Decisions[1] of the Netherlands-Japanese Property Commission

CASE OF THE NETHERLANDS STEAMSHIP *OP TEN NOORT*— DECISIONS I AND II HANDED DOWN ON 16 JANUARY 1961

Decision I

The Netherlands-Japanese Property Commission established pursuant to the "Agreement for the Settlement of Disputes under Article 15 (*a*) of the Treaty of Peace with Japan" (the said Agreement for Settlement of Disputes and the Treaty of Peace being hereinafter referred to as the Agreement and the Peace Treaty) and composed of Dr. J. H. W. Verzijl, former professor of International Law at the Universities of Utrecht, Amsterdam and Leiden, Member

[1] Texts provided by the Permanent Representative of the Netherlands to the United Nations.

of the Commission appointed by the Government of the Netherlands; Mr. Kumao Nishimura, Member of the Permanent Court of Arbitration and Former Ambassador of Japan to France, Member of the Commission appointed by the Government of Japan; and Doctor Ake Holmbäck, Member of the European Court of Human Rights and former Professor of the University of Uppsala, Third Member of the Commission chosen by mutual agreement of the Government of the Netherlands and the Government of Japan,

Having received from the Netherlands Government a Submission dated October 23, 1959, an Answer thereto from the Japanese Government, followed by a Reply from the Netherlands Government and a Rejoinder from the Japanese Government,

Having during oral hearings of December 15, 16, 21, 26, 27 and 28, 1960 and January 6, 1961 heard the Agents of the two Governments, the Netherlands Government being represented by Dr. M. J. Meijer, First Secretary of the Netherlands Embassy in Tokyo, and the Japanese Government by Mr. Tatsuo Sekine, State Attorney, Litigation Bureau, Ministry of Justice, agent and Mr. Tatsuo Fukai, Counsellor, Treaties Bureau, Ministry of Foreign Affairs, Mr. Kiichiro Otaka, Chief of General Affairs Section, Maritime Transportation Bureau, Ministry of Transportation and Mr. Shigeharu Yokoyama, State Attorney, Litigation Bureau, Ministry of Justice,

Is satisfied that the Netherlands Government have made their application within the time limit stated in Article 15 (*a*) of the Peace Treaty and have referred their claim to the Commission within the further time limit stated in Article 1 of the Agreement.

On December 21, 1960, the Netherlands Agent, upon instructions by his Government, requested the Commission to rule upon a preliminary question in accordance with Article 2 paragraph 2 of the Rules of Procedure with respect to the Commission's competence to deal with the Netherlands claim. The Netherlands Government requested the Commission to rule (*a*) as to its competence, and (*b*) as to the extent or scope of its competence.

The Commission thereupon stated that it was not able to decide immediately upon its competence but would do so as soon as possible. The hearings were to continue but the Agents were requested to concentrate upon the points most relevant to the issue of the competence of the Commission.

The subject matter of the dispute is the return of the wreck of the lost Netherlands s.s. *Op ten Noort*, originally owned by the N.V. Koninklijke Paketvaartmaatschappij (Royal Packet Navigation Co., Ltd.), a Netherlands company limited by shares, having its seat in Amsterdam. The Netherlands Government having reimbursed the company for the loss there is no original claimant in the dispute.

THE FACTS:

After the outbreak of the second world war the *Op ten Noort* was fitted out as a hospital ship by order of the Royal Netherlands Navy. In February 1942, in the area of the Java Sea, the ship was taken by the Japanese Navy. According to the Netherlands Government the ship was captured in contravention of Article 1 of the 10th Hague Convention, whereas according to the Japanese Government she was detained in accordance with Article 4, paragraph 3 and 5 of the same Convention. In December 1942 the ship was taken to Japan where eventually the captain, the staff and the crew were interned. Thereafter the ship was used by the Japanese Navy under the name of *Tenou Maru* said sailed under the Japanese flag.

On August 14, 1945, the Japanese Government addressed a formal communication to the Allied Powers accepting the provisions of the Potsdam

Declaration and stating their preparedness to command all the military, naval and air authorities of Japan and all the force under their control to cease active operations. On the following day, August 15, a message of the Government of the United States of America directed prompt cessation of hostilities by Japanese forces, informing the Supreme Commander for the Allied Powers of the effective date and hour of such cessation.

The Armistice was concluded on September 2, 1945. In the Instrument the Japanese forces and people were commanded to cease hostilities forthwith and to preserve and save from damage all ships, aircraft, and military and civil property.

Some days after the conclusion of the Armistice, the Netherlands Government asked for information on the whereabouts of the ship, but the Japanese Government, in a *note verbale* of September 27, 1945, asserted that they had heard nothing about the ship since she sailed from Maizuru Port on September 10, 1944.

During the pleadings before the Commission the Netherlands Government argued that it appeared from information received by the Government that on August 19, 1945, the Japanese Navy had instructed a special crew to sink the ship just within three miles of the Japanese coast. During the hearings the Agent of the Netherlands Government asserted that on August 19, 1945 the Japanese Navy towed the ship out of port and scuttled her. The Japanese Agent thereupon informed the Commission that a captain of the port had admitted that he scuttled the ship on August 16, 1945.

In their forementioned note of September 27, 1945 the Japanese Government added that "said ship was under detention wherefore we will repay by the same type of ship". (During the pleadings before the Commission the Japanese Agent pointed out that the relevant part of the Japanese original means: "the Japanese Government are prepared to repay by an appropriate ship of the same type".) Such a replacement has not taken place.

On September 8, 1951 the Peace Treaty was signed. Japan deposited its ratification on November 28, the same year.

On December 1, 1951, the Netherlands Reparations and Restitution Delegation in Tokyo concluded a contract for salvage of the *Tenou Maru* (ex s.s. *Op ten Noort*) with Kayashita Gumi, Ltd. a salvage concern of Japan. This contract has never been implemented.

On January 21, 1952, the Netherlands Mission in Japan requested, in a *note verbale* addressed to the Japanese Ministry of Foreign Affairs, the restitution of the *Op ten Noort* in its "present condition as is and where is". (During the pleadings before the Commission this phrase was explained by the Netherlands Agent as meaning in better English: "whatever its condition and wherever located".) To this no reply was given by the Japanese Government.

The Peace Treaty entered into force between the Kingdom of the Netherlands and Japan on June 17, 1952, the date on which the Government of the Netherlands deposited their ratification.

On February 20, 1953 the Netherlands Embassy in Tokyo referring to its Note of February 21, 1952, transmitted, in accordance with Article 15 (*a*) of the Peace Treaty, to the Japanese Ministry of Foreign Affairs a "Request for Restoration of United Nations Property" concerning the said ship. Subsequently a "Request for Investigation on Present Status of U.N. Property" was submitted on March 6, 1953. In reply to these Requests the Japanese Ministry of Foreign Affairs, in a *note verbale* of October 7, 1953, informed the Netherlands Embassy that as a result of spot investigations conducted in August 1953 in the Sea area north of Maizuru Port, where the ship in question was supposed to have sunk, a ship was found sunk and later identified as the s.s. *Op ten Noort*.

The ship was found at point 35° 43′ 54″ north latitude and 135° 31′ 12″ east longitude, being 3.9 miles out to sea from the coast of the island nearest to the above point and, consequently, 0.9 nautical mile outside the territorial waters of Japan. In the Note the Ministry of Foreign Affairs stated that the ship was lying in the open Sea outside the Japanese territorial waters, that in view of this she did not fall under the category of "property in Japan of an Allied Power" as provided for in Article 15 (*a*) of the Treaty of Peace with Japan and that, therefore, the Japanese Government were not under obligation to meet the Request for Restoration filed by the Embassy.

In the *note verbale* of March 9, 1954, the Netherlands Government replied that they were not able to accept the repudiation on technical grounds of the Netherlands claim. The Government added that, before considering any further steps, they would appreciate to be advised as to the action the Japanese Government intended to take in order to perform the undertaking given on September 27, 1945 to compensate for the loss of the *Op ten Noort* by returning a vessel of the same type.

In reply the Japanese Ministry for Foreign Affairs stated, in a Note of February 1, 1955, that the Japanese Government could find no reason for modifying their view as set forth in their Note of October 7, 1953. As to the Note of September 27, 1945 the Ministry stated that it was its understanding that, as a result of the Peace Treaty, the Netherlands waived all reparations claims including the case of the said vessel, as provided in Article 14 (*b*) of the Treaty, and that, therefore, the Japanese Government were no longer in a position to "undertake its compensations" by replacement of the vessel as proposed in the *note verbale*

In a *note verbale* presented on May 25, 1955, the Netherlands Government observed concerning the Japanese assertion that the s.s. *Op ten Noort* does not fall under the provisions of Article 15 (*a*) of the Peace Treaty; "The Netherlands Government is of the opinion that the fact that the wreckage of the said ship is located just outside the limits of Japanese territorial waters—assuming for the moment that this statement is correct—constitutes a consideration of a merely formalistic nature, and that Article 15 (*a*) of the said Treaty of Peace, if reasonably interpreted, does, in fact, imply that the wreckage be restored by the Japanese Government to the Netherlands Government in such a manner that the latter Government may freely dispose of it. The Netherlands Government is therefore of the opinion that there is involved in this case a dispute arising under Article 15 (*a*) of the Treaty of Peace with Japan and as also referred to in the Agreement for the Settlement of Disputes Arising Under Article 15 (*a*) of the Peace Treaty dated June 12, 1952, which agreement was ratified for the Netherlands on September 10, 1953. Under the terms of Article II of the Agreement the Netherlands Government requested the appointment of a Netherlands-Japanese Commission as referred to in Article I of the Agreement. For the record the Netherlands Government pointed out that according to the Government's opinion the submission of the subject dispute to the said Netherlands-Japanese Commission in no way would prejudice the right of the Netherlands Government to bring before the International Court of Justice in accordance with Article 22 of the Treaty the questions whether the acknowledgment of liability and the offer of repayment by the same type of ship have since been cancelled by virtue of the waiver of war reparations claims as laid down in Article 14 (*b*) of the Treaty.

THE CLAIM OF THE NETHERLANDS GOVERNMENT:

In his Submission the Agent of the Netherlands Government requested the Commission "to adjudge and declare that Article 15 of the Treaty of Peace with

Japan of September 8, 1951 imposes on Japan the obligation to lift, at its sole cost, the wreck of the s.s. *Op ten Noort* and to return it to the Netherlands Government free of all encumbrances and charges to which it may have become subject after its seizure or detention and without any charges for its return."

In the Reply of the Netherlands Government to the Answer of the Japanese Government it was stated:

1. The Netherlands claim is twofold:

A. As stated in the Submission and further clarified in this Reply (see paragraph 2), the Netherlands Government hold the Japanese Government responsible under the Treaty of Peace with Japan for the return to the Netherlands Government of the wreck of the s.s. *Op ten Noort* free of all encumbrances and charges.

B. Independently of the Peace Treaty of Japanese Government undertook to compensate the Netherlands Government by the transfer of an appropriate ship of the same type. This undertaking, officially notified to the Netherlands Government (see Annex IV of the Submission and for further clarification of the English translation paragraph (1) (*e*) of the Answer) renders the Japanese Government liable to pay compensation. Since this undertaking was made after the cessation of hostilities it cannot be affected by the waiver contained in Article 14 (*b*) of the Treaty of Peace with Japan. This specific undertaking of the Government of Japan was one of the reasons why it was not necessary for the Netherlands Government to start the cumbersome procedure of introducing a specific provision regarding the *Op ten Noort* in the Treaty of Peace with Japan.

In the Statement which opened the hearings the Netherlands Agent told the Commission:

> It is the Netherlands Government's hope that you will give a ruling upon the dispute in its entirety and that you will rule that the Japanese Government shall pay full damages. The damage suffered by the Netherlands Government is 777,108,857 yen, being the equivalent of the amount the Netherlands Government paid to the owner of the ship, the Royal Packet Navigation Company, on April 1st, 1952 (D. Fls. 5,324,400 or 507,085,714 yen) increased by five percent interest per annum as to January 1st, 1961.

In his Oral Reply the Netherlands Agent then stated:

> The Netherlands claim finds its basis in Article 15 (*a*) of the Peace Treaty on the ground that the ship was in Japan when the hostilities ceased in Japan, viz. August 15, 1945 and that it was scuttled afterwards.
>
> It is beyond the competence of the Commission to enter into the assertion of the Japanese Government that any claims are waived ex Article 14, paragraph V, sub-paragraph (*b*). But in any case the scuttling of the vessel cannot be considered as an act committed in the course of the prosecution of the war.
>
> The Netherlands Government maintains its opinion that justice can only be done by taking into consideration *all* the merits of the case and that it would be substantial injustice for the Commission to leave out of its considerations facts which have the gravest bearing on the present location and condition of the *Op ten Noort*. Judging only part of the merits of the case could never lead to a decision in accordance with justice. These considerations of fundamental importance must inevitably be of a decisive character for the final determination of competence itself. Should the Commission feel unable to decide on the claim by con-

sidering all its aspects, it would be much more in accordance with justice to simply conclude that it is incompetent to deal with the Netherlands claim at all.

Therefore, the Netherlands on this ground demands the lifting and return of the *Op ten Noort*, free of all encumbrances and at the cost of the Japanese Government. The reasons why the Netherlands Government still considers the Japanese Government obligated to return the ship, have been clearly stated before. If the Japanese Government prefers to indemnify the Netherlands Government in another way to avoid the high expenses of salvaging the ship, the possibility thereto has been indicated before.

THE JURISDICTION OF THE COMMISSION:

As was already said earlier a request for a preliminary decision on the jurisdiction of the Commission was made by the Agent of the Netherlands Government on December 21, 1960, and implicitly granted by the Commission the same day. It is necessary, therefore, first to summarize the pertinent or relevant legal arguments invoked by either party.

The Netherlands Government state in their Reply that they originally had some doubt as to whether the non-compliance with the Japanese undertaking of September 27, 1945, which undertaking is independent of the Peace Treaty, could be brought before the Commission. The Netherlands Government are, as it is said in the Reply, of the opinion that it would be more practical if the Commission would consider the claim in its entirety and they deem the Commission competent to do so under paragraph 2 of Article 2 of the Rules of procedure since both aspects of the Netherlands claim are closely interrelated. In the opening statement of the oral hearings the Agent of the Netherlands Government repeated that they consider the Commission to be competent to give a ruling upon the dispute in its entirety: "Whenever a claim for the return of property is submitted, the Commission can only determine whether the Treaty is executed *in good faith* if it has the competence to consider all aspects of such claim. In this connexion both the way in which the property in dispute has come into the possession of the Japanese Government and has been treated afterwards and the attitude taken by the Japanese Government with regard to the request for restitution are relevant factors." The same view was put forward, also in the part of the Netherlands' oral reply already quoted under the heading "The claim of the Netherlands Government".

On the other hand, the Netherlands Government stated in that reply, that it is beyond the competence of the Commission to enter into the assertion of the Japanese Government that "any claims are waived ex Article 15 paragraph V sub-paragraph (*b*) (i.e., Article 14 (*b*) of the Peace Treaty)".

The Japanese Government pointed out before the Commission that the jurisdiction of the Commission covers disputes only to the extent to which they are based on Article 15 (*a*) of the Peace Treaty. In other words, the Netherlands claim as far as it is not based on Article 15 (*a*) of the Peace Treaty does not fall under the jurisdiction of the Commission.

It is furthermore to be noted that the Netherlands Government in their Submission reserved their rights arising under the promise made by the Japanese Government in their *note verbale* of September 27, 1945, in so far as these rights are not covered by Article 15 of the Peace Treaty. In his statement of December 21, 1960, the Netherlands Agent declared that if the Commission finds Article 15 (*a*) not applicable to this case the Netherlands Government deems the way open to bring the matter before the International Court of Justice. "Should the Commission", the Netherlands Agent later stated in its oral reply, "feel unable to decide on the claim by considering all its aspects it would be

much more in accordance with justice to simply conclude that it is incompetent to deal with the Netherlands claim at all".

The Japanese Government, on the other hand, in their Answer opposed the reservation made by the Netherlands Government in their Submission. "The Japanese Government", it was said, "does not recognize the reservation of such rights. The dispute regarding the claim of the Netherlands Government concerning the s.s. *Op ten Noort* shall be settled only in accordance with Article 15 (*a*) of the Treaty of Peace with Japan. Moreover, the Netherlands Government, by having of its own accord referred the case to the Netherlands-Japanese Property Commission, has sought to settle the dispute through the Commission. By virtue of 'the Agreement for the Settlement of Disputes Arising under Article 15 (*a*) of the Treaty of Peace with Japan', the decision of the Commission is final and binding to the both parties. Accordingly, the dispute relating to the claim for the return of the s.s. *Op ten Noort* is to be finally settled by the decision of the Honourable Commission".

In their oral reply the Japanese Government maintained their opposition to the view that the Commission can refrain from deciding upon a claim presented as being based on Article 15 (*a*) of the Peace Treaty: "Since the cause of action of the Netherlands claim is asserted to be based on Article 15 (*a*) of the Peace Treaty, the Commission is obligated to assume jurisdiction on this Netherlands claim and to proceed to the final decision on the merits of the case. Under Article 2, paragraph 2 of the Rules of Procedure, the Commission is authorized, if necessary, to decide upon the jurisdiction, but strictly in accordance with the terms of the Agreement for the Settlement of Disputes arising under Article 15 (*a*) of the Peace Treaty. The Commission, therefore, is not empowered either to widen or to curtail its jurisdiction."

After due deliberation the Commission has reached the following conclusion as to its jurisdiction and the extent thereof.

DECISION:

The Treaty of Peace states in Article 22, first sentence, that any dispute concerning the interpretation or execution of the Treaty which is not settled by reference to a special claims tribunal or by other agreed means shall, at the request of any party thereto, be referred for decision to the International Court of Justice.

The Agreement provides for setting up such special claims tribunals called Property Commissions for the settlement of disputes concerning the interpretation and execution of Article 15 (*a*) of the Peace Treaty. Article 1 of the Agreement provides that if the Government of an Allied Power is not satisfied with the action taken by the Japanese Government with respect to an application for return of Property or a claim for compensation, the Government of the Allied Power may refer such claim or application for final determination to such a Commission.

The jurisdiction of the Commission appointed by the Netherlands Government and the Government of Japan in accordance with the Agreement covers such disputes, as defined above, and the Commission is under a duty to decide upon all disputes between Japan and the Kingdom of the Netherlands which may arise in the interpretation and execution of Article 15 (*a*) of the Peace Treaty and the Compensation Law and which are in due way referred to the Commission. The jurisdiction of the Commission is on the other hand limited to such disputes.

The Rules of Procedure of the Commission neither have nor could have widened the Commission's jurisdiction.

In accordance with the above the Commission concludes that concerning the *Op ten Noort* it has no jurisdiction to decide upon (*a*) whether the Government of Japan is liable to the Netherlands on the basis of the undertaking of September 27, 1945, (*b*) whether the Netherlands claim concerning the hospital ship from other aspects than Article 15 (*a*) is excepted or not from the stipulation in Article 14 (*b*) nor (*c*) the legal consequence of the alleged illegality of the Japanese Navy's actions in this case. On the other hand the Commission is under a duty to decide whether concerning the ship in question the Government of Japan is liable to the Netherlands under Article 15 (*a*) of the Peace Treaty.

Tokyo, January 16, 1961.

(Signed)
Third Member

(Signed)
Japanese Member

DISSENTING OPINION

I regret to be unable to agree with the last, and to have to make a reservation with regard to the third, of the four conclusions formulated in the final paragraph of the preliminary ruling just given by the Commission on the extent of its jurisdiction, at the formal request made by the Netherlands Agent in its session of December 21, 1960.

To begin with the third of those conclusions, according to which "(the Commission) has no jurisdiction to decide upon the legal consequences of the alleged illegality of the Japanese Navy's actions in this case", I agree that, since the Japanese Government has refused, until the very end of the oral pleadings, to meet the suggestion of the Netherlands Government to invest this Commission with the additional power, by way of prorogation of jurisdiction, to judge upon the pending dispute in its entirety and from all its aspects, the Commission is not competent to deal with the dispute *directly* from that angle. The reservation which, however, I feel bound to make in this respect is that one specific element in the series of alleged international delinquencies on the Japanese side, viz. the deliberate scuttling of the hospital ship in the night of 18/19 August 1945 after the cessation of hostilities on the island of Honshu, might nonetheless *indirectly* have to plan a part in the construction to be put upon the provision contained in Article 15 (*a*) of the Peace Treaty, in particular as far as the words "property in Japan" are concerned, and thus still might come by a devious way under the questions of which the Commission is competent to take cognizance.

However, the point on which I entirely dissent from the majority of the Commission relates to its fourth, positive conclusion on the jurisdictional issue. In that positive part the Commission successively expresses itself in two different ways, which are not identical. It first says that "the Commission is under a duty to decide upon all disputes between Japan and the Kingdom of the Netherlands which may arise in the interpretation and execution of Article 15 (*a*) of the Peace Treaty, etc.", whereas at the end it narrows and specifies its first pronouncement in the sense that "the Commission is under a duty to decide whether concerning the ship in question the Government of Japan is liable to the Netherlands under Article 15 (*a*) of the Peace Treaty". Apart from the fact that it would have been more correct to mention a liability of Japan herself—the only entity which under international law is responsible—no adequate argument, in fact no argument at all, is invoked in support of this change of

wording and, in particular, in support of this specific definition of the extent of the alleged "duty (of the Commission) to decide".

It is, of course, beyond doubt that the Commission has jurisdiction to decide upon the extent of its own jurisdiction but, in doing so, it has to make a clear distinction between issues belonging to the merits of a dispute and preliminary questions of competence.

Now it is obvious that, before being in a position, let alone under a duty, to decide whatsoever, the Commission must be satisfied that it has jurisdiction to deal with the dispute at all, in particular if one of the parties requests the Commission to render a preliminary decision on that jurisdictional issues.

In the present decision the Commission comes to the conclusion, expressed without any reservation and unsupported by any further argument, that it has jurisdiction "to decide whether concerning the ship in question the Government of Japan is liable to the Netherlands under Article 15 (*a*) of the Peace Treaty". And it does so, in particular, without any previous examination of the question as to whether the ship is (was) "property in Japan", a preliminary question upon which the very applicability of Article 15 (*a*) and, consequently, the Commission's competence to deal with the dispute under its terms of reference is the first place depends. For if the conclusion had to be that the ship does not at all fall under the description "property in Japan", then the Commission would have no concern with the vessel, this having been identified as property which entirely lies outside the scope of Article 15 (*a*).

Having all the relevant material ready before it, the Commission could easily, and should legally, have taken position with regard to that simple preliminary question before making its sweeping declaration unsupported by any legal argument, that it has jurisdiction to decide upon Japan's liability towards the Netherlands under Article 15 in any case, even if the ship is no "property in Japan". In the latter case the Commission, far from being "under a duty to decide whether concerning the ship in question (the Government of) Japan is liable to the Netherlands under Article 15 (*a*) of the Peace Treaty", would on the contrary lack any jurisdiction to deal with this property at all. It is, indeed, entirely outside the power of the Commission to usurp any competence with regard—in the terminology used in the last sentence of Article 1 of the Agreement for the Settlement of Disputes of June 12, 1952—to any dissatisfaction on the Netherlands side with any lack of action on the Japanese side in respect of property situated outside Japan. By nevertheless upholding its jurisdiction under Article 15 over the merits of the dispute even in respect of such property, the Commission has, to my mind, entirely disregarded the procedural axiom, constantly acted upon by both Courts of International Justice. Whenever, once the preliminary question as to its jurisdiction having been raised before an international tribunal, it appears to the latter that one of the prerequisites thereof is not fulfilled, the dispositive part of the judgement or of the final judgement has always to be, and in fact always has been, not a negative decision on the merits, but one on the tribunal's jurisdiction. This is true irrespective of whether this conclusion on the nonfulfilment of the conditions required immediately follows from elements entirely foreign to the merits or whether it can only be reached after a summary examination of the merits as presented to the tribunal in the preliminary pleadings, or even only after a full discussion of the merits to which the tribunal was forced to join the objection to its jurisdiction because of the close interconnection between the latter and the merits. The Commission ought, therefore, to have guarded itself against pronouncing such a sweeping and unqualified affirmative statement on its jurisdiction under Article 15 (*a*) without having previously ascertained *in concreto* that the property concerned was indeed "property in Japan". By

this assumption of jurisdiction without reservations the Commission has even exposed itself and its decision to the argument—which, in the light of the prevailing international jurisprudence, might be considered valid by another international tribunal—that by following its course the Commission has implicitly and irrevocably recognized for the purposes of this case, the location of the property concerned within Japan, since it has no competence whatsoever to admit or reject claims regarding property situated outside Japan.

(*Signed*)
Netherlands Member

DECISION II

The Netherlands-Japanese Property Commission established pursuant to the "Agreement for the Settlement of Disputes under Article 15 (*a*) of the Treaty of Peace with Japan" (the said Agreement for Settlement of Disputes and the Treaty of Peace being hereinafter referred to as the Agreement and the Peace Treaty) and composed as indicated in its Decision I,

Referring for the names of the Parties and of their Agents, the subject matter of the Dispute, the claim and the facts of the case to the same Decision;

Having upheld in that Decision its jurisdiction to deal with the Netherlands claim under Article 15 (*a*) of the Peace Treaty with Japan;

Now proceeds to a decision on the question concerning the *Op ten Noort* whether the Government of Japan is liable to the Netherlands under Article 15 (*a*) of the Peace Treaty.

The Article reads as follows:

> Upon application made within nine months of the coming into force of the present Treaty between Japan and the Allied Power concerned, Japan will, within six months of the date of such application, return the property, tangible and intangible, and all rights or interests of any kind in Japan of each Allied Power and its nationals which was within Japan at any time between December 7, 1941, and September 2, 1945, unless the owner has freely disposed thereof without duress or fraud. Such property shall be returned free of all encumbrances and charges to which it may have become subject because of the war, and without any charges for its return. Property whose return is not applied for by or on behalf of the owner or by his Government within the prescribed period may be disposed of by the Japanese Government as it may determine. In cases where such property was within Japan on December 7, 1941, and cannot be returned or has suffered injury or damage as a result of the war, compensation will be made on terms not less favourable than the terms provided in the draft Allied Powers Property Compensation Law approved by the Japanese Cabinet on July 13, 1951.

In the course of the written and oral pleadings the legal arguments presented to the Commission by the two Governments mainly concerned the following matters: (1) the location of the ship in the light of Article 15 (*a*); (2) the possibility of lifting the wreck; (3) the actual legal force of the undertaking of the Japanese Government of September 27, 1945 in the light of Article 14 (*b*) of the Peace Treaty; (4) the legal consequences of the alleged illegality of the Japanese Navy's actions with regard to the ship in question.

Since, however, the Commission held already in its Decision I that it has no jurisdiction over the matters covered by the above-mentioned items (3) and

(4), it must confine its final decision to an examination of, and an adjudication upon, the legal arguments relating to items (1) and (2).

(1) THE LOCATION OF THE SHIP

In their Submission the Netherlands Government argued: "In the opinion of the Netherlands Government there does not exist, as between this Government and the Japanese Government, any difference of opinion as to whether the s.s. *Op ten Noort* was 'within Japan at any time between December 7, 1941 and September 2, 1945' as provided in Article 15 (*a*) of the Japanese Peace Treaty. The point on which the two Governments are divided is rather whether the said property was 'within Japan' at the moment the application for its restitution was lodged or, in any case, at the moment the said Treaty came into force, assuming at least that the admissibility of the Netherlands claim is in fact dependent upon such a condition. As to this issue the Netherlands Government cannot accept the Japanese point of view that the words 'property in Japan' could be interpreted as restricting the Japanese obligation to return the ship to such an extent that Article 15 (*a*) of the Treaty of Peace with Japan would not apply in this case. In the opinion of the Netherlands Government the exact location of the ship cannot be decisive in the present case, since there is no doubt that the ship is not under the jurisdiction of any other State. Furthermore the ship is located on Japan's continental shelf in such a way that it can be salvaged without undue effort by the Japanese Government, which employed the ship in their naval services at the time she sank."

In their Reply to the Answer of the Japanese Government the Netherlands Government, as is already stated in the heading "The facts" of Decision I, asserted that from information received by the Government it appeared that on August 19, 1945, the Japanese Navy instructed a special crew to sink the ship just within three miles of the Japanese coast. In continuation the Netherlands Agent said: "As to the meaning of Article 15 (*a*) it may be observed that Japan as the initiator of an aggressive war under the obligation to return all property taken from an Allied Power or its nationals which was within Japan at any time between December 7, 1941, and September 2, 1945. Article 15 (*a*) in referring to such property in 'Japan' (at the moment of entry into force of the Treaty), cannot reasonably and in good faith be interpreted as permitting Japan to refuse the return of a ship which, after being illegally taken, was employed by the Imperial Japanese Navy in the naval service up till August 19, 1945, and sunk on the date—i.e., after the termination of hostilities—on the instructions of the Imperial Japanese Navy, whether inside or just outside the territorial waters of Japan."

The Netherlands Agent considered the question also in the following part of his statement of December 21, 1960:

> Because of the attitude taken by the Japanese Government in these proceedings the Netherlands Government now has come to the conclusion that the Japanese Government by availing itself of excuses of a more formal nature persists in trying to shun its responsibility arising from an inexcusable unlawful act committed by the Japanese Navy after the cessation of the hostilities, viz. the act of scuttling the ship. According to general fundamental principles of law, a debtor can never invoke conditions brought about by his own illegal actions in order to free himself from an obligation. This is also the standpoint of the Netherlands Government. A Treaty indeed should be construed, as the Japanese Government states in its answer, in favour of a party which is obliged under it. But it should definitely not so be construed if the obligated party itself has by its own illegal acts created con-

ditions which render a provision of the treaty illusory. This is exactly the situation with which we are faced.

In his oral reply the Netherlands agent stated the following concerning the location of the wreck.

> The Netherlands Government is not in a position to verify the present location of the wreck. For the purposes of the proceedings before the Commission, however, it is willing to accept the expert opinion as formulated by the Japanese Ministry of Transportation, viz. that the ship is situated 0.9 miles outside the territorial waters. Our information is that the ship was scuttled within the territorial waters, that she was released too soon and drifted outside the territorial limits before settling on the bottom of the sea. At what moment it passed the borderline of the territorial waters we do not know. Moreover, in the opinion of the Netherlands Government this is rather immaterial since the claim is based on the knowledge that at the time the hostilities ceased in Japan, viz. August 15, 1945, the ship was in the harbour of Maizuru, and in Denjiro Goto's own words it was brought outside on the night of 18 to 19 August 1945, not as Mr. Sekine vaguely remembered on the 16th. At this time the actual hostilities on the island of Honshu had all ceased.

From the Japanese side the following was brought forward concerning the location of the ship.

After having quoted the statement of the Netherlands Agent that the exact location of the ship could not be decisive in the present case, since there is no doubt that the ship is not under the jurisdiction of any other state, the Japanese Agent remarked in his Answer to the Submission.

> The purport of the above statement is not quite clear. But it would appear as if the above assertion is tantamount to interpreting that the ship which "is not under the jurisdiction of any other state" in effect be regarded as the ship "in Japan". If such an assertion were permissible, it would result in an unreasonable interpretation that, even if the ship were located at a far distant spot in the midst of the High Seas which is not under the jurisdiction of any other state, the Japanese Government would still be obligated to return the ship.
>
> It is, however, not to be imagined that the Netherlands Government would go so far as to put such an interpretation on Article 15 (*a*) of the Treaty of Peace.

Furthermore the Japanese Agent observed:

> Presumably, the Netherlands Government would like to interpret the Treaty in such a way that the ship which is just outside the territorial waters of Japan may legally be regarded as the property in Japan. But it must be stressed that the ship located at the bottom of the High Seas, however close to the limits of the territorial waters, cannot be assimilated in law to the ship located in the territorial waters. The three mile extent of the Japanese territorial waters which is established under the existing international law is the only criterion to determine whether the ship is in Japan or not under Article 15 (*a*) of the Treaty of Peace.
>
> . . .
>
> The language of the Treaty of Peace with Japan is so explicit that there is no shadow of doubt that only the property which exists in Japan could be made the object of return. In asserting that the Japanese Government is obligated to return even the property which is outside the territory of Japan, the Netherlands Government appears to extend unduly the obligation of Japan contrary to the express provision of the Treaty. Such an interpretation of the Treaty is unfounded.

In the Rejoinder the Japanese Agent remarked:

> It would appear that the Netherlands Government, while implicitly admitting that the steamship is situated outside the territory of Japan and therefore the Japanese Government has no obligation to return the ship under the letter of Article 15 (*a*) of the Peace Treaty, regards the ship as if it were situated in the territory of Japan on the basis of the allegation that the ship was taken illegally and sunk by the Japanese Navy. By such an argument the Netherlands Government is attempting to hold the Japanese Government responsible for the return of the ship under Article 15 (*a*) of the Peace Treaty. In other words, the Netherlands Government appears to assert that the Japanese Government is liable to return to Allied Powers the property which is outside its territory, in case where it is situated outside Japan due to an illegal act of the Japanese Government.
>
> It is to be noted that Article 15 (*a*) of the Peace Treaty, in providing for the extent and conditions of the obligation of the Japanese Government to return property or to make compensation, has made no distinction according to whether an illegal act in this regard has been committed by the Japanese Government or not.
>
> The Peace Treaty has been concluded, among other things, for the purpose of settling finally all the claims which have arisen in connection with the war. Accordingly, all such claims are to be dealt with by relevant provisions of the Peace Treaty without regard to whether such claims arose from legal acts or illegal acts. The claims of the Allied Powers are to be satisfied only to the extent specifically provided for in the Peace Treaty. All the claims of the Allied Powers which were not covered by these express provisions of the Treaty, were waived whether such claims arose from legal acts or illegal acts. This is evident in view of the provision of Article 14 (*b*) of the Peace Treaty: "Except as otherwise provided in the present Treaty the Allied Powers waive all reparations claims of the Allied Powers, other claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war, . . .".

In his oral reply the Japanese agent said:

> The evidence produced by the Japanese Government clearly establishes the fact that the ship is located outside the territory of Japan. It is the belief of the Japanese Government that this fact alone should suffice to persuade the Commission to determine, without deliberating on other points, that the claim by the Netherlands Government is not valid.
>
> . . .

There is no shadow of doubt that the word "Japan" which is used in the first sentence of the said Article which runs ". . . return the property . . . or interests of any kind in Japan . . ." means the territory of Japan or the area over which the sovereignty of Japan has been restored by virtue of the Peace Treaty. (Please refer to Article 2, paragraph 3 of the Allied Powers Property Compensation Law).

It may be added that as to the fact that the width of territorial waters under international law in general is three miles, there is no difference of views between the Government of Japan and the Government of the Netherlands.

Article 15 (*a*) of the Peace Treaty obligates the Japanese Government to return Allied property when certain requirements are fulfilled. In particular, there is the important requirement that the property is the property in Japan. It is therefore manifest that the obligation of the Japanese Government arises only when these specific and explicit requirements are fulfilled.

That these requirements should not be ignored is endorsed by the following principles regarding the interpretation of treaties:

(*a*) The principle that treaties should be interpreted primarily as they stand and on the basis of their actual texts.

(*b*) The principle that treaties are to be interpreted so as to give each word its full meaning, weight, and effect.

(*c*) The principle that particular words and phrases are to be given their normal, natural, and unstrained meaning, in the text in which they occur.

Article 15 (*a*) of the Peace Treaty explicitly provides that the Japanese Government is obligated to return the Allied Property which exists in Japan.

Considering the above-mentioned basic principles regarding the interpretation of treaties, an attempt is unwarranted to depart from such actual text and to obligate the Japanese Government to return the property which is outside the territory of Japan.

The Netherlands Government, by pointing out that the ship in question is very close to the territorial waters of Japan, is trying to hold the Japanese Government liable under Article 15 (*a*) of the Peace Treaty to return the ship.

But, if the Japanese Government is obligated to return Allied property existing in the High Seas on account of its geographical propinquity from the territory of Japan the extent of such propinquity would vary considerably according to the subjective interests or views of the parties concerned.

If the intention of the Contracting Parties to the Peace Treaty had been to obligate the Japanese Government to return Allied property which though located in the High Seas, is quite adjacent to the territorial waters of Japan, such intention should have been explicitly so stated in the Peace Treaty. It is inconceivable that at the time of the conclusion of the Peace Treaty, the Contracting Parties had such an intention. Nor has Article 15 (*a*) of the PeaceTreaty any trace which could imply that the Contracting Parties had such an intention.

(2) THE POSSIBILITY OF LIFTING THE WRECK

The Netherlands Government argued that the lifting of the wreck is possible and they are ready, if necessary, to present an expert's opinion to that effect while the Japanese Government asserted that the lifting of the wreck is impossible (technically and economically) and presented an expert's opinion to the effect that the lifting is technically impossible.

DECISION:

The Netherlands claim in so far as it is based on Article 15 (*a*) of the Peace Treaty consists of a request to the Commission to adjudge and declare that Article imposes on Japan the obligation to lift, "at its sole cost the wreck of the s.s. *Op ten Noort* and to return it to the Netherlands Government free of all encumbrances and charges to which it may have become subject after its seizure or detention and without any charges for its return".

The first sentence of Article 15 (*a*) poses three conditions for the obligation of Japan to return property: (1) the condition that the property was within Japan at any time between December 7, 1941, and September 2, 1945, (2) the condition implied in the words "in Japan" and (3) the condition stated in the words "unless the owner has freely disposed thereof without duress or fraud".

According to the opinion of the Commission the words "in Japan" mean that the property shall have been (*a*) on the territory, including the territorial waters, over which the full sovereignty of the Japanese people was restored

by Article 1 of the Peace Treaty, (*b*) at the date of the coming into force of that Treaty. An obligation under Article 15 (*a*) for Japan to return, under special circumstances, property which at the coming into force of the Peace Treaty was outside of the territory over which the full sovereignty was restored to the Japanese people would, according to the view of the Commission, require special stipulation.

In particular it can be pointed out that the continental shelf of Japan outside the Japanese territorial waters neither is nor has been a part of Japan and that the opinion that the date of the coming into force of the Peace Treaty is decisive for the date at which the property must have been in Japan is according to generally accepted rules of international law.

There is no difference of opinion between the parties that the *Op ten Noort* has sunk in the sea before the coming into force between the Netherlands and Japan of the Peace Treaty, i.e., June 17, 1952, and that the wreck of the *Op ten Noort* now is situated on the bottom of the sea 0.9 nautical miles outside the territorial waters of Japan. No evidence has been given whether the wreck can have been brought outside the territory of Japan after the said day by ocean currents or other means. Therefore the condition implied in the words of Article 15 (*a*) "in Japan" is not fulfilled and Japan is under no liability in so far as that Article is concerned to return the ship. Consequently the Commission, without entering into further considerations dismisses the claim of the Netherlands Government in so far as it is based on the said Article.

Tokyo, January 16, 1961.

(Signed)
Third Member

(Signed)
Japanese Member

DISSENTING OPINION

After having assumed in its Decision I full jurisdiction on the merits of the Netherlands claim under Article 15 (*a*) of the Peace Treaty (described as the question of the liability of the Government of Japan to the Netherlands under that Article), the Commission has now, in its Decision II, "dismissed the claim of the Netherlands Government in so far as it is based on the said Article".

Curiously enough, this Second Decision is based exclusively on the conclusion reached by the Commission that the wreck of the *Op ten Noort* cannot be considered in law to be "property in Japan", and this on the strength of a purely verbal construction and without even the slightest consideration for the moral aspects of this peculiar case, in which the ship was deliberately and illegally scuttled by the Japanese Navy and in that way reached the spot where it now lies.

I am unable to accept a decision rendered with such complete disregard for moral considerations on purely formalistic grounds which enable the perpetrator of an international delinquency to shield himself behind his own unlawful actions in order to escape his responsibility for the legal consequence of such a delinquency.

Apart from that, I am of the opinion—in the view that I take of the case—that the Commission, by finally holding that the vessel was not in Japan at the crucial date, has put itself in a logical contradiction to its Decision I and even

undermined the legal foundation of its initial unqualified assumption of jurisdiction with regard to the question of Japan's liability.

Having found *a posteriori* that the claim does not relate to property in Japan, the Commission should, in my opinion, have stated that the examination of "the merits" has established that the claim falls outside the scope of Article 15 (*a*) and that, consequently, the Commission must refrain from expressing any opinion upon the validity of the claim, either by admitting or by dismissing it. Its terms of reference do not empower the Commission to give decisions with regard to the return of property found to be outside Japan.

(*Signed*)
Netherlands Member

W. Thorn LEESON
Netherlands Secretary

Hideo KAGAMI
Japanese Secretary