when one of the members of an arbitral tribunal has been withdrawn or has failed to take his seat, to which subject I shall return presently when I deal specifically with the Fourth Question.

Their attitude is also shown by their views on the problem of *non-liquet*, that is to say, by their refusal, whenever possible, to hold that they were unable to give a decision on account of some difficiency or incompleteness in the law. This has a bearing on the present case, where some may think there is a deficiency or incompleteness in the law. Past instances of refusal by international tribunals to arrive at a *non-liquet* are to be found, for instance, in the award of the Permanent Court of Arbitration in the island of *Palmas* case (p. 61); the first *Chorzów Factory* case (Permanent Court of International Justice, Series A, No. 9, p. 25); the *Pajzs, Csáky and Esterházy* case (Series A/B, No. 68, p. 60); and the decision of the British-American Claims Tribunal in the case of the *Eastern Extension, Australasia and China Telegraph Company* (reported in the *American Journal of International Law*, Vol. 18, 1924, p. 838). I shall refer again to this last case in connexion with the Fourth Question. The applicable principle is stated by Schwarzenberger (*International Law*, 1, p. 220) as follows:

> "If the interpretation [sc. of a treaty] is to give full scope to the aims and objects of the treaty, this purpose would be vitiated if the interpretation did not lead to a final settlement of the dispute between the parties."

A paraphrase of this principle which would make it exactly applicable to the circumstances of the present case would be the following:

> That if the purpose of an arbitration clause in a treaty is to secure that disputes between the parties concerning the treaty are duly settled by arbitration, then this purpose would be vitiated if the clause were not interpreted so as to lead to a final settlement of any disputes between the parties.

As was pointed out in the concluding paragraph of the United Kingdom written statement of January last, contained in Document Distr. 50/13, the general view I am contending for is an application of the well-known principle of treaty interpretation, *ut res magis valeat quam pereat*, which I submit should be applied in relation both to the third and fourth questions now before the Court: the doctrine that treaty provisions should, whenever possible, be given adequate effect and so interpreted as to prevent their clear intention being nullified. A good deal of authority for this principle has been given in previous United Kingdom statements before the Court, and in the course of the present proceedings, so that I will not take up time by repeating it and will content myself with this simple reference to the matter.

These considerations of a general legal, or doctrinal character are most strongly reinforced by the actual wording of the arbitration articles of the peace treaties, and I know that the Court attaches great importance to the actual wording of provisions which it is called upon to interpret. I suggest that even if we exclude doctrine altogether and look merely at the actual text of the relevant articles, we shall reach the same conclusion. For what do we find there? We find a series of provisions most clearly designed and intended to produce a final settlement of any dispute that arises. Progressive steps are laid down: first, there are to be diplomatic negotiations; if those fail, the matter is to be referred to the Heads of the major Allied Missions in the capitals concerned; should they not resolve the matter within a certain time,

then, if no other means of settlement are agreed upon, recourse is to be had to a commission at the request of either party; the parties are each to appoint their commissioner, but if they cannot agree upon the the third member of the commission, either of them may request the Secretary-General of the United Nations to make the appointment. The intention to procure a settlement by one means or another could scarcely be clearer, and can anyone doubt, therefore, that it would be contrary to the whole spirit and tendency of these provisions if they could be frustrated, first by denying that any dispute exists and, when that fails, by refusing or failing to nominate a commissioner on the appropriate treaty commission? It is true that the relevant article might theoretically have provided in terms for what was to happen in such an event. But, as was pointed out in the United Kingdom written statement, it is rare for arbitration clauses in treaties to make provision for the kind of events which have occurred in the present case, just as it is comparatively rare for treaties to provide for what is to occur in the event of a breach of them. It is assumed that the treaties will be carried out and that obligations to go to arbitration in the event of a dispute will not be frustrated by procedural manoeuvres. I shall have to say more about this presently, but, briefly it is invidious and often psychologically and politically impossible to provide in advance for some thing that ought not to occur, and cannot occur except as the result of the default or bad faith of one of the parties. The fact that this is not specifically provided for in terms should not prevent the article in question being duly interpreted so as to give it its logical and clearly intended effect.

[*Public sitting of June 28th, 1950, morning*]

Mr. President and Members of the Court,

Yesterday evening I made some general observations applicable to both the questions before the Court. I will now make some remarks on these questions individually.

The first question — that is to say, the third in the Assembly's resolution of last October—while requiring careful study of the relevant clause in the peace treaties need not, I think, occasion any serious difficulty. The relevant clause speaks of a third member of the treaty commissions in addition to the national commissioners, and it says that failing agreement between the parties on this third member, the Secretary-General of the United Nations may be requested by either of the parties to appoint him. It is, therefore, this so-called third member, who is to be appointed by the Secretary-General, and the central issue, consequently, is whether the term "third commissioner" or "third member" is to be understood as making it an absolute pre-condition of the appointment of that commissioner that the two national commissioners should already have been appointed, or whether, on the other hand, the term is merely a piece of description, signifying an additional, neutral member of the commission appointed by a different process from that employed in the case of the national commissioners, who need not necessarily be appointed in advance.

I suggest that a careful reading of the relevant provisions shows clearly that the latter interpretation is the correct one. In the first

place, the third or neutral commissioner is not appointed by agreement between the two national commissioners—a method which is frequently adopted in arbitration clauses, but not in this particular case. On the contrary, here the appointment is by agreement between the two Governments concerned or, should they fail to agree, by the Secretary-General of the United Nations at the request of either of them. Consequently, the non-appointment of either or both of the national commissioners does not offer any material or mechanical obstacle to the appointment of the third or neutral commissioner.

Next, it will be seen that the relevant provision would not render it in any way impossible for the two Governments, by mutual agreement, deliberately to appoint the third member of the commission before nominating their own national commissioners, or, failing agreement between them, to ask the Secretary-General to do so. They might well feel that until they knew who the third commissioner was going to be, or who the Secretary-General was going to nominate, they would prefer to postpone the appointment of their national commissioners. It might well be that the appointment of the national commissioners would depend on the temperament and personality of the neutral member of the commission, on which particular language he used as his preferred working language, and so on. There is, as far as I can see, nothing in the article which would prevent the members of the commission being appointed in, so to speak, reverse order -that is to say, the third or neutral member first, and the national members afterwards.

If, therefore, the appointment of the third or neutral commissioner could take place, although neither of the national commissioners had yet been appointed, *a fortiori* it would seem that it could take place if one of them had been appointed but not the other. It would, to say the least of it, be a very unfortunate reading of the clause if one of the parties could not only refuse or fail to nominate his own commissioner, but could thereby automatically bring to an end all further steps to get the commission constituted.

Not only does the process of requesting the Secretary-General to make the appointment of the third commissioner not require the prior appointment of both or either of the national commissioners, it equally does not require the mutual consent of the two Governments. The relevant phrase quite clearly says that it may be done at the request of either party acting alone. The only requisite conditions are, first, that the two Governments should have failed themselves to agree on the third or mutual commissioner, and, secondly, that a period of one month should have elapsed during which it was open to the parties to agree, and that they should have failed to agree within this period. It is important to notice that the period of one month does not run, as could have been provided, from the appointment of the two national commissioners. Had this been the case, it would have suggested that the third commissioner could not be appointed until the national commissioners had been appointed. However, that is not the position. According to the language of the relevant clause, the period of one month runs from the time when, no other means of settlement having been mutually agreed upon, either party requests reference to a commission. I will read the relevant passage. After providing for a reference to the Heads of the United States, United Kingdom and Soviet Missions

in the ex-enemy capital concerned, it goes on to say that any dispute not resolved by these Heads of Mission within a period of two months,

> "shall, unless the parties to the dispute mutually agree upon another means of settlement, be referred at the request of either party to the dispute to a commission composed of one representative of each party and a third member selected by mutual agreement of the two parties from nationals of a third country. *Should the two parties fail to agree within a period of one month upon the appointment of the third member* [i.e., one month from the request for reference to a commission], the Secretary-General of the United Nations may be requested by either party to make the appointment."

So far as the United Kingdom Government is concerned, this period of one month began, strictly speaking, on the 1st August of last year, when the United Kingdom Government formally requested reference to a commission. The position had then been reached that the dispute had not been settled by diplomatic negotiations and had not been settled by the contemplated reference to the three Heads of Mission ; and more than two months had elapsed, as required by the relevant position, since the moment when the matter had been referred to the Heads of Mission. The details of all steps involved will be found in paragraphs 17 to 19 of the United Kingdom Written Statement in Document Distr. 50/13 and need not be recapitulated here. Accordingly, by notes dated August 1st, 1949, the United Kingdom Government formally requested a reference to the treaty commissions in notes addressed to each of the three former enemy Governments. These Governments all replied in notes dated the 26th August and the 1st September and the 2nd, refusing to participate in the setting up of any commission. At this point then, the following position existed : no other means of settlement had been agreed ; and the three former enemy Governments had refused to appoint their commissioners, and had refused generally to participate in the setting up of the commissions. From this it necessarily followed that there was a failure to agree upon the appointment of the third member of the commission. In brief, by the beginning of September, the position was that the parties had failed, within one month from the time when one of them, i.e. the United Kingdom, had exercised its right to request a reference to a commission, to agree upon the appointment of the third member of the commission. Consequently, the situation then was that either party could have requested the Secretary-General of the United Nations to make the appointment. If there were any doubts about the failure to agree within the specified time, they would be set at rest by the further lapse of a period of nearly a year since these events took place, and also by what has occurred during this period. What has occurred is this : first the Court has found that the former enemy Governments are under an obligation to co-operate in setting up the treaty commissions and to appoint their commissioner. Secondly, the United Kingdom Government and the other Allied Governments concerned have not only appointed their commissioners, but have on at least two occasions formally requested or urged the three former enemy Governments to do the same and to enter into consultations as to the appointment of the third commissioner. These Governments have, however, maintained their refusal or failure to take any

step in the matter, or to co-operate in any way in the setting up of the commissions. Consequently, it is clear that there now exists (and had long existed) a situation of *fact* in which the parties have failed within the specified period to agree on the appointment of the third commissioner. Therefore, if, as I submit to the Court, it is correct to say that the appointment of either or both of the national commissioners is not an essential precondition of the nomination of the third or neutral commissioner, then the position is that the United Kingdom Government and the other Allied Governments concerned have, and have for some time had, the right to request, and could now request, the Secretary-General of the United Nations to make this appointment, and the Secretary-General for his part would be entitled under the peace treaties to comply with this request and make the appointment. Accordingly, I submit that the answer to the third question should be in the affirmative.

I shall now pass on to the fourth question. This question is by far the more important of the two, both because it is the more fundamental and because on it depends the practical utility of the answer given to the other question; since, as I said earlier, there is little object in the Secretary-General being asked to make appointments if the resulting commissions cannot be regarded as being properly constituted commissions for the purposes of the treaty or competent to give final and binding decisions. It is the object of the fourth question to determine this issue.

It is clearly a difficult question, for there are admittedly a number of factors which must raise doubts whether commissions constituted in the manner contemplated by the fourth question can do the work of the three-member commissions primarily envisaged by the peace treaties. There is obvious room for argument whether commissions on which only two of the three potential members are sitting can constitute commissions at all within the meaning of the peace treaties. If not, then, of course, they could not give any valid or binding decisions. These difficulties were fully discussed in paragraph 25 of the original United Kingdom Written Statement, since my Government considered that it would be lacking in frankness towards the Court to attempt to evade or ignore them, and in any case the Court would certainly not have failed itself to perceive these difficulties.

Nevertheless it is also necessary to take into account the fact that this situation has been created by, and that these difficulties arise from, the failure—the deliberate refusal even—of the three former enemy Governments to comply with their obligations under these very provisions for setting up the treaty commissions. This is clear because the fourth question could only arise, and in the formal sense does only arise, in consequence of the finding of the Court that these three Governments are under a legal obligation to co-operate in constituting the treaty commissions, and in consequence of the fact that they are still withholding such co-operation.

One difficulty with which we are faced as regards the present question is the complete lack of any *direct* international precedent or authority to guide us, or to assist the Court in reaching its conclusion. There are, indeed, precedents for the case where a member of a commission

or arbitral tribunal is withdrawn after its constitution, or fails or refuses to take his seat or to participate in the work; but, so far as we are concerned, diligent search has failed to disclose any previous instance in which a dispute within the scope of an arbitration clause having arisen and been clearly established, one of the parties has refused point blank to participate in setting up the commission or tribunal.

It would, however, I suggest, be a mistake to conclude from this lack of precedents that no remedy exists in a situation of this kind. On the contrary, I suggest that the inference should be just the opposite. If there are no precedents, it is because the situation is unprecedented, because in fact the history of arbitration shows an unvarying international practice on the part of States of taking all the necessary steps to set up the contemplated tribunal, once the existence of a dispute is disclosed or established which cannot be settled by any other means. This points strongly to the conclusion that the tribunal is to be constituted and is to function in all cases where this is not rendered materially impossible by the circumstances.

This view is supported by two considerations to which further reference will be made presently. The first of these is that while situations of this kind may be unprecedented in international law and relations, they are not unprecedented in domestic law and relations, and domestic law usually makes some definite provision for them, either by enabling those arbitrators who have been duly appointed to function alone without the others, of by enabling recourse to be had to a Court to appoint the missing arbitrator or arbitrators.

Secondly, international law does have precedents for the case of the withdrawal or refusal of an arbitrator to act after the tribunal has been constituted. These precedents almost all point in the same direction, namely towards the principle that the absence of one of the members of an arbitral tribunal is not necessarily or by itself a bar to the functioning or to the competence of the tribunal or to its ability to render a valid decision.

The various considerations to which I have drawn attention all point to the same conclusion, namely that the refusal or failure of a party to a dispute to appoint his arbitrator or commissioner should not be regarded as a bar to the setting up of the tribunal or commission unless the circumstances render that a material impossibility. If the Court answers the third question in the affirmative, there will be no material impossibility in the present case in setting up the treaty commissions, because the Secretary-General of the United Nations will be able to appoint the third member of each commission, and he, together with any national member already or subsequently appointed, will constitute the commission. It is perhaps worth pointing out that, as has been recognized by more than one authority on the subject, the essential element of tribunals or commissions of the present character really consist in the presence of the third or neutral member who has the casting or deciding vote, since in many cases the national members may be expected to reflect the points of view of their respective governments. If, therefore, the third or neutral member is there, the commission is duly constituted, at any rate as regards its essential element.

It may, of course, be argued that such a commission would *not* be the commission contemplated by the peace treaties, and that the setting up of the commission contemplated by the peace treaties *is* rendered

materially impossible if one of the parties refuses or fails to appoint his commissioner. That party—so it may be argued—will, of course, have acted wrongly; he will have been guilty of a clear breach of his treaty obligations, as the Court has found. In this situation various courses of action may be open to the other party, but—so it may be argued - whatever remedies are available, the setting up of the commission in the absence of the defaulting party's commissioner cannot be one of them, because as a matter of constitution the commission contemplated by the treaty cannot be set up in the absence of one of the national commissioners. The entity thus created would not be the entity contemplated by the treaty; it would be a different entity.

I have stated the objection fully and explicitly because it clearly forms the central difficulty in the present case, and it must be dealt with. I venture to suggest, however—and here, I think, I reach the core of my argument—that the objection which I have just stated really involves a *petitio principii*; it assumes something which ought first to be demonstrated; it assumes that a commission consisting of the nominee of the Secretary-General and the representative appointed by one of the parties would be a different entity, an entity different in character from the commission contemplated by the peace treaties.

I suggest that it would not be different in character but only, so to speak, in degree, and even that only for so long as the other party still refused or failed to appoint his representative, which it would be open to him at any time to do, which, indeed, he would be under a constant and continuing obligation to do. It is one thing to set up an entity wholly different in character from that contemplated by the relevant treaty; it is quite another thing to set up what is essentially the same entity, lacking only some component which can at any time be supplied by those whose legal duty is to do so.

To put my argument in its most concentrated form, I suggest that it would be juridically incorrect to regard the commissions contemplated by the fourth question as being mere two-member commissions instead of the three-member commissions contemplated by the treaties. I suggest that juridically and essentially they would be three-member commissions, two of the members of which had been appointed, and the third of which could be appointed at any time by the party having the faculty and indeed the legal duty of doing so. I suggest, in fact, that these commissions would *be* the treaty commissions, mechanically incomplete, perhaps, for as long as those responsible still failed to carry out their legal obligations, but not juridically defective.

There is a fundamental difference between a material or mechanical defect which merely affects the working of the entity concerned and a defect or flaw of an essential or juridical character which affects its validity or competence. If I may illustrate my theme from the naval and military sphere, what is known as a battle fleet is not the less essentially a battle fleet, nor does it cease to be an entity or degenerate into a mere assemblage of naval units, because its destroyer or cruiser screens are lacking; though the absence of these components may gravely affect the operations of the fleet; still it remains a fleet. The same may be said of an army division as regards its artillery or engineers. Equally, a tribunal is not the less a tribunal because one of its members is missing. Still less does it become some other or different tribunal. For my part, I cannot see that it makes any essential difference of

principle whether the member is missing because he has been withdrawn or fails or refuses to attend, or because he has never been appointed. The cause is different but the result is the same.

In the Written Statement of the United Kingdom, attention was drawn to the possible difficulty resulting from the paragraph in the disputes articles which says that the decision of the majority of the members of the commission shall be binding; because, of course, if commissions constituted as contemplated by the fourth question are regarded as new and different entities, then, seeing that they will only consist of two members, this provision about the majority may seem meaningless since with only two members there cannot be a majority, but only either unanimity or disagreement. But if the commissions are regarded, as I suggest that they should be, as consisting in principle of three members, two of whom have been appointed and the other can take his seat any time when his government carries out its legal obligation to appoint him, then this difficulty automatically disappears, and the decision of the two appointed members will constitute a majority decision of the commission which will be valid and binding under the relevant clause of the treaty.

I would like now to suggest yet another approach to this problem, which leads to the same result by a different route. This will also perhaps be another way of applying the doctrine of waiver, to which the United States representative referred when he expressed the view that the three former enemy Governments had waived or forfeited their right of objection in this case. Mr. President, it is sometimes useful when there are doctrinal and theoretical difficulties in finding the answer to a given question, to adopt the empirical methods of the scientist and mathematician, by assuming or postulating a certain answer and seeing how it works. If the results harmonize with all known existing principles and facts, and do not involve any inherent contradictions, there is a good chance that the answer will in fact be the correct one. That some such process is in no way foreign to the jurisprudence or methods of international tribunals is, I think, indicated by the following passage from the decision of the British-American Claims Tribunal in the case of *Eastern Extension, Australasia and China Telegraph Company* (reported in the *American Journal of International Law*, Vol. 18, 1924, at p. 838):

> "International law, as well as domestic law, may not contain, and generally does not contain, express rules decisive of particular cases, but the function of jurisprudence is to resolve the conflict of opposing rights and interests by applying, in default of any specific provision of law, the corollaries of general principles, and so to find—exactly as in the mathematical sciences—the solution of the problem."

Applying this method, let us suppose that the Secretary-General of the United Nations has in fact been asked to make and has made the necessary appointments, and that commissions, consisting of the person appointed by the Secretary-General and the national commissioner nominated by one of the parties—two-member commissions—have

met and gone into all the evidence available to them or which they have been able to procure, and have given a unanimous decision. (If, of course, they disagreed there would be no decision at all, and a situation would arise in which fulfilment of the intentions of the treaty clauses about arbitration was a material impossibility.) But assuming that there was a decision, concurred in by both the existing members of the commission, what then would be the position? The decision could only be challenged by one of the parties to the dispute. *Ex hypothesi* it could not and would not be challenged by the government whose member sat on the commission and concurred in the decision. It could therefore only be challenged by the former enemy government concerned. But on what basis could such a challenge be made? The only possible basis, so far as this particular issue is concerned, would be that the commission was incomplete because it did not include commisioners appointed by the former enemy Governments, and it would have to be argued, therefore, that for this reason the two-member commission was not a properly constituted commission and could not give a valid decision. But (even assuming this to be a valid objection legally, which, for reasons I have given earlier, I do not think it would be—but assuming it was theoretically valid as far as it went), why would the commissions not have been complete? The answer is that they would not have been complete because the former enemy Government concerned had wilfully defaulted in its obligation to appoint its own national commissioner. In brief, the challenge would be rendered inadmissable from the start, because its basis, namely the absence of the ex-enemy commissioner, would be something for which the challenging party was himself responsible. This absence of one of the national commissioners would have been due to the wilful default of the very party trying to make that absence a ground for challenging the competence of the commission. In brief, any challenge on this basis would itself be invalid and inadmissible and could not therefore be made the basis for questioning the competence of the commission. But, if this is correct, it would follow that the commission's decision was not open to challenge at all on the basis of any lack of proper constitution of the commission. Now, in these circumstances, and whatever the theoretical position as to the validity of a decision given by such a commission, if the position is that the decision cannot in practice be challenged because one of the parties has accepted it in advance, and the other party is precluded by its own action from putting forward any valid challenge, then it surely follows that the decision must in practice be valid and binding because both parties would be juridically precluced from alleging the contrary.

There is a good deal in the practice of international tribunals which supports the view I have just been suggesting. There is first of all the general principle, which is almost a legal platitude, that States and parties to disputes cannot be allowed to profit from their own default or wrong-doing. In its Written Statement, my Government cited a striking passage from the judgment of the Permanent Court in the first *Chorzów Factory* case (Series A, No. 9, p. 31), and it has been cited again by the representative of the United States. The passage in question seems to me to be so important and apt to the present case that I will permit myself to read it again:

> "It is .... a principle generally accepted in the jurisprudence of international arbitration as well as by municipal courts that one party cannot avail himself of the fact that the other has not fulfilled some obligation or has not had recourse to some means of redress, if the former party has, by some illegal act, prevented the latter from fulfilling the obligation in question, or from having recourse to the tribunal which would have been open to him."

In its application to the present case, this passage might be paraphrased as follows, namely that

> if, in the present case, the three former enemy Governments have, by their failure to appoint their commissioners, prevented the other parties to the dispute from having recourse to the tribunal which would otherwise have been open to them, namely the three-member commission contemplated by the peace treaties, the former enemy Governments cannot avail themselves of that fact, i.e. of their own default or wrong, in order to challenge a decision arrived at by such other means as are possible within the general scope of the treaty clause on arbitration.

What is involved is really an application of the principle known in English law as estoppel (or to use what I believe is the equivalent French term *préclusion*)—to which effect has frequently been given by international tribunals—for instance by the Permanent Court of Arbitration in the *Grisbadarna*, *Pious Fund* and *Venezuelan Preferential Claims* cases, by the *Alaska Boundary* tribunal, by the United States-Mexican Claims Commission in the *Chamizal* case, by the tribunal in the *Croft* case (reported in *Pasicrisie*, 371), in the *Russo-Turkish Payment of Interest* case (reported in the *American Journal of International Law*, Vol. 8, p. 178), and in the *Corvain* case in the *Venezuelan Arbitrations* of 1903. The Permanent Court of International Justice also recognized the principle in the *Serbian Loans* and *East Greenland* cases (Series A, No. 20, p. 39, and Series A/B, No. 53, pp. 62 and 69), although it did not think it necessary to apply it in those cases. An excellent statement of the principle, in language very apt to the present case, is to be found in the following passage from the decision of the arbitrator in the case of the *Tinoco Concessions-Great Britain* versus *Costa Rica* (Administrative decision No. 1. p. 44):

> ".... the mere possession of a licence does not estop [the holder of a licence] from attacking its validity. It is the possession of a licence under an agreement with the licensor which estops [a person] who has not fulfilled the terms of that agreement from pleading and proving the invalitidy [of the licence] .... in order to avoid liability for breach of his contracts".

Although the Permanent Court recognized but did not apply the principle of estoppel in the *Serbian Loans* and *East Greenland* cases, it did, in effect, apply that principle frequently in another field, namely that of the relationships between a country's constitutional and municipal law and its international obligations, treaty or other. As was pointed out in paragraph 40 of the United Kingdom Written Statement, certain aspects of this question have, by analogy, a distinct bearing on the present case. I have in mind particularly the rule which the Permanent

Court made into one of the corner stones of its jurisprudence—the rule that States, being obliged to bring their domestic law into conformity with their international obligations wherever this is necessary for the execution of these obligations cannot, if they fail to do this, plead their domestic law as a ground for not carrying out their international obligations—since, in effect, this would amount to pleading their own default as a justification. The Permanent Court applied this principle on a basis of quasi-estoppel or *préclusion* in the *Mavrommatis (Jerusalem)* case (Series A, No. 5, pp. 42-43), the case of the *Lotus* (Series A, No. 10, p. 24), the second *Chorzów Factory* case (Series A, No. 17, p. 33), the *Free Zones* case (Series A, No. 24, p 12), the case of the *Danzig Railway Officials* (Series B, No. 15, p. 26), the case of the *Treatment of Polish Nationals in Danzig* (Series A/B, No. 44, p. 24), and the second *Free Zones* case (Series A/B, No. 46, p. 167). The same principle under other aspects was applied in the cases of the *German Interests in Polish Upper Silesia*, the *German Settlers in Poland*, the *Exchange of Greek and Turkish Populations* and the *Greco-Bulgarian Communities* (Series A, No. 7, pp. 21-24, 32, 42 and 46 ; Series B, No. 6, pp. 25 and 36-37, No. 10, p. 20 and No. 17, p. 32). I have ventured to stress this position because, although the application is a little different, I believe the underlying principle is the same as that I am contending for in the present case. In each case you get a country which has admittedly failed to do something it ought to have done, and which then proceeds to make that same failure the basis for contending either that it is thereby absolved from its international obligations, or, as in the present case, that it is not bound to recognize something *the validity of which it can only contest on the basis of that same failure or default ;* for let it be remembered that in the circumstances we are now contemplating, there has *ex hypothesi* been a default by the three former enemy Governments, because the Court has answered the first two questions in the Assembly's request in the affirmative, but still these Governments have not appointed their representatives on the treaty commissions. Moreover, in these circumstances (i.e. since the Court has found that a dispute exists which ought to be heard by the treaty commissions, to which the former enemy Governments ought to appoint their representatives), in these circumstances, the absence of the ex-enemy commissioners will constitute the sole ground on which the competence of these commissions and the validity of their findings could be challenged. But can the Court admit that this is a legitimate ground of challenge, seeing that it results from the Court's own previous opinion that the failure to appoint is wrongful and in violation of the peace treaties ?

I have naturally not overlooked the fact that in many cases the breach of a contractual obligation only gives rise to a claim for damages, and does not give a right to what is known in English law as "specific performance", i.e. to the actual performance of the original obligation. But this is because, if I may refer to the principles of English law—which I do not doubt are not dissimilar in this respect from those of other legal systems—this is because in most cases damages are considered to constitute an adequate remedy, while in many cases an order for specific performance of the contract would be impracticable. On the other hand, to quote one of the leading English cases on the subject, *Ryan* v. *The Mutual Tontine Association* (1893, Chancery Cases, at page 126) :

> "The remedy by specific performance was invented .... in order to meet cases where the ordinary remedy by an action for damages is not an adequate compensation for breach of contract."

In many cases damages are *not* an adequate remedy, and only actual performance suffices. Thus, it was always the practice of the English Court of Chancery in appropriate cases to order the actual delivery under a contract of sale of articles possessing a special beauty, rarity or interest, where the importance of the contract lay in the intrinsic nature of the article to be sold rather than in its money value; and now, under the English Sale of Goods Acts, the Court can, if it thinks fit, order the actual delivery of *any* specific and ascertained goods contracted to be sold.

I suggest, Mr. President, that the present case is eminently one in which there can be no real or adequate remedy short of carrying out the intention of the peace treaties and referring the disputes which have arisen to arbitral commissions. It is true that since we are in the international, not the domestic, field, specific performance of the obligations of the former enemy Governments cannot technically be decreed, because there is no means of compelling them to carry out these obligations or to appoint their respective commissioners; but that is no reason for failing to take such other action as is possible and would tend to achieve the same result, namely to procure a decision on these disputes.

Now, this is the very position which we find under many, if not most, systems of domestic law in relation to the performance of contracts to resort to arbitration. There equally the Court will not, because *in fine* it cannot, compel a recalcitrant party to nominate an arbitrator. What it will do is to appoint the arbitrator itself on the application of the other party. Alternatively, as in England, the law itself makes provision for the case by authorizing the willing party's arbitrator to proceed alone and to give an award which is then binding on both parties.

This practice, which prevails in England and elsewhere, is precisely that which we contend should be followed in the present case. I suggest that the Court has power to follow it under Article 38, paragraph (*c*) of its Statute, which entitles it to apply "the general principles of law recognized by civilized nations". This clearly includes principles of domestic law if of a general character, and their application is specially called for where existing rules of international law may not be wholly adequate. Indeed, I suggest that the whole tenor of Article 38 of the Court's Statute is directed against the Court being deprived of the means of rendering a decision on account of the absence of any obviously and directly applicable rule.

In the domestic sphere, none of this gives rise to any serious difficulty, and in the international sphere I suggest that equally such difficulties of a practical character as may result from the absence of the arbitrator or commissioner of one of the parties are not insuperable either. Reference to these difficulties was made in paragraph 25 of the United Kingdom Written Statement, and a solution was suggested in paragraph 28 of that statement. The matter is also discussed on pages 28 and 29 of the United States Written Statement, in Document 50/171.

It is clear in any case that there is nothing new about these practical difficulties in the international field. They have occurred whenever, after a tribunal has been constituted, the arbitrator or commissioner

of one of the parties is withdrawn, or fails or refuses to attend, and they are of exactly the same character; yet these difficulties have not prevented the tribunals concerned from continuing to function and from giving decisions. The relevant cases are very fully gone into on pages 22-28 of the United States Written Statement, and are alluded to in the footnote to pages 67-69 of the United Kingdom statement, with particular reference to the very striking *Lena Goldfields* case.

I shall not, therefore, go over this ground again, but it is worth noticing that in some of these cases—for instance, those known as the *Sabotage* cases between the United States and Germany- the objections of the withdrawing or defaulting State, Germany, were specifically founded on the argument that a mixed commission required by its nature the presence of commissioners of both countries. The remaining commissioners, however, including the umpire, held that the retirement of the German commissioner did not render the commission *functus officio*, and did not deprive it of the power to decide the question at issue. It was observed in that case that the only motive for the withdrawal "was to prevent, if possible, a conclusion from being reached, or to render the award invalid should one be made". Now, that applies precisely to the present case, where the former enemy Governments refuse even to appoint their commissioners. As I suggested earlier, it is really a case of the revocation by these Governments of a consent already given by them, which would necessarily be invalid, and ought not to be allowed to prevent a decision being reached by such means as are possible.

Equally, it was observed in the *Sabotage* cases that if, by withdrawal, a commissioner could "defeat the very purpose for which the commission was constituted under the treaty .... such a result would make a mockery of international arbitration". That is precisely what we say will be the result, a mockery of international arbitration, if the manœuvres of the three former enemy Governments in the present case have the consequence that peace treaty commissions cannot be constituted and no decisions can be rendered.

In this connexion I should like to recall and refer once more to the general remarks which I made at the beginning of my present statement, and I should like to add this to those general remarks. For my part, I cannot regard the present case as one in which the Court has to perform an operation in the nature of *lex ferendi*. It is rather a question of extending into the international field a principle already well recognized in the domestic field and under many systems of domestic law. Even in the international field, it is really only a question of applying to a new situation principles already wellestablished in the case of analogous situations which have arisen in the past, where members of international commissions or tribunals are withdrawn or fail to take part in the proceedings. I would ask the Court to bear this point specially in mind, for I think it is a very important one in the novel and unusual circumstances of the present case.

I come to the final section of my statement. As the representative of the United States pointed out in his remarks yesterday, the importance of this matter for the future of international arbitration is well illustrated

by the fact that the present case and the issues which it raises are referred to in the report on arbitration procedure furnished by Prof. Georges Scelle to the International Law Commission now in session at Geneva, which is charged by the Assembly of the United Nations with the task of producing a code on that subject. Prof. Scelle, who is well known to the Court, and whose erudition and balanced judgment are familiar to us all, takes a line which supports very strongly the view which I am now advocating. His remarks have already been quoted by the representative of the United States, so that I shall not quote them again, but, briefly, he has no doubt that juridically the failure of one party to co-operate in carrying out the prescribed procedure for arbitration ought not to deprive the other party of his right to an arbitral settlement. He points out that French law guarantees this right; and, as we know, other systems of domestic law do the same. In the international field, however, Prof. Scelle foresees certain difficulties of a practical and political order in the application of a similar principle, but he adds that he does not consider these objections entirely convincing or insuperable, or that they should be allowed to override the clear juridical position.

Prof. Scelle then goes on to expound his solution of the problem. His solution consists of introducing certain specific clauses into arbitration agreements, the chief of which for our present purposes would read as follows:

> "If one of the parties by systematically abstaining obstructs the operation of the procedure laid down in the said articles, the missing arbitrators shall be appointed by the President of the International Court of Justice in accordance with Article 23 (3) of the said general act. The tribunal so constituted shall hear the case and its judgment shall be binding."

With this proposal I respectfully agree, but, of course, it can only as such apply to the future, to arbitration agreements or arbitration clauses in treaties which are drawn up at some time hereafter. What of the past? Because, as we know, arbitration clauses have not hitherto made express provision for this type of case. Generally speaking, as we noticed earlier, it has hitherto been thought unnecessary, where a clause clearly obliged the parties to go to arbitration and to take certain steps for setting up the tribunal or commission, to provide also for what was to happen if these steps were not taken, since it has been generally assumed, and correctly before the present case, that there could be no question of refusing to co-operate in the setting up of the tribunal where a manifest dispute existed concerning the interpretation or application of the relevant treaty clauses, and the treaty provided that such a dispute was to be settled by arbitration.

Nor, I suggest, can any satisfactory solution be found by implying or reading into arbitration clauses an obligation to arbitrate about whether an obligation to arbitrate exists; for the party which denies the primary obligation to arbitrate will almost certainly deny the secondary obligation to arbitrate about whether the primary obligation exists. This will lead to what mathematicians call an infinite regress, like a story about the man who tells a story about a man who tells a story, or like a play within a play within a play—but on every stage the action is the same, a refusal to co-operate in setting up any commission or arbitral tribunal.

The only real remedy therefore lies in giving the party who is ready to go to arbitration the faculty to constitute the tribunal or commission independently by such means as are available in the circumstances within the scope of the arbitration article, and the right to obtain a valid decision from it. This is what domestic law does, and it is what Prof. Scelle, in effect, suggests should be specifically provided in future arbitration clauses. It is equally what my Government suggests should constitute the correct *interpretation* and application of *existing* arbitration clauses, the true intention of which such an interpretation would certainly represent, but which have never hitherto contained any express provision on the subject, because it was never imagined that they could be interpreted in such a way as to render such express provision necessary.

As I said a moment ago, this is not in our view a case of *lex ferendi*. To legislate would be improper for the Court, or for any Court ; but to interpret and apply existing principles to new facts, that is proper for a Court. It is, indeed, one of the main functions of Courts, and in this function lies a large part of their great value to the community. If, in the present case, the Court considers that existing principles do not go far enough to enable it to answer the present questions in the affirmative, that will be one thing ; but if this is not so, and if the Court thinks that existing principles can be extended in the required manner, then I respectfully submit that the Court need not be deterred from giving affirmative answers by any feeling that in so doing it will be going beyond its province as a Court.

I have finished, Mr. President, and I make my formal submissions to the Court as follows :

On the third question I say this : that if one of the parties to a dispute under the relevant clauses of the peace treaties fails to appoint his representative to the approprite treaty commission, the Secretary-General of the United Nations is authorized to appoint the third member of the commission upon the request of the other party to the dispute.

On the fourth question we say this : A treaty commission composed of the representative of one party and of the third member appointed by the Secretary-General of the United Nations would constitute a commission within the meaning of the relevant treaty articles, competent to give a definitive and binding decision in any dispute coming within the scope of those articles.

I thank the Court.