CASE CONCERNING THE QUESTION WHETHER THE RE-EVALUATION OF THE GERMAN MARK IN 1961 AND 1969 CONSTITUTES A CASE FOR APPLICATION OF THE CLAUSE IN ARTICLE 2 (*e*) OF ANNEX I A OF THE 1953 AGREEMENT ON GERMAN EXTERNAL DEBTS BETWEEN BELGIUM, FRANCE, SWITZERLAND, THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AND THE UNITED STATES OF AMERICA ON THE ONE HAND AND THE FEDERAL REPUBLIC OF GERMANY ON THE OTHER

DECISION OF 16 MAY 1980

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Abbreviations

A I	Volume I of the Annexes to the Applicants' Memorial, English version
A II	Volume II of the Annexes to the Applicants' Memorial, English version
Annex I A 2 (*e*)	Annex I, Section A, Article 2, paragraph (*e*), Agreement on German External Debts (LDA)
Bank	The Bank for International Settlements
BGBl	*Bundesgesetzblatt* (Federal Law Gazette)
CM	Respondent's Counter-Memorial, English version
CMAA	Annex A to the Respondent's Counter-Memorial, English version
FDA	The Federal Debt Administration *(Bundesschuldenverwaltung)*
FRG	The Federal Republic of Germany
ICJ	The International Court of Justice
ILO	The International Labour Organisation
IMF	The International Monetary Fund
LDA	The Agreement on German External Debts, London, 27 February 1953
LDC	The Conference on German External Debts, London, February-August 1952
LDC Report Report of the LDC	Report of the Conference on German External Debts, English version
LNTS	League of Nations Treaty Series
M	Applicants' Memorial, English version
PCIJ	The Permanent Court of International Justice
R	Applicants' Reply, English version
Rj	Respondent's Rejoinder, English version
The disputed clause The clause in dispute	Annex I, Section A, Article 2, paragraph (*e*), Agreement on German External Debts (LDA)
Tripartite Commission	The Tripartite Commission in German External Debts
VCT	Convention on the Law of Treaties, Vienna, 23 May 1969

THE ARBITRAL TRIBUNAL

constituted in accordance with Article 28 of the Agreement on German External Debts of 27 February 1953,

composed as follows:

Erik CASTRÉN, President,
Messrs. Karl ARNDT,
Marc J. ROBINSON,
Mrs. Hedwig MAIER,

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Messrs. Maurice E. BATHURST,
Albert D. MONGUILAN,
Wilhelm A. KEWENIG,

Registrar E. A. MARSDEN,*
L. HUSEL,**

in the case of

the Kingdom of Belgium,

represented by the Agent of the Government of the Kingdom of Belgium, M. Jacques Karelle, Premier Conseiller pour les Affaires Juridiques près du Ministère des Affaires Etrangères, Brussels, assisted by Professor François Gianviti, Université de Paris,

the French Republic

represented by the Agent of the Government of the French Republic, M. Jacques Delmas, Inspecteur Général des Finances, Paris, assisted by Professor François Gianviti, Université de Paris,

the Swiss Confederation,

represented by the Agent of the Swiss Federal Council, M. Jean Hulliger, Département d'Etat des Affaires Etrangères, Berne, assisted by Professor François Gianviti, Université de Paris, and M. Christoph Loew, Legal Adviser, Swiss Federal Council, Basle,

the United Kingdom of Great Britain and Northern Ireland,

represented by the Agent of the Government of the United Kingdom of Great Britain and Northern Ireland, Mr. Franklin D. Berman, Legal Counsellor at the Foreign and Commonwealth Office, London, as well as Mr. M. R. Eaton, Assistant Agent, Legal Adviser, British Embassy, Bonn, assisted by Sir Francis Vallat, KCMG, QC, and Mr. J. L. Simpson, CMG, TD,

and the United States of America,

represented by the Agent of the Government of the United States of America, Mr. Peter H. Pfund, Department of State, Washington D.C., assisted by Mr. Ambassador Richard D. Kearney and Professor Stefan A. Riesenfeld, University of California, School of Law, Berkeley,

Applicants

versus

the Federal Republic of Germany,

represented by the Agent of the Government of the Federal Republic of Germany, Professor Dr. Helmut Rumpf, Vortragender Legationsrat I, Auswärtiges Amt, Bonn, assisted by Professor Dr. F. A. Mann, F.B.A., London, Professor Dr. Hugo Hahn, Universität Würzburg, and Dr. Seidler, Ministerialrat (retired), formerly Federal Ministry of Finance, Bonn,

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* Up to 30.9.1979.
** Acting Registrar since 1.10.1979.

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Respondent,

on the basis of the written pleadings of the parties and the oral hearing of 5, 6, 7, 8, 9, 12, 13, 14, 15, 16, 19, 20, and 22 March 1979

renders the following decision

on 16 May 1980:

The question in these proceedings is whether the revaluation of the German Mark in 1961 and 1969 constitutes a case for the application of the clause in Article 2 (*e*) of Annex I of the LDA.

Statement of facts

A

I. Under Article 233 of the Versailles Peace Treaty of 28 July 1919, Germany agreed to pay compensation for losses sustained as a result of the First World War. A Reparations Commission was set up to determine the extent of the German obligation. In April 1921, the amount of reparations was fixed at 132,000 million gold marks; a mandatory payments plan was submitted to the German Government in May 1921.

Having regard to its dire economic and financial situation and the resulting inflation, Germany was unable to fulfil the payment obligations imposed upon it. The Reparations Commission therefore appointed two expert committees in November 1923, i.e. as soon as the German currency had stabilised, in order to investigate Germany's financial capability. They worked out a scheme intended to reduce Germany's war debt and, in order to stabilise the German currency, provided for the issue of a foreign loan of 800 million gold marks, negotiated in various currencies. Redemption and interest payments on the dollar bonds, which were issued in the USA, were to be made in gold. This scheme is known as the "Dawes Plan" after the chairman of one of the committees.

True enough, Germany enjoyed an appreciable economic boom in the years following the end of inflation but it was not clear whether this was to be attributed merely to the money borrowed abroad. It appears that, after 1924, the German foreign loans amounted to nearly twice the German reparations payments. In September 1928, a new expert committee was therefore formed to prepare proposals for a comprehensive and final settlement of the reparations problem. The scheme devised by this committee was called the "Young Plan", after the chairman of the committee. It was put into force by a Hague Agreement with effect from 17 May 1930.[7] The German reparations debt was to be redeemed by precisely defined annual instalments, commencing on 1 September 1929.

Of the annual instalments, a proportion amounting to 600 million dollars was to be payable in foreign currency "unprotected", i.e.

[7] 104 LNTS 244.

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without a deferment option. Payments on the Dawes loan were set off against this sum. The remainder of the annual instalments, also payable in foreign currency, was subject to the reservations contained in the Young Plan regarding deferred transfers and payments.

The Young Plan was intended to transfer the reparations obligation from the political to the financial level. The aim was to place the obligation on a commercial and mobilized footing. To achieve this objective, "Agreements on the financial mobilization of the German payments" were concluded and signed in 1930 as a further Hague Agreement.[8] The agreement provided for the issue of one or more tranches of loan bonds in the international markets, to an effective value of 300 million dollars. The conditions of these bonds were fixed and approved by the Paris Agreement of 10 June 1930.[9]

In order to implement the commitments under the Young Plan, the Bank for International Settlements was formed. It acted as Trustee for the Loan creditors and drafted the text of the "General Bond" which was signed on the same date, as an Annex to the Paris Agreement.[10]

The General Bond took the form of an agreement between the Government of the German Reich, as debtor, and the Bank "as Trustee for the holders of Bonds for the time being issued and outstanding" (the wording of the preamble to the Bond).

The following provisions of the General Bond are material to these proceedings before the Arbitral Tribunal:

Acknowledgment of the debt by the German Government and distribution of the debt over the individual currencies (VII);

All bonds to rank *pari passu* in all respects irrespective of date or place of issue or otherwise (II);

Primacy of the English text in the event of a divergence (III);

An interest rate of 5 1/2 per cent (V);

Gold clause (VI *a*);

Nominal value clause (VI *a*);

Option de place (VI *b*);

Sole right for the Bank to interpret the provisions of Article VI (VI *f*).

Each of these provisions was also incorporated in abbreviated form in the individual bonds.

II. Already by 1933, the German national-socialist government was meeting only part of its obligations under the Dawes and Young Plans, despite protests from the Trustee. As from 1 July 1934, it all but suspended payments of interest and redemption moneys; a few redemption payments continued to be made to the neutral states of Sweden and Switzerland until shortly before the end of the Second World War. Bonds outstanding abroad were for the most part repur-

[8] 104 LNTS 404.
[9] 112 LNTS 238, 242.
[10] 112 LNTS 247.

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chased at an artificially low price. As reported by the US Foreign Bondholders Protective Council in 1936, out of 900 million dollar bonds, only 260 million were still "legitimately outstanding". The remainder had been repurchased by Germany at depressed prices. According to a submission by the Respondent, a quite substantial part of the bonds is now in German hands.

III. After the Second World War, the Allies took steps to rehabilitate the West German economy, but the Federal Republic, founded in 1949, could be integrated into the world economy only after the legal status of its outstanding foreign debts had been settled.

By a letter of 6 March 1951, reproduced in Annex A to the LDA, the Federal Chancellor, Herr Adenauer, confirmed that the Federal Republic accepted liability for the outstanding pre-war debt of the German Reich. He expressed the hope that when the way in which and the extent to which the Federal Government fulfilled these obligations was decided, due account would be paid to the Federal Republic's general situation and, particularly, to the effects of the territorial restrictions on its sovereign powers and to its financial capability. The same letter acknowledged the debt in respect of the economic aid given the Federal Republic after 1945. It further expressed the desire for a resumption of payments on the external debt, the hope being again stated that the overall effect of a settlement plan would neither dislocate the German economy nor prove a drain on foreign-exchange resources.

In April 1951, the three western occupying powers set up the Tripartite Commission on German Debts to act on their behalf in the forthcoming discussions and negotiations. Its powers included the co-ordination of guidelines for the three governments on the German external debts and the preparation of a plan to settle these debts, and the incorporation of the plan in an agreement between the participating governments. It was to preside over the subsequent conference. The British representative, Sir George Rendel, formally took the chair. The representative of the American Government had substantial influence, since the United States had the largest post-war claims, and the opportunity for a settlement depended on American willingness to relax these claims. The American representative at the London Conference was initially Mr. Pierson, and subsequently Mr. Gunter.

In the annex to a Note of 24 May 1951, the Three Powers stated that it was indispensable to the creation of proper relations for representatives of private creditor and debtor interests to participate in the debt settlement as well. The settlement should not lead to unfair or privileged treatment for individual groups of creditors. The conditions of the debt settlement were to include no variation arising from the difference between the currencies in which the liabilities were expressed.

The members of the Tripartite Commission conferred with representatives of the Federal Republic of Germany in Bonn from 5 to

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7 June 1951. They submitted their post-war aid claims to them. This was followed by further discussions which, on occasion, included observers from the Belgian, Dutch, Swedish and Swiss Governments and representatives of German debtor interests. Debts under the Young Loan were also discussed and it was decided that they deserved special attention.

On 6 December 1951, the Tripartite Commission informed the German delegation that, and to what extent, the Governments of France, the United Kingdom and the United States were prepared to reduce their claims in respect of economic aid after the Second World War—France by 75 per cent, the United Kingdom by 73.2 per cent, the United States by 62.5 per cent. Herr Abs, leader of the German delegation, said that never in past history had a victor shown so much generosity to the vanquished. He impressed on the Commission that he would make every effort to ensure that the German Government and the citizens of his country should realize the extent of this generosity.

IV. The Conference on German External Debts opened in London on 28 February 1952. It continued, with a break between 5 April and 19 May, up to 8 August of the same year. A preparatory memorandum, which was sent to all the countries invited, referred to the special interests of the Tripartite Commission's governments arising not only out of their status in Germany but also out of their willingness to renounce the priority of their claims under post-war aid and substantial payments in order to achieve a fair and equitable debt settlement. The German delegation was informed that this renunciation was subject to the provision that a fair and just solution was found for German pre-war debts. On the gold clause, they were told that the Tripartite Commission felt that, in order to put an end to the fruitless discussion on the legal position, the Conference should seek a practical and equitable solution to the problem, which would place all holders of bonds expressed in various currencies on an equal footing.

The Report of the Conference on German External Debts (reproduced as Annex B to the LDA) states the following:

> The Conference held its first plenary meeting at Lancaster House, London on 28th February 1952. The Governments of France, the United Kingdom and the United States of America were represented by the Tripartite Commission on German Debts; the private creditors of these three countries were represented by separate delegations; 22 creditor countries sent national delegations composed of governmental and, in many cases, private creditor representatives; 3 countries sent observers; the Bank for International Settlements was represented as a creditor in its own right; the Delegation of the Federal Republic of Germany included governmental representatives and representatives of private debtors.

The following Committees were set up:

(*a*) A Steering Committee, composed of the three members of the Tripartite Commission, 13 representatives of creditor interests from Belgium, Brazil, France, Italy, the Netherlands, Sweden, Switzerland, the United Kingdom and the United States, and 5 members

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representing public and private debtor interests. Its duty was to organize the work of the Conference and to ensure that all recommendations submitted to the plenary meetings were such as to achieve an equitable overall settlement and equal treatment for all creditors within each category.

(*b*) A Creditor's Committee, in which each of the delegations of creditor countries was represented. Its duty was to co-ordinate the views of the various groups of creditor interests, to appoint creditor representatives to the negotiating committees and to convey to the Steering Committee the creditors' views with respect to any recommendations resulting from negotiating committees.

(*c*) Four negotiating committees to deal with the following categories of debts:

Committee A: Reich debts and other debts of public authorities;

Committee B: Medium- and long-term debts;

Committee C: Standstill debts;

Committee D: Commercial and miscellaneous debts.

Each committee was composed of representatives of the creditors and debtors, and with observers from the Tripartite Commission. A number of sub-committees was set up by the negotiation committees to deal with specific types of debts.

The Young Loan fell, together with the Reich debts and other public-sector debts, within the purview of Committee A. Its chairman was Sir Otto Niemeyer, the chief representative of British bondholders. The committee included, in addition to the German representatives, representatives of creditors in France, The Netherlands, Sweden, Switzerland, the United Kingdom and the United States. A seventh creditor seat on the committee was reserved on a rotating basis for representatives of other States concerned.

The General Bond itself required that all issues should receive equal treatment. The requirement was mentioned repeatedly at the LDC. M. Guisan, the Bank's legal adviser, said on 14 March 1952:

> The General Bond provides with great precision that all issues rank *pari passu* in all respects, irrespective of date or place of issue or of other considerations.
>
> . . .
>
> Finally, principal and interest are payable, at the option of the bondholder, not only in the country of issue but also on any market on which the Loan is quoted in the currency of that market, it being understood that the gold clause attached to the currency in which the Bond is expressed is applicable, even if payment is made outside the country of issue.
>
> . . .
>
> These very precise terms of the Loan Contract make it quite clear that the Young Loan, both in law and in fact, constitutes a single and indivisible loan, giving identical rights to all the holders in all circumstances.

The sessions following the negotiating break were concerned with the amount of the Federal Republic's annual payment commitments,

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creditor's renunciation of accrued interest, and particularly the question of the gold clause and the currency to be used as a basis for payment. From the start, this point was the most difficult and the most disputed. During the preliminary talks at the end of June 1951, it had only been touched on marginally. The German representatives pointed out that any gold clause would be invalid under both American and German law and that creditors would have to be satisfied with payment of their debts in the currencies applicable under the loan and debt agreements, in their depreciated state. To this, the French creditors, in particular, whose currency had suffered the greatest loss in value, did not agree. At the first session of the Conference, the representatives of the Federal Republic accordingly indicated that they were prepared to take account of the general depreciation of currencies. Mention was made of raising them to the status of the paper dollar, though this would have been very unfavourable for American creditors. The representatives of the US Government and of American bondholders consequently left the Conference temporarily and consideration was given to deferring the question of the gold clause to subsequent negotiations and to concluding the LDA without a settlement on this point. Adopting the pound sterling as a basis was also considered at one time, as it would have led to more favourable circumstances for the American creditors. This proposal was rejected by the French and British creditors as it would have worked out unfavourably for them.

By the end of July 1952, the parties had agreed on the following payment conditions for the Young Loan, which Committee A recommended for acceptance and which were incorporated into the LDA:

> (*a*) As on the first coupon date following 31st March, 1953, interest at 5 per cent per annum on the American Issue and 4 1/2 per cent per annum on the other Issues.
>
> (*b*) As on the coupon date following 31st March, 1958, a sinking fund of 1 per cent per annum shall be added to the above interest payments and constitute with them a cumulative annuity.
>
> (*c*) The maturity date shall be extended to the year 1980.
>
> (*d*) Arrears of interest outstanding shall be recalculated at 4 1/2 per cent simple interest and in respect of the resulting total the Federal Government will issue 20-year Bonds carrying 3 per cent per annum interest and after 5 years 1 per cent sinking fund. On Bonds for so much as represents arrears due to 31st December, 1944, payment will be made as from 15th April, 1953. Bonds for the balance will not be issued until the unification of Germany, when payment on these Bonds will begin. . . .

Moreover, a reduction of the outstanding amount by 41 per cent was agreed in view of the economic and financial position of the Federal Republic. This reduction was achieved by calculating the sum due by initially converting the amount expressed in a non-dollar currency into its dollar value at the time the Loan was issued and reconverting the nominal amount in US dollars obtained in this way to the currency concerned at the rate of exchange ruling on 1 August 1952.

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This scheme for the debt payable was later incorporated in the first part of Article 2 (*e*) of Annex I A to the LDA, which read as follows:

> The amounts due in respect of the various issues of the 5 1/2 per cent International Loan 1930 are payable only in the currency of the country in which the issue was made. In view of the present economic and financial position in Germany, it is agreed that the basis for calculating the amount of currency so payable shall be the amount in US dollars to which the payment due in the currency of the country in which the issue was made would have been equivalent at the rates of exchange ruling when the Loan was issued. The nominal amount in US dollars so arrived at will then be reconverted into the respective currencies at the rate of exchange current on 1st August, 1952.
>
> *Die auf die verschiedenen Tranchen der 5 1/2 prozent Internationalen Anleihe von 1930 fälligen Beträge sind lediglich in der Währung des Emissionslandes zahlbar. In Anbetracht der gegenwärtigen Wirtschafts- und Finanzlage in Deutschland besteht Einvernehmen darüber, daß als Grundlage für die Berechnung dieses Betrages in fremder Währung der Dollarbetrag dienen soll, dem die in der Währung des Emissionslandes fällige Zahlung entsprochen haben würde, umgerechnet zu dem in Zeitpunkt der Emission der Anleihe maßgebenden Wechselkurs. Der auf diese Weise ermittelte Nominalbetrag in US-Dollar wird dann zum Wechselkurs vom 1. August 1952 wieder in die betreffenden Währungen umgerechnet.*
>
> *Les sommes dues au titre des diverses tranches de l'Emprunt international 5 1/2 p. 100 1930 sont payables seulement dans la monnaie du pays d'émission de chaque tranche. Eu égard à la situation économique et financière en Allemagne, il est convenu que le montant ainsi payable sera calculé sur la base du montant en dollars américains auquel les sommes dues dans la monnaie du pays d'émission auraient été équivalentes, au taux de change en vigueur lors de l'émission de l'Emprunt. Le montant nominal en dollars américains ainsi calculé sera reconverti dans les diverses monnaies d'émission au taux de change en vigueur le 1er août 1952.*

The maintaining of the other terms of the original Loan contracts also recommended by Committee A under paragraph (*f*) was rejected by the Tripartite Commission as it would have meant the continued existence of the gold clause. The Commission referred to an agreement between the American, British and French Governments of November 1951, which up till then had been withheld from all participants at the Conference, and in which the United Kingdom and France undertook *vis-à-vis* the United States no longer to recognize any gold clause.

At a joint meeting between the Tripartite Commission and creditor representatives of Committee A on 30 July 1952, the European creditor representatives again asked for continued application of the gold clause. Mr. Gunter, the American representative on the Tripartite Commission, said that the three governments rejected any effect for the gold clause in the future but "that they would not object to some protective clause" instead of the gold clause. They had not desired to place any particular limitations on the negotiators in this respect but had thought of substituting a dollar clause for the gold clause, without wishing to imply that the dollar clause was the only possible substitute for the gold clause. The minutes then again refer to "protection on a monetary basis". Sir Otto Niemeyer stated that if

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the dollar clause were applied the actual benefit to bondholders would be the same except in the event of "a devaluation of the dollar". Mr. Meijer, the Dutch Representative, said that he wondered whether all the governments would be willing to agree to an arrangement by which the most important feature of the contract was given away. Apart from this, repeated mention was made at the meeting that the creditors would have to make concessions on the question of retaining the gold clause unless they wanted the whole Debts Agreement to break down; agreement was reached on all other points.

The meeting was continued on 31 July. Sir Otto Niemeyer indicated that the creditor representatives were prepared to accept a settlement in which the gold clause was to be replaced by a dollar clause, provided that, in the event of a change in the existing relation between gold and the US dollar, new negotiations would take place. In order to save the Conference from a deadlock, the creditor representatives presented a proposal for a replacement for the gold clause, which was accepted by Committee A. It foresaw new negotiations in the event of a change in the relation between the US dollar and gold. This proposal, too, the United States Government rejected by a telegram of 5 August, because it conflicted with official American policy on the gold clause. Great confusion followed and both the Tripartite Commission and the individual delegations sought for a way out in order to prevent the Conference coming adrift on this one point still outstanding.

A draft currency clause by Sir George Rendel of a "Deferred Multiple Currency Exchange Guarantee for Young Loan" dated 4 August 1952 was presented to the Tripartite Commission on 5 August 1952, 10 a.m., and referred to a working group. It read as follows:

> 2. Should the rates of exchange ruling between the various currencies of issue at the date when the Intergovernmental Agreement on German Debts comes into force materially alter thereafter, it will be open to any bondholder to ask that any payment due to him after that date, while still being made in the currency in which his bonds are denominated, shall be calculated on the basis of the amount of any other currency of issue to which it would have been equivalent at the rate of exchange current when the loan was first issued, reconverted into the currency of his bond at the rate of exchange current when the payment in question becomes due.

The members of the Tripartite Commission met at 2.30 p.m. on 5 August 1952. They had before them a new draft of the disputed clause, which read as follows:

> 2. Should the rates of exchange ruling between the various currencies of issue on 1st August, 1952, alter thereafter by 5 per cent or more, any bondholder shall be entitled to demand that any payment due to him after that date, while still being made in the currency of the country of issue, shall be calculated on the basis of the amount of any currency of issue to which it was equivalent at the rate of exchange current on 1st August, 1952, reconverted into the currency of issue at the rate of exchange current when the payment in question becomes due.

The Tripartite Commission approved the draft, subject to some editorial changes, which was to be put forward at the next meeting with the representatives of Committee A.

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The meeting between the Tripartite Commission and representatives of Committee A was continued at 3 p.m., again with Sir George Rendel in the Chair. The text proposed by the Tripartite Commission was discussed. Sir Otto Niemeyer made some suggestions which did not change its meaning but were intended only for clarification. The new wording was approved by the Swiss representative, Herr Vieli, while the Dutch representative, Mr. Meijer, maintained his previous objections against the abandonment of the gold clause. The absence of a unanimous decision was regretted. On a proposal by Committee A, agreement was then achieved on the following version, which was incorporated into the final text of the LDA:

> Should the rates of exchange ruling any of the currencies of issue on 1st August, 1952, alter thereafter by 5 per cent or more, the instalments due after that date, while still being made in the currency of the country of issue, shall be calculated on the basis of the least depreciated currency (in relation to the rate of exchange current on 1st August, 1952) reconverted into the currency of issue at the rate of exchange current when the payment in question becomes due.
>
> *Sollte sich der am 1. August 1952 für eine der Emissionswährungen maßgebende Wechselkurs später um 5.v.H. oder mehr ändern, so sind die nach diesem Zeitpunkt fälligen Raten zwar nach wie vor in der Währung des Emissionslandes zu leisten; sie sind jedoch auf der Grundlage der Währung mit der geringsten Abwertung (im Verhältnis zu dem Wechselkurs vom 1. August 1952) zu berechnen und zu dem im Zeitpunkt der Fälligkeit der betreffenden Zahlung Maßgebenden Wechselkurs wieder in die Emissionswährung umzurechnen.*
>
> *Au cas où les taux de change en vigueur le 1er août 1952 entre deux ou plusieurs monnaies d'émission subiraient par la suite une modification égale ou supérieure à 5 p. 100, les versements exigibles après cette date, tout en continuant à être effectués dans la monnaie du pays d'émission, seront calculés sur la base de la devise la moins dépréciée par rapport au taux de change en vigueur au 1er août 1952, puis reconvertis dans la monnaie d'émission sur la base du taux de change en vigueur lors de l'échéance du paiement.*

The draft submitted by the Tripartite Commission on 5 August 1952 and the amended draft at the second sitting were both written in English only. Herr Abs claims that he was shown the manuscript draft of the second sitting of 5 August that same day in a lift at Lancaster House.

This meeting went on to discuss currency options which existed in the loan to the City of Munich and the Potash Loan. Sir Otto felt that the draft of a new currency option was over-simplified. It was not adopted.

On 6 August, Committee A's final report was published, summarising the agreements made on the Young Loan and containing the full set of settlement terms for the Loan. The report was discussed at the meeting of the Steering Committee on 8 August 1952. A final report of the Conference was also produced, which was approved at the Plenary Meeting on 8 August 1952. Section IV of the LDC Report contains recommendations of which the following extracts are material:

> 23. No discrimination or preferential treatment in the fulfilment of the terms agreed on as among categories of debts or currencies in which payable, or in any

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other respects, should be permitted by the Federal Republic or sought by the creditor countries.

. . .

28. Some loan contracts contain a currency option, i.e., at the option of the creditor, payment may be required in some currency other than the currency of the country in which the loan was issued. Some other contracts may contain similar provisions. This matter is to be discussed further by the Governments concerned with a view to reaching full agreement before the conclusion of the Intergovernmental Agreement.

Without prejudice to any agreement which may thus be reached as to the currency in which payment is to be made, currency options should, in those cases where the contract provides for payment of a fixed amount of the alternative currency, be considered valid as exchange guarantees; e.g., any creditor holding a loan contract containing such a currency option shall be entitled to receive in the currency of the country in which the loan was issued the equivalent, at the rate of exchange current on the date payment falls due, of the amount of the alternative currency which would have been payable if the option had been exercised.

. . .

30. On the question of the gold clause in general the Tripartite Commission informed the Conference that, as part of the arrangements agreed on in order to make a comprehensive settlement of the German debt problem possible, the Governments of France, the United Kingdom and the United States of America had decided that, insofar as the German Debt settlement was concerned, gold clauses should not be maintained but might be replaced by some form of exchange guarantee.

With respect to the Young Loan they[11] of course regarded it as essential that the equality of treatment for the different issues of that Loan provided for under the loan contract should be maintained. The representatives of the European bondholders have expressed their regret at the decision to depart from the contractual right of the bondholders of this international Loan to payment in their own currencies on a gold basis. They have inserted in the 'Agreed Recommendations for the Settlement of Reich debts and debts of other public authorities' (Appendix 3) the provision there included solely in view of this Governmental decision.

Corresponding provisions had been included in other reports where appropriate.

V. Negotiations had already started on 16 September 1952 between the Tripartite Commission and the German delegation on preparing a draft agreement to transform the decisions of the LDC into applicable law. The procedure to be adopted was laid down in Article 8 of Annex I, Section C, of the LDA. As the minutes of the Meeting of 18 September 1952 state, a draft agreement had been prepared by the Tripartite Commission. It kept to the wording of the LDC Report, in order to prevent changes in the wording being taken as changes in the substance.

The preparation of authentic texts was discussed at a meeting on 13 November 1952. English had been used almost entirely for the preliminary draft of the agreement but, as the final clause of the LDA

[11] "Dreimächteausschuß" in the German text and "ces Gouvernements" in the French text: probably translation errors.

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states, the three texts in which it is issued are equally authoritative (English, French, German). Further discussions were held subsequently between the Tripartite Commission and the German delegation. The only material change to the recommendations of the LDC on the Young Loan was the postponement of the first repayment on the Funding Bonds from 15 April 1953 to 1 June of the same year.

The LDA was signed in London on 27 February 1953 by the Federal Republic of Germany,[12] the States represented on the Tripartite Commission, and fifteen further creditor countries, and took effect on 16 September 1953. Other States subsequently acceded to the LDA pursuant to its Article 36.

The majority of the contracting states had already acceded to the IMF as from 1 January 1953. There was no agreed rate for the French Franc from 26 January 1948 to 29 December 1958.

VI. In Section A ("Debts of the Reich") of Annex I to the LDA, the Federal Republic undertook to make offers to holders of Young Loan bonds for the future settlement of obligations by an issue of conversion bonds. Holders were again represented by the Bank for International Settlements as Trustee. The holders or their representatives in various countries had to submit their former bonds to the Federal Debt Administration in Bad Homburg to prove their entitlement. The FDA drafted offers which repeated verbatim the wording of the currency clause.

A communication from the President of the United States to the Senate of 10 April 1953 stated that the currency clause should be applied in the event of a "further depreciation".

A communication from the Swiss Federal Council to the Swiss Federal Assembly of 5 May 1953 describes the clause as a guarantee "against a future depreciation exceeding 5 per cent".

The Bank of England, as servicing bank for the sterling tranche of the Young Loan, on 2 April 1953 sent to the FDA a draft of the sterling Funding Bonds, and a draft of the sterling tranche Settlement Offer by letter of 21 August in the same year. Both drafts referred to "the currency most favourable" to bondholders. The second draft read as follows:

> . . . If at any due date the value of sterling in terms of any of the currencies of issue is five per cent or more below such value on the 1st August, 1952, all payments (whether in respect of principal or interest) due on such due date, while still being made in Pounds Sterling, will be of an amount equal to the sterling equivalent, converted at the rate of exchange ruling on such due date, of the amount due expressed in one of the other currencies of issue, the currency most favourable to bondholders being selected for this purpose. . . .

By letter of 8 August 1953, the FDA sent the *Schweizerische Kreditanstalt* a new draft for the Funding Bonds of the Swiss tranche, which repeated the Bank of England's proposal of 2 April 1953 on the currency clause.

[12] BGBl 1952, II, p. 637.

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The Association of French Creditors *(Association Nationale des Porteurs Français)*, in a draft which had been approved by the French Ministries of Finance and Foreign Affairs and which they had sent to the FDA, suggested with regard to the disputed clause that the following be incorporated:

> *Au cas où l'une des monnaies d'émission bénéficierait d'une appréciation égale ou supérieure à 5 p. 100 par rapport à une, à plusieurs ou à toutes les autres monnaies d'émission, le capital et les versements exigibles des tranches émises dans une monnaie n'ayant pas bénéficié de cette appréciation seraient réévalués en proportion de cette appréciation.*

Talks were held from 26 to 31 October 1953 at the Bank for International Settlements in Basel, at which the final wording of the Settlement Offers was to be agreed. The meeting was attended by representatives of British and French bondholders, the Federal Republic and the Trustee.

Discussions centered on the interpretation of the disputed clause. In view of the difficulty in arriving at a generally acceptable interpretation, a sub-committee was appointed to consider the chief points arising in connection with the 5 per cent clause and to attempt to arrive at a common approach. The German side was represented on the sub-committee by Herr Ebert, then a *Regierungsrat* at the FDA and now its President. He was heard as a witness in the present proceedings.

The various conceivable cases where the disputed clause might apply were discussed. Examples were given for the Swiss tranche of the effect the clause would have if a currency of issue were depreciated or appreciated. Discussions covered, amongst other things, the question whether the clause would also apply on the appreciation of a currency of issue. However, no agreement was reached on a binding interpretation. The representative of the FDA said that he was not authorised "to interpret any provision of the Debts Agreement until the Debt Administration came face to face with a concrete situation". During negotiation, the French representatives agreed not to press for the inclusion of the proposal of the *Association Nationale des Porteurs Français* in the Offer. It was decided to adopt the version in Annex I A 2 (*e*) of the LDA verbatim.

With a letter of 17 November 1953, the Bank of England sent to the Bank for International Settlements a new draft of the text of the Funding Bond, which in the light of the decisions of the Basel Conference included the guarantee clause in the LDA version. It asked for confirmation to be obtained from the FDA that the 5 per cent clause protected "matured coupons against devaluation until the relevant Exchange Offer is published by the German Federal Republic".

In order to demonstrate the difficulties arising, the Trustee appended to its Report on the Basel talks an extract from a draft circular to the French bondholders, in which the conditions of the new conversion bonds were explained. The explanation began by stating that creditors would benefit neither from the gold clause nor from

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an *option de change*, but would obtain a "*clause de garantie de change jouant sur toutes les monnaies d'émission*". Paragraph (*b*) in the explanation used the expressions "*dépréciation*" and "*réévalué*" in juxtaposition.

The offers made to bondholders in Belgium, the Federal Republic of Germany, France, Switzerland, and the United Kingdom of new bonds, to be exchanged for the 1930 Young Loan bonds, reproduced the text of the clause in dispute, while the offer made in the United States to holders of the dollar tranche did not mention it at all.

The bonds replacing the 1930 Young Loan bonds in accordance with the accepted offers in all currencies of issue corresponded neither in heading nor in text. The same applies to the wording of the new 3 per cent Funding Bonds which were issued in respect of arrears of interest outstanding at 31 December 1944.

The replacement bonds of the dollar tranche contained a new text with the heading "Extension Issue 1953"; the bonds of the other tranches were called "Conversion Bonds" and took the form of a reprint of the original bonds of 1930, with an enfacement which, without entering into details, referred to the modifications made under the LDA to "the original loan contract".

The Conversion Bonds contained the text of the General Bond in the three languages on the reverse, which was not the case with the Dollar Extension Bonds. The latter bonds provided that the English wording should have priority in the event of a divergence between the three texts; the Conversion Bonds, being reprints of the 1930 Issue, stated the same.

The Dollar Extension Bonds did not mention the disputed clause, whether by special reference to the LDA or by explaining its effect; they contained a stipulation that they were intended to guarantee the holder's entitlement to his rights under the old bonds, except where the provisions of the new Issue conflicted with those of the old Issue, or where the LDA and Annex I thereto should indicate otherwise.

The Funding Bonds for the arrears of interest under the Dollar Issue, like the Extension Bonds, contained no reference to or explanation of the clause in dispute, nor did they have the text of the General Bond on the reverse. But, again like the Extension Bonds, they gave the English text preference in the event of a divergence.

The Funding Bonds for the other currencies of issue (insofar as they were shown to the Arbitral Tribunal—the bonds expressed in Belgian francs, German marks, sterling and French and Swiss francs) repeated the wording of the disputed clause (with a minor modification of the English text—"change" for "alter" in the texts of the Belgian, French and Swiss bonds). On the Bonds expressed in German marks, sterling and Swiss francs, they did so immediately after the promise by the FRG to pay "the principal sum" or "such greater

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amount'' that might be due in accordance with the provisions of the clause in dispute.

The English text of the General Bond appears on the reverse of the Funding Bonds of the Belgian, Dutch, French and Swedish Issues.

The coupons on the Funding Bonds of the French Issue (a facsimile of which was submitted in evidence to the Arbitral Tribunal in the course of the oral hearing) also contained a statement of the same wording as the disputed clause. The Arbitral Tribunal was given no evidence as to the texts of the coupons of the other Funding Issues.

VII. The French franc was devalued in 1957 and again in 1958, in each case by more than 5 per cent. The guarantee clause was applied, the non-depreciated US dollar being adopted as the ''least depreciated currency''. The Trustee described the methods for determining the effects in a Memorandum dated 17 April 1961, stating on this point that ''as the result of the two devaluations of the French franc it has further been established that the term 'least depreciated currency' employed in the exchange guarantee provisions of the Agreement is to be understood as also covering a currency which has not depreciated, i.e. in this instance, the dollar. In other words, it appears that the term employed is not quite adequate.'' At the time of both devaluations, France had neither a par value agreed with the IMF nor a rate of exchange agreed in a bilateral agreement with the United States. Accordingly the middle rate of exchange for the French franc on the New York exchange market was used by application of Article 13 (*c*) of the LDA.

The first revaluation of the DM took place in 1961, followed shortly afterwards by a rather smaller revaluation of the Dutch florin. The rate of exchange between the DM and the dollar altered as follows:

Rate on 1 August 1952:	DM 4.20	= US $1.
	DM 1.	= US cents 23.8095
Rate on 3 March 1961:	No change over 1952	
Rate on 6 March 1961:	DM 4.	= US $1.
	DM 1.	= US cents 25

The price of one DM had therefore increased by 1.1905 US cents; the increase corresponds to 5.000105 per cent of the old rate of exchange of 23.8095 US cents to DM 1.

On the other hand, the price of one US dollar had reduced by DM 0.20; this reduction corresponds to 4.761905 per cent of the old rate of exchange of DM 4.20 to US $1.

According to whether the change in the rate of exchange for the DM is expressed as an appreciation of the DM as against the US dollar or as a depreciation of the dollar as against the DM, the alteration in the rate of exchange between the DM and the dollar amounts

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to more or less the 5 per cent laid down in the LDA for application of the guarantee provision.

The same applied to the appreciation of the DM as against the pound sterling and the new French franc.

By letter of 27 May 1961 to the FDA, the Trustee asserted the bondholders' claim to an adjustment of the payments to be made on 1 June 1961 and subsequently, stating that in relation to the DM

> "all the other currencies of issue of the Young loan have depreciated and the 5 per cent minimum has been irrelevant since 1957 in the case of all issues".

The FDA replied on 9 November 1961 that there was no occasion for applying the guarantee clause. This, it said, was also the view of the Max Planck Institute for Foreign and International Private Law from whom it, the FDA, had received a legal opinion. The Trustee notified the Governments of the Applicants of the German attitude and recommended recourse to the Arbitral Tribunal which, under Article 28 of the LDA, has exclusive jurisdiction in all disputes regarding the interpretation or application of the LDA.

The DM was again revalued in 1969, equal to a 12.857 per cent change in the 1952 rate of exchange for the US dollar. The Respondent again refused to make payments on the basis of the new par values. After repeated negotiations in 1964 and 1965 had proved fruitless and after the second revaluation, the Kingdom of Belgium, the French Republic, Switzerland, the United Kingdom and the United States instituted proceedings against the Federal Republic of Germany.

B

The Applicants' principal arguments may be summarised as follows:

According to Article 28 of the LDA, the Arbitral Tribunal had jurisdiction regarding the matter in dispute, as to whether the revaluations of the DM in 1961 and 1969 are subject to the Currency Clause.

Article 2 (*e*) of Annex I A of the LDA applies not only to the depreciation but also to the appreciation of a currency of issue. This appears from the wording of the clause in dispute which, in the English and French texts, referred to "depreciation", "*depréciation*", an expression which, unlike the terms "devaluation", "*dévaluation*" also comprises the simple loss of a currency's value not merely as the result of devaluation imposed by governmental act. Any appreciation of a currency automatically meant the depreciation of all other currencies in this broader sense.

It further appears from the object and purpose of the LDA and from its historical background that the clause in dispute applies not only to depreciation in the strict sense but also to the loss in value of a currency of issue. Its declared object was to achieve a fair settlement of German pre-war and certain post-war claims. This had been made possible only through private creditors and their governments

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generously waiving a substantial part of their claims. The Respondent's obligation to permit all creditors to participate in an appreciation of the DM followed, further, from the prohibition on discrimination imposed by Article 8 of the LDA, this being a basic principle of the LDA.

At the oral hearing of 22 March 1979, the Applicants asked the Tribunal to adjudge and declare:

—That the revaluation of the DM in March 1961 gave rise to the application of the Exchange Guarantee, provided in the second sub-paragraph of paragraph (*e*) of Article 2 of Annex 1 (Section A) to the LDA;

—That the holders of each issue of the Young Loan made in a non-German currency have the right to have payments falling due on an after 1 June 1961 calculated and paid on the basis of the rate of exchange in force between the DM and that currency of issue on the due date;

—That the alteration in the exchange rates of the DM established by the revaluation of that currency in October 1969 gave rise to the application of the said Exchange Guarantee;

—That the holders of each issue of the Young Loan made in a non-German currency have the right to have payments falling due on and after 1 December 1969 calculated and paid on the basis of the rate of exchange in force between the DM and that currency of issue on the due date.

The Respondent moved that the Applicants' submissions be rejected on the following grounds:

While, in its Counter-Memorial, the Respondent had not objected to the jurisdiction of the Arbitral Tribunal, it questioned, during the oral hearing, whether the Applicants had a legally justified interest in a decision by the Tribunal as it would not be binding on the relationship between the Respondent and private creditors.

The Respondent further submits that, at the time of concluding the LDA, which was decisive to an interpretation of the clause in dispute, none of the participants had thought of the possibility of an appreciation of the DM. The disputed clause had been intended only as a protection against devaluation, as already appears from the wording of the German text. The procedure to be applied when converting the rate of exchange, where necessary, was laid down in Article 13 of the LDA and had to follow that provision. Since the revaluation of the DM has not led to an alteration in the par values agreed between creditor countries and the IMF, it does not imply an increase in the sums due.

In summing up:

1. The provision in Annex I A 2 (*e*), second sub-paragraph, of the LDA is a protective clause against depreciations of the respective (due) currency of issue.

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2. It is applicable each time when the (due) currency of issue depreciates by 5 per cent or more as compared to its position on 1 August 1952, or if, as a result of several depreciations of less than 5 per cent, a depreciation of 5 per cent or more is reached as compared to the position on 1 August 1952.

3. The term "the least depreciated currency" *(der Währung mit der geringsten Abwertung, la devise la moins dépréciée)* cannot be understood to mean a currency that has appreciated as compared to the position on 1 August 1952, but only a depreciated currency or a currency which has neither appreciated nor depreciated.

An oral hearing took place in Bonn from 5 to 22 March 1979. Eight witnesses were examined, of whom the Applicants had called five and the Respondent three.

REASONS

1. Before it proceeded to discuss its decision in this case, the Arbitral Tribunal *ex officio* considered two preliminary questions concerning the admissibility of the proceedings. The first was whether the subject-matter submitted to the Tribunal for a decision actually concerned a dispute, a disagreement "between two or more of the Parties to the present Agreement or the Annexes thereto" within the meaning of Article 28 (2) of the LDA, and whether, if so, the Tribunal should have resort to its jurisdiction. The second question was whether the Arbitral Tribunal's jurisdiction in the pending legal proceedings was not jeopardised by ArticleVI *(f)* of the General Bond, which gives the Bank for International Settlements, as trustee, sole right of interpreting the rules governing the servicing of the bonds.

2. With limitations not material to these proceedings the Arbitral Tribunal has exclusive jurisdiction "in all disputes between two or more of the Parties to the present Agreement regarding the interpretation or application of the Agreement, or the Annexes thereto, which the Parties are not able to settle by negotiation . . .": LDA Article 28 (2).

The parties in the present proceedings signed a Protocol at Bonn on 29 January 1965 stating that in the light of the exchange of views among their representatives regarding paragraph 2 (*e*) of Annex I A of the LDA it appears that "a dispute exists between the Federal Government and the other Governments regarding the interpretation or application of the provision in question and that it might not be possible to settle the dispute by negotiation".

In a Note from the American Embassy to the German Ministry of Foreign Affairs dated 15 November 1967 the Government of the United States of America expressed its willingness to request the Arbitral Tribunal to render an advisory opinion in the dispute "provided that the Government of the Federal Republic of Germany will voluntarily participate in this procedure and will undertake to abide

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by and give effect to the advisory opinion, which will finally be given by the Arbitral Tribunal''.

In a Note dated 1 February 1968 the German Ministry of Foreign Affairs replied that the Federal Government considered that it was not in a position to recognize that an advisory opinion of the Arbitral Tribunal on this question may have binding effect and that it must leave it up to the Government of the United States whether it wished to obtain a decision of the Arbitral Tribunal. Similar notes were exchanged between the other applicant Governments and the Federal Republic of Germany.

In its Counter-Memorial the Respondent states that it does not question the Tribunal's jurisdiction.

3. Though the parties have raised no jurisdictional issue it still remains the responsibility of the Tribunal to determine, *ex officio*, its competence to act. Not even an explicit agreement by the parties could confer on the Tribunal a jurisdiction that is not contemplated by the LDA. In accordance with the provisions of Article 28 (7) of the LDA the Tribunal itself has the power to decide questions as to its jurisdiction.

In these proceedings the Tribunal is satisfied that all the conditions giving rise to its authority to act have been met. The parties in these proceedings are all parties to the LDA. The dispute concerns the interpretation or application of a paragraph in one of the annexes to the LDA and it is manifest that the parties are not able to settle their dispute by negotiation. The Tribunal concludes that it is seised of jurisdiction.

4. Although the Respondent did not present it as a challenge to the jurisdiction of the Tribunal, during the oral proceedings it contended for the first time that the Tribunal should not exercise its jurisdiction in this matter. It asserts that there is a fundamental distinction between the obligations agreed to by the parties to the LDA and the agreement between the bondholders and the debtor, which arises when the recommended offer is accepted; that the LDA operated only until the so-called settlement of the debt; that, thereafter, the agreement between the creditor and the debtor as manifested by the acceptance of the offer is alone relevant. It argues that the LDA embodied an agreement to make a recommended offer to the bondholders and that once that offer was made and accepted, the LDA in relation to the provision with which the Tribunal is concerned was ''exhausted''; that what remained were different obligations arising from the bearer bonds which incorporated terms originating from the LDA but which confer no cause of action upon the applicant Governments; that it follows that the Tribunal cannot make a judicial as opposed to an academic decision.

The Respondent adds that the effect of incorporating the terms of the treaty into the bonds is that those terms are governed by the same law as the bond itself because such incorporated words become

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a part of the original bond agreement and are governed by it rather than by the law applicable to the LDA. It concludes that the decision the Tribunal is asked to make lies outside its judicial function, that any such decision would have no practical application but would be an exercise in academic law and that the Applicants have no legal interest in such a decision.

5. The Respondent relies on the *Case concerning the Northern Cameroons* which was decided on 2 December 1963 by the International Court of Justice (*ICJ Reports*, 1963, pp. 15-40). The pertinent facts in that case were that pursuant to a United Nations resolution a plebiscite was held under its supervision at a time when the Northern Cameroons were under United Kingdom Trusteeship. As a result of the plebiscite, the territory of the Northern Cameroons joined Nigeria rather than the Federal Republic of Cameroon. The plebiscite was subsequently confirmed by the General Assembly of the United Nations and the Trusteeship Agreement was terminated.

The Federal Republic of Cameroon requested the Court to adjudge and declare "that the United Kingdom has, in the interpretation and application of the trusteeship agreement . . . failed to respect certain obligations directly or indirectly flowing from the said agreement".

The Court refused that request. It stated that the dispute concerned the interpretation and application of a treaty that had been terminated, and that as it was no longer in force there would be no opportunity for a future act of interpretation or application of that treaty in accordance with any judgment the Court might render. The Court concluded that to adjudicate on the merits of the request would be inconsistent with its judicial function.

6. The Arbitral Tribunal, in its considered judgment, concludes that it not only has jurisdiction in the dispute before it but that it can and, in the circumstances of this case, must exercise that jurisdiction and deal with the representations made by the Applicants on their merits.

7. It is significant that the settlement of the claims of the bondholders played a major role during the London Debt Conference. The solution that was found involved major concessions on the part of the creditors and on the part of the Powers constituting the Tripartite Commission. These concessions were contingent upon the satisfaction on the part of the Respondent of the obligations agreed upon and incorporated in the LDA, which obligations contemplated not only a bond settlement plan but which were also designed to ensure the fulfilment of that plan. Article 2 of the LDA, entitled "Implementation by the Federal Republic of Germany", obligated the Respondent to "enact such legislation and take such administrative action as may be necessary to give effect to the present Agreement and the Annexes thereto . . .". In addition, Article 6 (*a*) of the LDA provides that the Federal Republic of Germany will "make payments and transfers, in accordance with the present Agreement and the Annexes thereto, on the debts for which it is liable thereunder . . .". These constituted

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obligations over and beyond the formal act of presenting the bondholders with a revised version of the bond. The LDA, to the extent that we are concerned with it, was not "exhausted" upon the acceptance of the new offer by the bondholders even though that offer included language identical with that found in Article 2 (*e*) of Annex I A. On the contrary the LDA and its annexes remained operative beyond that step and at least until the indebtedness evidenced by the bonds had been satisfied in the manner provided by the LDA. In order to ensure such satisfaction provision was made in the introductory sentence of Article 34 for consultations "in the interest of the continuing and effectual carrying out of the present Agreement and the Annexes thereto . . .".

8. It is clear to the Tribunal that the Applicants' legal interest in the proper satisfaction of the debts to the bondholders continued with full validity into the future and beyond the time when the new offer had been made and accepted.

If the Respondent's contention were accepted it would, in effect, mean that the Tribunal at no time had a judicial interest in interpreting or applying the clause in dispute because such a dispute would not normally arise until payments, on the basis of the disputed clause, had been refused, and since such payments could only be made after the acceptance of the Respondent's offer by the bondholders. The effect would be an unwarranted limitation on the authority and responsibility granted to the Tribunal by the LDA.

The Tribunal's exclusive jurisdiction of interpretation or application is limited only in that it shall not deal with the consultation provisions found in Article 34 of the LDA. The Tribunal is neither disposed, nor ought it, to restrict itself further.

9. The Applicant's right to an authoritative interpretation of the clause in dispute is not measured by the number or percentage of bondholders who at the present time may or may not be nationals of one or more of the applicant States. That right is grounded on the bedrock of the considerations which the Applicants gave and the concessions which they made in exchange for the disputed clause. They have a right to know what is the legal effect of the language used. The Tribunal in the exercise of its judicial functions is obliged to inform them.

10. The Respondent's reliance on the *Case concerning the Northern Cameroons* is misplaced. In that case the United Kingdom had no power to rectify the consequences of the alleged breach or breaches. It could neither nullify the plebiscite nor hand over the disputed territory to the Republic of Cameroon. The Trusteeship Agreement in that case was no longer in force. It had been effectively terminated.

11. That is not the case of the LDA provision before the Tribunal. As already pointed out, that provision is still in force and, moreover, the Respondent has the power as well as the obligation to comply with any judgment of the Tribunal respecting its interpre-

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tation or application: LDA Art. 28 (8) (*a*). It should be added that at no time has the Respondent indicated or inferred that it would not do so. On the contrary, its Counsel stated that in his opinion it would comply and "will leave to posterity to judge whether it does so as a matter of legal obligation or as a matter of honour and as a matter of respect" to the Tribunal.

12. That there is a genuine dispute among the parties is explicitly acknowledged in the Protocol of 29 January 1965. In clear and unambiguous wording it is there stated that a dispute exists regarding the interpretation or application of the provision in question. The Respondent now contends that the reference in the Protocol to the "exchange of views" was no more than a reference to a "statement of facts" and had no legal significance. The Tribunal is not certain what was intended by this assertion, but what it finds significant is that in 1965 all the parties agreed that the conditions for the exercise of the Tribunal's jurisdiction had been met.

13. We conclude that the exercise of its jurisdiction in the matter before the Tribunal and the adjudication on the merits on the Applicants' representations are not inconsistent with the Tribunal's judicial functions.

14. The Arbitral Tribunal has considered whether the stipulation in Article VI of the General Bond regarding the Bank's right, as trustee, to interpret the Loan provisions with absolute discretion and without appeal by legal proceedings to the courts is relevant to its decision, and has come to the conclusion that it is not.

Article VI of the General Bond deals firstly with the practical application of the gold clause (VI (*a*)), payment of the sums calculated in consequence (VI (*b*)), the significance of several currencies being quoted on the bonds (VI (*c*) and (*d*)), and the furnishing by the debtor of the sums payable by the Bank (VI (*e*)).

Article VI then states:

> (*f*) For the purpose of applying the provisions of this Article the Bank shall have the sole right of interpreting such provisions and absolute discretion from time to time to adopt any method or methods it may consider appropriate with a view to giving effect to the same, and no Bondholder or person representing or acting on behalf of a Bondholder shall be entitled to question any such decision or method or any act of omission or commission on the part of the Bank in executing such decision or method by legal proceedings or otherwise or to call for evidence of the correctness thereof.

The Agreed Recommendations of the LDC for the Settlement of Reich Debts and debts of other public authorities—reproduced in the LDA as Annex I A 2—provide with regard to the Young Loan under paragraph (*f*), after listing the changes to apply in the future, that "in all respects other than those indicated above, the terms of the original Loan contracts shall be maintained".

The Arbitral Tribunal readily accepts that the provisions of Article VI (*f*) of the General Bond will also apply to the servicing of the bonds that have now superseded the former issue. The powers granted

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to the Bank also apply to any corresponding new provisions regarding the terms of the bonds. However, the rules in Article VI (*f*) are in parts very broadly drafted and require restrictive interpretation. This is already indicated by the fact that in Article VI (*f*), as regards the Bank's methods of interpreting being impugned by legal proceedings or otherwise, only "Bondholders" or their representatives are mentioned as initiators. Furthermore, each decision of the Bank listed under Article VI (*a*) *et seq.* concerns subordinate technical matters that are not on a par with the fundamental question of interpretation now in dispute.

With this interpretation, the Arbitral Tribunal is clearly in line with the views of the Bank. The latter addressed itself to the interpretation of the disputed clause in 1953 and 1961 (Memoranda of 7 November 1953 and 17 April 1961), in connection with the differences of opinion, which are now the subject of the present proceedings, between the Bank and the Federal Government; nevertheless, the Memorandum of 1953 made reference to possible future "legal proceedings" (i.e. judicial litigation) on the correct interpretation, and the Memorandum of 1961 cites, without comment, a judgment of the Swiss Federal Court of 26 May 1936 concerning the interpretation of the gold clause, as it then was, in which the trustee is held "as a mere intermediary" to be essentially bound by the debtor's instructions.

A decision by the Bank pursuant to its continuing right to interpret the provisions of Article VI of the General Bond does not, therefore, affect the competence of the Arbitral Tribunal in the present proceedings.

15. The decision in this case depends on what is meant by the expressions "*Währung mit der geringsten Abwertung*", "least depreciated currency", "*devise la moins dépréciée*", in the second part of the disputed clause of Article 2 (*e*) of Annex I A of the LDA. Does this phraseology—at least, within the period 1961 to 1969 with which we are now concerned—relate only to devaluation in the strict sense, i.e. to cases where the par value of the currency concerned has been changed as a result of governmental action, or does the clause apply as soon as the currency in question is "depreciated" in relation to another currency of issue owing to the revaluation of the latter?

16. According to Article 6 of the Charter of the Arbitral Tribunal, when interpreting the Agreement and the Annexes thereto the Tribunal shall "apply the generally accepted rules of international law". The international law on treaties—including the principal rules of interpretation—has been codified in the Vienna Convention on the Law of Treaties of 23 May 1969. The provisions of the Convention do not apply in the present proceedings (see Article 4 of the VCT), but nevertheless it is widely held in jurisprudence and legal literature that the Convention properly reflects both the present and the past state of international treaty law since, as regards interpretation at least, it is restricted to the codification of customary law in force. This is

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a view subscribed to not only by all parties to these proceedings, but by the Tribunal itself in its previous decisions.

Cf. e.g. the decision in *The Kingdom of Greece v. the Federal Republic of Germany* in: Arbitral Tribunal and Mixed Commission for the Agreement on German External Debts, Decisions and Opinions 1970/72, p. 42.

17. Articles 31, 32 and 33 of the VCT contain the rules of interpretation for international treaties. Article 33 (1) of the VCT states in respect of plurilingual treaties that where there is more than one authentic text, each of them has equal force. According to the final clause of the LDA, the Agreement was drafted "in three original texts, in the English, French and German languages respectively, all three texts being equally authoritative".

It may be directly inferred from the final clause of the LDA in conjunction with Article 33 (1) of the VCT that the English text of the Agreement and the Annexes thereto carry no special interpretative weight merely because the Agreement was largely—and undisputedly, as far as the disputed clause is concerned—drafted in that language and discussed in English by the committees concerned with it on the basis of English texts. The Tribunal takes the view that the habit occasionally found in earlier international practice of referring to the basic or original text as an aid to interpretation is now, as a general rule, incompatible with the principle, incorporated in Article 33 (1) of the VCT, of the equal status of all authentic texts in plurilingual treaties.

For references, see Hilf, *Die Auslegung mehrsprachiger Verträge*, Berlin 1973, p. 88 *et seq.*

The interpretational maxim of the special importance or precedence—whatever form it may take—of the original text would relegate the other authentic texts again to the status of subordinated translations.

18. Article 31 (1) of the VCT reads as follows:

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

The decisive terms to be interpreted are the words "*Abwertung*", "depreciation", "*dépréciation*". The Tribunal has no doubt that if it were to proceed on terminology alone and take the words in their ordinary, everyday sense in the language concerned, it is at least not excluded that the German text would provide one answer to the original query, and the French and English texts a different one. In German, the meaning of the term "*Abwertung*" is relatively clear. In the proper technical language, it means a reduction in the external value of a currency—in relation to a fixed yardstick, e.g. gold—by an act of government.

Cf. e.g. Gabler's *Banklexikon, Handwörterbuch für das Bank- und Sparkassengewerbe*, 8th ed. 1979, p. 15.

In everyday German usage, however, there is, at least, some uncertainty, inasmuch as the expression "formal" devaluation ("*for-*

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melle Abwertung'') tends to be used to describe the devaluation of a currency by governmental act, as distinguished from the far more common economic phenomenon of the depreciation of a currency.

In English and French, on the other hand, the terms ''depreciation'' and *''dépréciation''*, as they occur in the disputed clause, are normally used to describe the economic phenomenon of depreciation of a currency quite generally, while ''formal'' devaluation is usually termed ''devaluation'' or *''dévaluation''*.

Cf. in this context e.g. Carreau, *Souveraineté et Coopération Monétaire Internationale*, Paris 1970, p. 208; Nussbaum, *Money in the Law, National and International*, Brooklyn 1950, p. 172.

However, even if the twin terms ''depreciation''—*''dépréciation''* and ''devaluation''—*''dévaluation''* are distinguishable in the two languages in the way indicated and normally refer to different events, they are also used interchangeably in the two languages to describe the same process, both in practice and in theory and both in everyday and in technical language.

Contemporary writings also contain examples of a continuing terminological uncertainty in these respects. See Carreau, Juillard, Flory, *Droit International Economique*, Paris 1978, p. 232; Hirschberg, *The Impact of Inflation and Devaluation on Obligations*, Jerusalem 1976, p. 40; Horsefield (ed.), *The International Monetary Fund*, 1945/65, vol. II: *Analysis*, Washington 1969, p. 90 *et seq*; *cf.* also Nussbaum, *op. cit.*, p. 172.

The possibility of the German and English or French texts of the disputed clause having different meanings cannot therefore be ruled out. The wording of the disputed clause therefore gives no clear guidance as to which of the meanings is intended, in fulfilling the requirements of Article 33 (3) of the VCT, which calls for concordance in the construction of the terms adopted.

19. In the Tribunal's view, the uncertainty arising from a—possible—discrepancy between the texts is not removed if, for interpretation purposes, reference is made to the meaning generally attached to the terms ''depreciation'' and *''dépréciation''* at the time the LDA was concluded, i.e. in 1952.

Despite the wording of Article 31 (1) of the VCT, its intentions might still be met if even today an attempt to determine the ''objectified'' will of the parties, as expressed in the text of the treaty, were based on the normal significance of the terms used at the time the treaty was concluded.

Cf. e.g. *Case Concerning Rights of U.S. Nationals in Morocco, ICJ Reports*, 1952, p. 189; McNair, *The Law of Treaties*, Oxford 1961, p. 467; Rousseau, *Droit International Public*, vol. 1, Paris 1970, p. 281.

There should not be any doubt that when the LDA was concluded, i.e. at a time when the international monetary order was generally characterised by a system of fixed parities agreed with the IMF, and not, as now, by a network of floating, continuously changing exchange rates, the terms ''depreciation'', ''devaluation'', *''dépréciation''* and *''dévaluation''* usually described the same situation, since any depre-

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ciation of a currency in its external relations, in accordance with the system, constitutes a devaluation. How closely these concepts drew together can even be seen from the original wording of the Articles of Agreement of the IMF itself. When Article I (iii) speaks of "competitive exchange depreciation", in view of the fixed, the agreed parities, all that could be referred to here is devaluation by act of government.

However, the Tribunal is convinced that the circumstances mentioned are an insufficient reason for having to reduce at the time of the conclusion of the treaty the terms "depreciation" and *"dépréciation"* to the meaning of the German word *"Abwertung"*. Even at that time, there was some uncertainty in the use of the terms both in English and in French.

20. Since the vagueness of the terms used in the English and French texts and the possible discrepancy between the German version of the disputed clause on the one hand and the French and English versions on the other cannot be eliminated by textual interpretation, the words to be construed must, under Article 31 (1) of the VCT, be interpreted "in their context". "Context" in this case means both the wording in full of the disputed clause and the body of the LDA as a whole.

21. The clause to be interpreted is so drafted that the prerequisites for its application are formulated in the first part of the sentence while the second half deals with the consequences, the legal effects, of its application. While the second half of the sentence refers to *"der Währung mit der geringsten Abwertung"* ("the least depreciated currency", *"la devise la moins dépréciée"*) the first part of the clause states that the guarantee applies if the exchange rate in question were to "alter" by more than 5 per cent *(ändern, subir une modification)*. In their pleadings, the Applicants rely on the choice of this neutral expression in the first part of the disputed clause. An alteration, they say, could mean both a rise and a fall in the exchange rate; the result would be that the disputed clause would also apply if one of the currencies concerned were revalued, and the term "depreciated" in the second part of the clause must therefore be taken non-technically to mean depreciation in the larger sense.

The Tribunal cannot subscribe to the Applicants' view and conclude, merely from the use of the word "alter" in the first part of the disputed clause, that the term "depreciated" in its latter part should be taken in the non-technical sense. The question as to why the authors of the disputed clause adopted the neutral expression "alter" in the first part can be left open. In any event, the use of this neutral expression in the first part does not necessarily mean that the term "depreciated" (*"Abwertung"*, *"dépréciée"*) in the second part of the clause must be understood in the non-technical sense of depreciation. On the contrary, the openness of the wording in the first part of the clause is no indicator, precisely because of this characteristic, as to how the relatively ambiguous terms in English and French, "depreciated" and *"dépréciée"*, in the second part are to be interpreted.

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22. The French text of the first part of the disputed clause differs from the English and German wordings where it refers to "*subiraient une modification*". The Respondent wishes to infer from the French text that all that the authors of the clause evidently had in mind was a reduction in par values by governmental act, since "*subir*" can be taken as meaning "sustain" only if the object concerned—a currency in this case—is subjected to an intervention, as it were, from above.

The Tribunal cannot accept this argument. A quick glance at a French dictionary clearly shows that "*subir*" means not only "sustain" but that it may also be used in a much broader sense, akin to "experience".

23. At the oral hearing, consideration was given to the question whether the disputed clause could not have the meaning claimed by the Respondent, because such interpretation would produce an inequitable outcome in the hypothetical cases of a single currency being revalued while all others concerned were devalued, or of only one currency being devalued and all others remaining the same or being revalued. If the Respondent's construction were adopted, the inequitable result would be that no upward adjustment could be made since there would then be no "least depreciated currency" up to whose level a devalued currency could be raised.

It is clear merely from the wording of the LDA that in such cases the basis for calculation is the non-devalued currency before its revaluation. A non-devalued currency could also be termed "least depreciated", while a revalued currency could not. The position would be unreasonable if the devalued currencies could not be raised up because another currency had not been devalued but had in fact been revalued.

24. Not only the disputed clause itself but all the provisions of the LDA and its Annexes have to be taken into consideration while searching for the meaning of the terms "depreciation" and "*dépréciation*", and thereby trying to remove any discrepancy existing between the German wording on the one hand and the English and the French wording on the other. Of special interest to the subject-matter in dispute is Article 13 of the LDA. This article governs the conversion procedure in those cases where, under the provisions of the LDA and its Annexes, currency has to be converted. The disputed clause, if it is applied, requires such conversion. To that extent, there is a direct link between it and Article 13 of the LDA.

Article 13 of the LDA describes four different methods for calculations of amounts on the basis of a rate of exchange where this is necessary under the provisions of the LDA, as follows:

> Paragraph (*a*) refers to the par values agreed with the IMF as a basis for conversion;
>
> Paragraph (*b*) describes the bilateral payments agreements that may have been made between participating governments as a further possible basis for calculation, though only as a substitute, i.e. "if no such par values are or were in force on the appropriate date";

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Paragraph (*c*) mentions as a yardstick, if neither paragraph (*a*) nor paragraph (*b*) applies, the middle exchange rate ruling on the date concerned in the currency of the country in which payment has to be made at the principal exchange market of the country in whose currency the debt is initially calculated;

Paragraph (*d*): finally, if the provisions of none of (*a*) to (*c*) apply, the yardstick is the exchange rate for the currency in which payment is to be made in the principal exchange market of a third country.

The structure and wording of Article 13 of the LDA leave it beyond doubt that the calculation methods listed do not offer alternatives among which the parties may choose but that the order in which the methods are set out in the article is mandatory. The prerequisites for applying the methods in paragraphs (*b*) to (*d*) exist only if those in each preceding clause are lacking. From this and from the fact that at the time the LDA was signed, i.e. 1952, all the parties concerned—other than Switzerland, which even now has not acceded to the IMF Agreement, and France, which had no agreed par values with the IMF between 26 January 1948 and 29 December 1958—were members of the IMF and had agreed par values with it, it is clear that in the normal or standard case the mode of calculation was that of Article 13 (*a*) of the LDA.

Practice confirms this finding. When, in 1957 and 1958, the French franc was twice devalued, the question as to whether a 5 per cent alteration in the exchange rate arose within the meaning of the clause in dispute was settled in the terms of Article 13 (*c*) of the LDA, since the prerequisites for the application of paragraphs (*a*) and (*b*) did not exist. On the other hand, recourse was had to Article 13 (*a*) of the LDA as the basis for conversion in all other cases where conversion was necessary.

The importance of Article 13 of the LDA for an interpretation of the disputed clause is based on the fact that through this provision the LDA and its Annexes were in matters of monetary law expressly fitted into the Bretton Woods system, which was already in existence at the time the LDA was concluded and which continued to govern international monetary relations for another twenty years. The backbone of this system was the fixed par value agreed between the IMF and each Member State for almost every currency, and expressed, pursuant to Article IV (1) (*a*) of the IMF Agreement, in its original wording, in terms of gold or in terms of the United States dollar. The system was further based on fixed exchange rates anchored directly on these par values. The fact that foreign exchange transactions were also made outside this system in no way affects its general authority. The decisive difference between it and the present system of "floating", with its continually fluctuating exchange rates, is that the external value of a currency was not decided by the rate paid for it—differing from one day to the next—in another currency on the international monetary markets but was fixed—within a minimum band width—by its own par value.

The incorporation of the LDA and the disputed clause into the international monetary system, at a time when it still governed inter-

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national monetary relations both *de jure* and *de facto* and covered the DM revaluations of 1961 and 1969 with which we are now concerned, has a twofold concrete bearing on the essential meaning of *"Abwertung"*, "depreciated" and *"dépréciée"* in the second half of the clause in dispute.

First, the view repeatedly put by the Applicants that any revaluation of one of the currencies concerned automatically means a depreciation *(Abwertung, dépréciation)* of all currencies not simultaneously revalued cannot hold good. True, there is no disputing that, e.g., a revaluation of the DM means that a person purchasing these has to spend more sterling or Belgian francs for the same amount in DM than he had to spend before the revaluation. However, since neither the par value of sterling as agreed with the IMF nor that of the Belgian franc is changed through the revaluation of the DM there can be no question of these currencies being depreciated—*abgewertet, dépréciée*—in the sense that the disputed clause uses this term. In the IMF system as outlined, the counter-value of both currencies expressed in terms of gold or the US dollar remains unchanged. Similarly unchanged is the purchasing power of these currencies on their home market and the external value of these currencies in relation to all other currencies—with the sole exception of the revalued currency. In other words, the view put by the Applicants effectively holds good only to the extent that, through the revaluation of one currency, the other currencies are traded more cheaply in the money markets in comparison to *it*, so that the holder of non-revalued funds must spend more when purchasing funds in the revalued currency. The specific money value and its relationship to gold or to the dollar as guide currency are not affected. The holder of non-revalued funds can buy the same quantity of gold or the same amount in dollars—or, e.g., if the DM is revalued, also the same amount in Italian lire or in Swiss francs—after the revaluation of another currency as before. The position changes only if his own currency is devalued in the formal sense.

Secondly, if account is taken of Article 13 of the LDA when construing the disputed clause, the following also has a bearing on the matter now under consideration. At the time of the two revaluations of the DM, i.e. in 1961 and 1969, the circumstances were such that Article 13 (*a*) of the LDA applied. All the States concerned, apart from Switzerland, were members of the IMF and had undertaken to respect the fixed par values agreed with the Fund. Even France returned to fixed par values in 1958, after the second devaluation of the franc. Consequently, any conversion required when applying the disputed clause would be calculated in accordance with Article 13 (*a*) of the LDA, i.e., it would have to be based on the par values agreed with the IMF which—apart from the DM itself—had not changed as a result of the revaluation of the DM. In other words, the revaluation of the DM had not led to a depreciation *(Abwertung, dépréciation)* of the other currencies of issue in the sense that the disputed clause uses these terms.

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25. The Applicants have cast doubts on a recourse to Article 13 of the LDA for construing the disputed clause, claiming that Article 13 of the LDA is a purely technical provision, governing only the process of converting the one currency into the other. Consequently, they pointed out that in the German text of the LDA Article 13 referred to "*Umrechnungskurs*" ("conversion rate") while the disputed clause referred to "*Wechselkursen*" ("exchange rates"); generally speaking, the term "*Wechselkurs*" described the mutual relationship between two or more currencies; the exchange rate of a currency could therefore easily change without a governmental act affecting the external value of that currency.

Against this argument, it must first be said that it is only the German text of Article 13 which uses the term "*Umrechnungskurs*". The English text refers to "rate of exchange" and the French text to "*taux de change*", both these texts therefore using the same term, to which the clause in dispute makes repeated reference. A study of the German version of Article 13 in its entirety indicates that the words "*Umrechnungskurs*" and "*Wechselkurs*" differ only in form and not in substance. In fact, the term "*Umrechnungskurs*" is used in paragraphs (*c*) and (*d*) in the German version of Article 13 where it is obvious from the context that a rate of exchange is meant. Furthermore, the clause in dispute expressly states *in fine* that the instalments due must be "*reconverted* into the currency of issue at the rate of exchange current when the payment in question becomes due" (italics added).

For the rest, the Applicants have not succeeded in explaining the material difference between a conversion rate and an exchange rate. It is true that the term "exchange rate" is mostly used in conjunction with money market rates. But paragraph (*a*) of Article 13 of the LDA is in fact concerned not with money market rates but with the par values agreed with the IMF. On the other hand, paragraphs (*c*) and (*d*) of Article 13 refer to money market rates.

26. Contrary to the Applicants' assertion, the fact that the German text of the first sentence of the disputed clause, i.e. the part which sets out the conditions under which the guarantee applies, refers to *the* ruling rate of exchange, while the English text refers to "the rates of exchange ruling any of the currencies of issue" and the French text to "*le taux de change entre deux ou plusieurs monnaies d'émission*", does not alter the position.

Even if one were to go along with the French text and assume, as it does, that the first half-sentence of the clause in dispute refers directly to the mutual relationship between several of the currencies of issue and not, or at least only indirectly, to the relationship between each of them and either the gold or the dollar standard, this in no way absolutely points to the conclusion that the term "depreciated" in the second half-sentence of the clause must be taken in a non-technical sense, to mean a relative loss of value. On the contrary, the French version of the first half-sentence only confirms what had

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already resulted from construing the term *"ändern"* also used in the same place in the disputed clause (alter, *subir une modification*), namely, that the openness of the wording of this first half-sentence makes it impossible to draw inferences as to the content and meaning of the second half-sentence.

27. To support their view that the clause in dispute has nothing to do with the IMF's gold or dollar standard or with the fixed par values agreed with the IMF, the Applicants have relied on a decision of an English court, the Queen's Bench Division, in *Lively Ltd. and Another v. City of Munich*.

Decision of 30 June 1976, [1976] I W.L.R. at p. 1004 *et seq*.

The case concerned a loan to the City of Munich in 1928 which, as a component of the German pre-war debts, fell within the ambit of the LDA, the provisions of which accordingly applied. The original conditions of the loan were changed by the LDA, i.e., in that the maturity date was shifted from 1 December 1953 to 1 December 1973. In essence, the case was concerned with the question whether the amount payable on 1 December 1973 was to be calculated according to Article 13 (*a*) or Article 13 (*c*) of the LDA. The dispute arose because, while the system of fixed par values agreed with the IMF was still in existence at the due date, in actual fact by 15 August 1971 —the date on which the United States Government suspended the gold convertibility of the dollar—the system of fixed exchange rates had collapsed and had been replaced by a patchwork of flexible rates which fluctuated from one day to the next. When calculating the sums payable by the debtor, should the basis continue to be the agreed par values, despite the spectacular collapse of the Bretton Woods system? The Court preferred reality to legal construction, finding, in the interests of the effective protection of creditors, that conversion should be made on the basis of Article 13 (*c*) instead of Article 13 (*a*) of the LDA.

This decision in no way supports the view taken by the Applicants. On the contrary, it confirms that the term "depreciated" in the disputed clause may correctly be interpreted by reference to Article 13 (*a*) of the LDA. Whether the decision actually did justice to the political and legal aspects of the currency situation in 1973 can be left open here. Be that as it may, the crucial distinction between it and the present dispute is that the significant dates in the present case are 1961 and 1969 and *not* 1973. This difference in time is of decisive importance to this case since the Bretton Woods system had long been discredited by 1973 following the abandonment of the gold standard for the dollar in 1971, even though it could still be claimed that, in law, the old system still governed and had continued in general operation until 1971. Up to that year, most of the world's currencies were ruled not only in monetary law by fixed par values and fixed exchange rates on paper, but also in fact because the legal situation was reflected in the actual operation of the monetary system. This certainly was true for both the years, 1961 and 1969, in which the DM was

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revalued. The picture that the international currency system presented in both 1961 and 1969 was therefore quite different from that in 1973. All that the judgment in the *City of Munich case* cited by the Applicants can contribute to the Tribunal's decision is therefore the contrary of that for which they cited it: if one assumes that, in view of "floating", Article 13 (*c*) of the LDA was correctly resorted to in the judgment as the method of conversion, the reasons given by the Court in its decision would indicate that the method in Article 13 (*a*) of the LDA was the standard to be used *before* 1971, i.e. before the gold parity of the dollar was abandoned. This method is based on a system of fixed gold or dollar parities and fixed exchange rates as a necessary consequence. Under such a system, revaluation and devaluation were both bilateral "deals" between the IMF and the State concerned in each case.

28. The "context", in which the term "depreciated" with which we are now concerned is to be interpreted according to Article 31 (1) of the VCT, is not, however, limited to Article 13 of the LDA. The Applicants have also referred to Article 8 of the LDA. This article obliges the Federal Republic of Germany not to permit any discrimination or preferential treatment in the fulfilment of the terms of settlement in accordance with the Agreement, namely, "among the different categories of debts or as regards the currencies in which debts are to be paid or in any other respect", unless such difference is the result of settlement in accordance with the Agreement itself. Paragraph 23 of the Report of the LDC, which as Appendix B to the LDA is part of the relevant context under Article 31 (1) of the VCT for interpretation purposes, states similarly that the Federal Republic should, when implementing the agreed terms permit "No discrimination or preferential treatment . . . as among categories of debts or currencies in which (they were) payable, or in any other respects". Finally, as all parties have submitted without dispute, during the negotiations in London it was repeatedly stressed that the principle of equal treatment applied and must be observed in all circumstances.

The Applicants consider that it would amount to unequal treatment conflicting with the prohibition of discrimination under Article 8 of the LDA if, for example, the creditors of the German issue of Young Loan Bonds were to receive more as a result of the revaluation of the DM than the creditors of other issues, whose currencies had not been revalued.

It is true that a holder of bonds expressed in DM would receive more than other creditors as a result of the revaluations of the DM in 1961 and 1969. This is the consequence of abiding by the provisions of Article 13 (*a*) of the LDA when converting as required under the second half-sentence of the disputed clause. However, this inequality of outcome does not affect the discrimination prohibition under Article 8 of the LDA.

Article 8 of the LDA is not affected, chiefly because the prohibition which it imposes itself expressly provides that differential treat-

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ment of the various categories of debts should not be regarded as discrimination or preferential treatment if such treatment is the result of a "settlement in accordance with the provisions of the present Agreement and the Annexes thereto". According to the wording of the rule on non-discrimination both Article 13 of the LDA and the disputed clause take precedence, as *leges speciales*, over the *lex generalis*, i.e. the principle of equal treatment. However, in this case, it is not even necessary to have recourse to the general rule of interpretation of precedence for the more specific provision, because the prohibition of discrimination in Article 8 of the LDA in the special context now before the Tribunal has no bearing beyond that of the *pari passu* clause incorporated in Article II of the General Bond. This *pari passu* clause does not cover the eventuality of "inequality in outcome", i.e. that of unequally high redemption payments.

The customary function of a *pari passu* clause in loan contracts is, in the interest of the bondholders, to prevent the borrower from entering into new, additional obligations which then rank before the bonded debt itself. The intention is to prevent, for example, a creditor being put in a worse position in the servicing of loans than another with regard to the amount paid, if the borrower is unable to meet all claims fully and uniformly at the same time.

Cf. Horn, *Das Recht der internationalen Anleihen*, Frankfurt 1971, p. 305.

The decisive purpose of a *pari passu* clause, therefore, is to guarantee a specific, an equal *ranking* for loans furnished with such a clause. Article II of the General Bond accordingly states—in the English text, which, according to Article III of the Bond, shall prevail—that the different issues in the various currencies "shall rank *pari passu* in all respects irrespective of date or place of issue or otherwise". The article seeks to guarantee that, e.g., diminished solvency or even temporary insolvency on the part of the borrower will affect each bondholder to the same degree. In particular, the specific intention was to prevent the German Reich, in the event of difficulties with interest payments or redemption, from making payment unequally as between the various tranches, with the consequence that, for example, bonds expressed in Italian lire or in Belgian francs could be paid in full while those in dollars or sterling were not serviced at all.

Cf. the judgment of the Swiss *Bundesgericht* of 25 May 1936, *Entscheidungssammlung des Bundesgerichts*, vol. 62 (1936) II, p. 140 *et seq.*

29. The last interpretational aid for construing the disputed clause which falls within the mandatory context under Article 31 (1) of the VCT consists of two further provisions of the Annexes to the LDA. Reference may be made to Article V (2) (*b*) of Annex II and to Article 7 (3) of Annex IV. Annex II contains the agreed recommendations on the settlement of medium and long-term German debts resulting from private capital transactions and Annex IV the agreed recommendations, chiefly, on the settlement of claims arising out of goods and services transactions. Both these provisions in connection

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with the calculation of debts in foreign currencies—with the exception of debts expressed in gold dollars or gold Swiss francs—state the principle that the amount payable must be calculated as the equivalent of an amount in US dollars at the rate of exchange ruling when the amount becomes due for payment. However, "the amount of currency of issue so reached shall . . . not be less than if it were computed at the rate of exchange current on 1st August 1952". This means, in fact, that when calculating the amount due under both these provisions, the rate of exchange ruling at 1 August 1952 constitutes a minimum but not, however, a maximum.

These two provisions have a bearing on the interpretation of the disputed clause in that they give rise to the inference that the divergent formulation in that clause relating to the Young Loan was intended to prevent the taking into account of any revaluation when calculating the amount payable.

30. Article 31 (1) of the VCT requires, in addition to the wording and context, the "object and purpose" of the treaty to be taken into account when interpreting unclear treaty provisions.

The object of the LDA was the settlement of German external debts. The purpose of the LDA was an attempt to achieve a compromise, in the interests of all concerned, between the liabilities of the Federal Republic of Germany, which, according to its own understanding, felt itself bound to settle the whole of the German debt, and its actual economic capacity. A prerequisite of the fullest possible settlement with its creditors was the recovery of the German economy. This recovery, therefore, became as much the object of the treaty as the settlement of the debt itself. Even though the Federal Republic of Germany was fully prepared to guarantee the external debt for the pre-war period as well, the LDA's object could be achieved only if foreign creditors were prepared to waive a substantial part of their claims and to come to terms with the German debtors on conditions for payment of what remained. The object of the LDA is therefore such that, when interpreting the individual provisions of the LDA, one has always to take into consideration the particular concern of the contracting parties, while formulating the LDA, with maintaining in all parts the delicate balance between, on the one hand, the justified aim for adequate satisfaction of the creditors and, on the other, a desire not to burden the debtors with an economically intolerable load and so jeopardise successful implementation of the settlement.

As we all now know, the economy of the Federal Republic of Germany by the fifties had already made an unexpectedly rapid and strong recovery. The German debtors had therefore no difficulty in meeting their commitments to the extent laid down in the LDA. In view of this development, one can understand the Applicants' desire to cite the rapid and continuously strong recovery of the German economy as an argument in their favour in this dispute—on the lines that, as the Applicants did so much to accommodate the Respondent,

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the latter must now allow a broad interpretation of its obligations where doubt arises.

Such considerations are hard to reconcile with what must be regarded as the "object and purpose" of the LDA, as formulated, e.g., in the Preamble of the LDA. Economic developments in the Federal Republic of Germany could have turned out quite differently, but neither in the one case or in the other can the actual outcome have any bearing on the results of the efforts at interpreting the disputed clause. This clause undoubtedly constitutes an attempt by the contracting parties to find a sensible middle way between the desirable and the possible, as far as they could see it in 1952.

31. According to Article 31 (3) (*a*) and (*b*) of the VCT, interpretation of a treaty must take account both of subsequent agreements between the contracting parties on interpreting the treaty and of subsequent practice in the application of the treaty from which a consensus between the parties regarding the interpretation of specific parts of the treaty might be deduced.

First, it is undisputed that the parties to the LDA were unable to agree on a particular interpretation of the clause in question after the LDA had been concluded. An attempt to do so in October 1953 in Basel proved fruitless. The continuing differences of opinion are most clearly evidenced by the fact that after a few further vain attempts, the dispute was eventually brought before the Arbitral Tribunal.

An indication of at least a tacit subsequent understanding between the contracting parties on a particular rendering of the term "depreciated" in the clause in dispute might, therefore, at best be found in the relevant practice of the parties concerned. In fact, practice appears to confirm that at least several of the participating governments initially regarded the clause merely as a protection against the formal devaluation of their currency, i.e. to the extent that the clause did not deal with the revaluation of a third currency and with the consequences thereof. The communication from the Swiss Federal Council to the Federal Assembly of 5 May 1953 states with regard to the disputed clause that it contains a guarantee "*gegen eine künftige, 5 prozent übersteigende Abwertung*". The communication from the President of the United States to the Senate of 10 April 1953 points out that the gold clause should no longer be applied in cases of "further depreciation" and that, instead of the gold clause, the clause in dispute should now be applied in those cases where one of the currencies concerned "has depreciated by 5 per cent or more". In the case of Switzerland, the use of the word "*Abwertung*" without any explanatory addition, and, in the case of the United States, the link created between the term "depreciation" and the gold clause indicate that all that one had in mind at the time was the protection of the currencies concerned against "formal" depreciation.

Nevertheless, it should also be noted in this context that the letter from the Bank of England to the Federal Debt Administration of 2 April 1953 stated, in connection with the calculation methods

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under the disputed clause, that such calculations should be based on "the currency most favourable to bondholders". The Federal Debt Administration adopted this wording it its own letter of 8 August 1953 to the *Schweizerische Kreditanstalt*, clearly without realising to what inference this text gives rise. That it did not intend to subscribe to the Bank of England's interpretation of the disputed clause is quite clear from its attitude at the Basel Conference in October of the same year. One of the draft circulars of the French bondholders' association described the disputed clause in terms that expressly included cases of revaluation. However, on counter-proposals by the Federal Debt Administration, the final text of the circular (of 1 February 1954) included the clause as worded in Annex I A of the LDA.

Consequently, at least some of the comments made immediately after the LDA was concluded by spokesmen on the Applicants' side may be clearly interpreted as indicating that the clause in dispute should be regarded exclusively as a protective provision against devaluation. Furthermore, the Federal Debt Administration's own interpretation of the disputed clause in its correspondence and in the negotiations on implementing the LDA was from the start restricted to the case of devaluation, or at least it let it be understood that it could not subscribe to a broader interpretation of the clause.

All in all one must conclude that a look at the period between the signing of the LDA in 1952 and the first revaluation of the DM in 1961, when the differences of opinion came out into the open, bears little fruit. Despite the efforts made, no lasting agreement was reached amongst the contracting parties on the interpretation of the disputed clause, nor does the conduct of the individual parties give any clear insight into what they understood by the term "depreciated", *(dépréciée, Abwertung)* in the disputed clause. In fact, by early 1954, it became quite evident that the parties had agreed to leave open the question of interpretation.

32. According to Article 32 of the VCT recourse may be had to supplementary means of interpretation, which include in particular the circumstances of a treaty's conclusion and the *travaux préparatoires*, in two cases: either in order to confirm the interpretation arrived at with the aid of the rules of Article 31 of the VCT, or in order to obtain further clarification if the result of the attempt at interpretation under Article 31 leads to an ambiguous, obscure or manifestly absurd result.

The Tribunal is convinced that consideration of the *travaux préparatoires* of the LDA constitutes an application of the first alternative under Article 32 of the VCT. The main concern is to use the oral and written material so painstakingly produced by the parties in connection with the early history of the LDA to confirm the correctness of the findings obtained by interpretation in accordance with Article 31 of the VCT.

33. The clause in dispute was a compromise agreed by the private creditors' representatives and the delegates of the creditor States

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participating in the LDC after lengthy negotiations *amongst themselves*. The compromise had become necessary when it was clear that the United States would in no circumstances agree to retain the gold clause as originally embodied in Article VI (*a*) of the General Bond of the Young Loan. It has been described in the statement of facts how difficult it was to reach agreement at precisely this point, when a viable replacement for the gold clause was under discussion. It proved particularly difficult to obtain co-ordinated proposals on a compromise from representatives of the various creditor interests—e.g. the American as opposed to the European. True, the German representatives were evidently the first at the negotiations to point out that under both German and American law any new agreement on gold clauses was either unlawful or subject to special approval. However, Herr Abs, the head of the German delegation, who was called as a witness by the Respondent, stated expressly—and without opposition—that the Federal Republic of Germany would still have agreed to a retention of the gold clause nonetheless, had it proved to be a *sine qua non* for the debt settlement as a whole.

Negotiations on a replacement for the gold clause to secure creditors' interests also included discussions on a long-term link-up between the amounts due and a specific currency, e.g. the dollar or the pound sterling. However, no decision was reached on an appropriate substitute as it was clear that at least certain creditors doubted the long-term stability of any particular currency. On the other hand, the creditors were agreed that they had to insist on protection against a potential drop in the value of particular currencies of issue. But, in particular, the question how far such protection should extend was open and disputed. The minutes submitted to the Tribunal contain no statement which—even by implication—might indicate that the replacement to be devised for the gold clause should, in addition to protecting the relevant currency of issue against devaluation, also guarantee participation in the revaluation of any other currency of issue.

The testimony of the witnesses heard before the Tribunal also agrees on the point that revaluation or appreciation was not mentioned at the LDC. The witness Mr. Spang, called by the Applicants, said that he could not remember any mention of the disputed clause also covering cases of appreciation. The witness Mr. Gunter, also called by the Applicants, said that "appreciation" of the dollar or of any other currency had not been discussed. Mr. Gunter further stated that whether anyone might have mentioned "appreciation" was not all that important since, in his opinion, it "went without saying" that where guarantees and exchange rates and the relationship between exchange rates were under discussion, "depreciation" and "appreciation" were always implicitly involved. The Tribunal can attach no weight to this statement of opinion by the witness in an analysis of the *travaux préparatoires*, and his view of the legal aspects is not the Tribunal's concern.

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34. A few words seem necessary at this point to define the concept of *travaux préparatoires*. It must first be stressed that the term must normally be restricted to material set down in writing—and thereby actually available at a later date. This means that oral statements and opinions not recorded in minutes or conference papers can apparently be regarded as a component of *travaux préparatoires* only in exceptional cases. They can in any event be considered only if made in an official capacity and during the negotiations themselves.

Cf. Hyde, *International Law, Chiefly As Interpreted and Applied by the United States*, vol. 2, Boston 1947, pp. 1497-8.

A further prerequisite if material is to be considered as a component of *travaux préparatoires* is that it was actually accessible and known to all the original parties. Drafts of particular articles, preparatory documents and proceedings of meetings from which one member or some members of the contracting parties were excluded cannot serve as an indication of common intentions and agreed definitions unless all the parties had become familiar with the documents or material by the time the treaty was signed. If doubts already exist amongst the experts on international law and in international case law on whether the *travaux préparatoires* can be held against a State which accedes to a treaty at a later date, i.e. without participating in the original negotiations,

Cf. e.g. McNair, *The Law of Treaties*, Oxford 1961, p. 420 et seq.

such doubts become certainty when, as in the present case, it is a fact that the Federal Republic of Germany, even though it was an original contracting party—and in principle had equal rights—at the LDC, owing to the untypical organisational structure and procedures at the Conference, had no knowledge of certain documents and was excluded from certain negotiating committees, albeit temporarily. While a State which accedes to a multilateral treaty at a later stage is able, *before* accession, to examine all the available *travaux préparatoires*, i.e. to make itself familiar with them, before it gives its "yes or no", the Federal Republic of Germany was in this respect in an altogether less favourable position *vis-à-vis* the LDA. It is a fact that certain important documents and minutes of proceedings came to its knowledge only in the course of proceedings before the Arbitral Tribunal.

Cf. generally, e.g. Bernhardt, *Die Auslegung völkerrechtlicher Verträge*, Cologne 1963, p. 120.

35. In the light of the minutes of the LDC, to the extent that they were made available to the Arbitral Tribunal, and in the light of the testimony of the witnesses at the oral hearing, it must be assumed that no one at the LDC itself had seriously reckoned with the possibility of a revaluation of the DM and had therefore mentioned this eventuality. Instead, discussions on several occasions clearly centred on what should be done if the Federal Republic of Germany were unable to discharge its obligations. While the possibility of another currency, e.g. the US dollar, being revalued clearly appeared

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less unlikely in 1952 than a revaluation of the DM, such an event was not expressly taken into consideration. The fact that neither the one nor the other eventuality received specific attention seems to indicate that there was no intention of contemplating the consequences of a revaluation of any currency whatever.

36. An attempted reconstruction of the original history of the clause in dispute from the material described in the statement of facts and from the witnesses' testimony reveals, as the minutes of a joint (informal) meeting between the Tripartite Commission and creditor representatives of Negotiating Committee A on 30 July 1952 indicate, that at the time—shortly before the end of the LDC—opinions still differed widely on what shape the clause should take to benefit Young Loan creditors. While the Commission felt that the replacement of the gold clause by a dollar clause or some analogous protective device was indispensable, the European creditor representatives continued to press for a retention of the gold clause. The next day, Sir Otto Niemeyer, the representative of British creditors, submitted to the same body a compromise proposal which, in his words, had been agreed in consultations with the German delegation and with the various creditors' representatives. This proposal, which substituted a dollar clause for the gold clause and provided for new negotiations between the debtor and the creditor representatives in the event of a change in the dollar value of gold, was accepted by everyone—apart from the US Government representative. There can be no question that this proposal offered protection only against devaluation of the dollar as a yardstick for calculation. The next tangible stage in the history of the origin of the disputed clause is a draft, described in the statement of facts, of an alternative creditor guarantee prepared by Sir George Rendel on 4 August 1952 and submitted on 5 August 1952. This proposal was clearly drafted as an initial reaction to the US Government's rejection of the previous compromise proposal—the modified dollar clause.

The wording of Sir George Rendel's proposal now offered creditors an opportunity of opting for payment on the basis of any desired currency. In concrete terms, this meant that each creditor could select the currency most favourable to himself from the bundle of currencies of issue. The only difference between this mode of payment and a currency option was that the payments were not actually to be made in the selected currency but only in the currency of issue. The selected, most favourable, currency was to be used only as a yardstick for calculating the amount of the sum finally payable. Had this proposal been accepted, each creditor would have of course opted for the currency most favourable to himself, in which case the most favourable would doubtless have been the revalued currency.

Later, on 5 August, two sittings were devoted to the wording of the disputed clause. The draft put forward to the meeting of the Tripartite Commission at 2.30 p.m. substantially reproduced the proposal of Sir George Rendel but the draft contained one material alter-

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ation in that it referred to the rate of exchange at 1 August 1952 as the basis of conversion. It could not do otherwise as the amount due after a currency had changed and the option had been exercised could not be determined without a double calculation—the rate as at 1 August 1952 and reconversion at the payment date.

The text of the clause in dispute as approved at the second sitting of the Commission on the same day, which creditor representatives from Negotiating Committee A were again invited to attend, retained a reference to the exchange rate at 1 August 1952 but now permitted only the option of the "least depreciated currency", instead of the option of any desired currency. Linguistically, there can be no doubt that the new wording is narrower than the earlier. The creditors' option right was restricted. The restriction can only be understood by the fact that they could now no longer opt for a revalued currency.

It is true that the witness Baron van Lynden has stated that the new wording was not intended to make material changes, but only to clarify matters. However, this statement is hard to reconcile with a comparison of the two texts. It becomes understandable only when we take into account the fact that all participants at the sittings of 5 August 1952 were apparently so engrossed in the *protective* effect, in the strict sense, that the clause still to be drafted was to achieve, that they in fact did not consider the restriction of the creditors' option right to the "least depreciated currency" as a restriction of the right itself. In its final version, too, the clause evidently appeared to provide them with precisely *the* protection which they had struggled for.

When assessing the early history of the clause in dispute, it must be remembered that, up to 31 July 1952, discussions had undeniably been limited to proposed substitutes for the gold clause that would in the normal case of fixed par values provide protection only against the consequences of formal devaluation. The fact must further be borne in mind that all those attending the LDC were concerned about two things in particular—the unfortunate experience of creditors before and after the Second World War, with a drop in the value of many of the currencies of issue, and the fear that the economic recovery of the Federal Republic of Germany might not be achieved without setbacks. If one finally takes into account that, according to the submissions made by the Respondent and expressly confirmed by the witness Herr Abs, whose testimony was not disputed in this respect, the German delegation had received the compromise proposal of 31 July —the modified dollar clause—for information, but not the drafts of 4 and 5 August—the "Rendel" drafts—and that the German delegation in fact learned of the compromise reached only after it had already—later on 5 August—been given its *final* form in the shape of the clause now in dispute, the conclusion must unavoidably be drawn that the established pre-history of the disputed clause, as derived from the *travaux préparatoires*, also supports the interpretation that it is

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a protection solely against the devaluation of individual currencies of issue.

37. Finally, consideration of the fact that a meeting of 5 August subsequently went on to discuss currency options with reference to two other loans, that to the City of Munich and the so-called Potash Loan, brings the Tribunal to the same conclusion. A currency option also covers revaluation. The fact that the introduction of a currency option was never seriously considered for conversions under the Young Loan strengthens the conviction that all that was ever intended for this Loan was a clause to protect against a currency deterioration.

Altogether, the Arbitral Tribunal therefore considers that the *travaux préparatoires* confirm the conclusion to which the interpretation of the wording of the clause in dispute in accordance with Article 31 (1) of the VCT has already led.

38. In the opinion of the Tribunal, interpretation of the clause merely in the terms of Article 31 (1) of the VCT already proves the Applicants' claim to be unfounded. Any possible discrepancy between the texts, when the wordings of the three authentic versions of the disputed clause are compared, is resolved if the clause is interpreted in the context of the treaty and against the background of the "object and purpose" of the LDA.

But as the Tribunal sees it, the Applicants' claim would be untenable even if credence were given to the view that the discrepancy between the meaning of the German text of the disputed clause, on the one hand, and that of the English and French texts, on the other, could not be resolved by interpretation in the terms of Article 31 (1) of the VCT. In that event, Article 33 (4) of the VCT would be decisive.

39. According to Article 33 (4) of the VCT, any discrepancy between the several authentic texts of a treaty that cannot be eliminated by applying the principles of Articles 31 and 32 should ultimately be settled by attaching that meaning to the provision in question "which best reconciles the texts, having regard to the object and purpose of the treaty".

The repeated reference by Article 33 (4) of the VCT to the "object and purpose" of the treaty means in effect nothing else than that any person having to interpret a plurilingual international treaty has the opportunity of resolving any divergence in the texts which persists, after the principles of Articles 31 and 32 of the VCT have been applied, by opting, for a final interpretation, for the one or the other text which in his opinion most closely approaches the "object and purpose" of the treaty. Application of Article 33 (4) of the VCT to the case under decision means that the Arbitral Tribunal has the right —and the duty—to adopt that interpretation of the clause in dispute which most closely approaches the object and purpose of the LDA.

40. In deciding which text is to be granted priority, certain of the traditional principles of treaty interpretation, which apply when the texts of plurilingual international treaties diverge irreconcilably,

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offer no help having regard to the unambiguous wording of Article 33 (4) of the VCT in this respect. That is normally true for the principle of the prevalence of the clearest text. This principle, which would support precedence for the German text having regard to the quite unequivocal meaning of the German term *"Abwertung"*, cannot be used for a decision under Article 33 (4) of the VCT since, in this specific case, there is no certainty that the clearer text actually expresses the "object and purpose" of the treaty better than the less clear. On the contrary, the possibility cannot be ruled out that the less clear text was in fact adopted because it expresses the object of the treaty as a whole, as well as that of the clause in dispute, better than the German term *"Abwertung"*. Article 33 (4) of the VCT however requires particular reference to be made to the "object and purpose" of the treaty for a decision in favour of the one or other text.

Similar objections apply also to the principles of the "lowest common denominator"—which equally favour the German text—and of precedence of the original text—which would favour the English and French versions—application of which has already been rejected once—*cf.* para. 17 above—for a different reason. Both principles for more or less formal reasons favour a particular version of the treaty without their even touching on its "object and purpose", yet under Article 33 (4) of the VCT this is the decisive yardstick.

For the same reason, the Tribunal is convinced that the principle of *contra proferentem*, to which the Respondent has referred repeatedly and with particular emphasis, cannot stand. In practice, it would impose on the creditors the disadvantages of the unclearly formulated English and French texts of the disputed clause without, at the same time, revealing whether this was what was actually intended or corresponds with the object and purpose of the treaty. Whether the *contra proferentem* principle is in fact a generally accepted rule of interpretation in international law and what the particular conditions are for its application need not, therefore, occupy the Tribunal, which considers that in this particular case there was no question of the Respondent's position being a dependent one.

41. So one is left once again with direct recourse to "the object and purpose" of the treaty. The object and purpose of the LDA has already been discussed at an earlier stage—*cf.* para. 30 *supra*. The earlier discussion was concerned with the satisfaction of justified creditor interests, on the one hand, and an arrangement that would not adversely affect the debtor's process of economic recovery, on the other. The object of the clause in question was to protect creditors, especially, and undisputedly, against financial loss through depreciation of the currency in which they had originally made money available to the debtor or to its predecessor. To that extent i.e. with regard to devaluation, the purpose of the clause in dispute is fully achieved by using the German text as the basis for the decision. No doubt, a broader interpretation of the disputed clause—on the basis of the Applicants' submissions—would offer creditors more extensive safe-

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guards, but such an excessive degree of protection could be considered imperative only if, having regard to the "object and purpose" of the treaty, absolute equality, i.e. ultimately equal treatment for each individual creditor had been the acknowledged goal of the LDA. However, as mentioned—*cf.* para. 28 above—this was not the case, as neither the prohibition of discrimination under Article 8 of the LDA, nor the *pari passu* clause of the General Bond states such a claim. Even the gold clause i.e. the original mould in which the protection of creditors was cast under the Young Loan, does not guarantee "everlasting" and absolute equality as its final result.

42. The Arbitral Tribunal is convinced that these grounds justify its conclusion that even if—in the event of an irreconcilable discrepancy between the authentic treaty texts—the problem of interpretation had been resolved by application of Article 33 (4) of the VCT, it would still adjudicate in favour of the Respondent.

FOR THESE REASONS

The applications are rejected as unfounded by four votes to three.

The President:
Erik CASTRÉN
The Registrar:
L. HUSEL

DISSENTING OPINION OF MESSRS. ROBINSON, BATHURST AND MONGUILAN

Pursuant to the provisions of Rule 44 (*c*) of the Rules of Procedure we submit the following opinion.

1. We are in agreement with that part of the judgment which deals with jurisdiction and its exercise. We are unable to agree with the result reached by the majority of the Tribunal or with the reasoning in support of that result.

The Object and Purpose of the London Agreement on German External Debts

2. We initially seek guidance from the Vienna Convention on the Law of Treaties of 23 May 1969. Two Articles of that Convention are significant. Article 31 describes the general rule of interpretation and Article 33 deals with treaties authenticated in two or more languages. Under both Articles it is provided that, unless a special meaning has been given to the term in issue, the object and purpose of the treaty must be taken into consideration when interpreting ambiguous language. There is a significant difference, however, between these

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Articles. Pursuant to Article 31 it is the ordinary meaning that is to be given to the terms of the treaty in their context, whereas under Article 33 it is the meaning that best reconciles divergent texts that governs.

3. In an Exchange of Letters (appended to the LDA as Appendix A) on 6 March 1951 the Allied High Commissioners informed the Chancellor of the Federal Republic of Germany that the Governments of the French Republic, the United Kingdom and the United States of America were preparing proposals designed to arrive at "an orderly overall settlement of pre-war claims against Germany and German debtors and of the debt arising out of the post-war economic assistance, which would be fair and equitable to all the interests affected, including those of the Federal Government". The Exchange of Letters was, as the fourth recital in the preamble of the LDA recorded, the "basis" of the LDA.

In the Exchange of Letters the Respondent confirmed that it was liable for the pre-war external debt of the German Reich and expressed its desire to resume payments on the German external debt (Letter dated 6 March 1951 from the German Federal Chancellor to the Allied High Commission, I, III: Appendix A to the LDA). One of the "principles and objectives" which guided the London Conference on German External Debts was the need to negotiate a Settlement Plan which would "eliminate the state of default of Germany", i.e. of the German State, "by suitable treatment of matured and maturing debts and of arrears of interest", so as "to contribute to the recovery of Germany's international credit by the restoration of confidence in her financial standing and reliability as a borrower, while giving a reasonable assurance that Germany will not again default on her undertakings" (Report of the LDC, paragraph 11 (*c*) (i), (iii): Appendix B to the LDA). The "suitable treatment" adopted was a genuine composition with Germany's creditors reached by the Respondent; it was "not a dictate of the creditor powers and/or the creditor representatives" but was "negotiated and agreed upon" (CM para. 95 p. 31). A requirement of equality of treatment as between creditors of the same class and as between the tranches of multiple currency bond issues can therefore be said to have been dictated by the very nature of the collective settlement which was negotiated, it being of the essence of a composition with creditors made by a debtor in difficulties that all creditors who participate should do so on equal terms. Consequently it was natural that the concepts of fairness and equity were recurrent themes in the events leading to the convening of the LDC, in the negotiations at the LDC, in the Report of the LDC, and in the LDA itself.

4. In May 1951, in an Enclosure (No. 3) sent with a Note to all interested Governments about plans for the settlement of German external debts, the three Allied Governments gave notice that they would "wish to ensure that the settlement arrangements do not lead to inequity or preferential treatment as between some groups of creditors and others", and that they were agreed "that the terms of the

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debt settlement should not vary according to the currencies in which obligations are denominated" (M p. 21).

5. In a Memorandum of December 1951 communicated to States invited to participate in the LDC, the Tripartite Commission on German Debts (which the three Governments had set up in April 1951 to represent them in the settlement negotiations and to organize the LDC) looked to "a satisfactory and equitable settlement of Germany's pre-war debts" and "a reasonable settlement of these debts which will be fair to all concerned" (Paragraphs 16, 17 of the Memorandum, M p. 25). The Memorandum also commented (paragraph 23) that the Commission's basic concern was that the "settlement, and all payments made in respect of German external pre-war debt, should be fair and equitable both for the creditors as a whole and as among all categories of creditors" (M p. 25).

6. At the LDC a Steering Committee, composed of the three members of the Tripartite Commission, thirteen creditor representatives from nine countries, and five members representing public and private debtor interests, had the duty "to ensure that all recommendations submitted to plenary meetings were such as to achieve an equitable overall settlement and equal treatment for all creditors within each category" (LDC Report, para. 7 (*a*)).

In carrying out its work the LDC was guided by the principle and objective, among others, that the settlement plan should "provide for an orderly overall settlement and assure fair and equitable treatment of all the interests affected" (LDC Report, para. 11 (*b*) (ii)). The LDC considered that the recommendations made in its Report conformed to that principle and to the others that guided its work (LDC Report, para. 34). The three Allied Governments also found that the recommendations provided "a satisfactory and equitable plan for the settlement of German external debts" (LDA, tenth recital in the preamble); and the Parties to the LDA themselves regarded the provisions of the LDA and its Annexes "as satisfactory and equitable to the interests concerned" (LDA, Article 1).

7. The LDC declared that no discrimination or preferential treatment in the fulfilment of the terms agreed on as among categories of debts or currencies in which they were payable, or in any other respects, should be permitted by the Federal Republic or sought by the creditor countries (LDC Report, para. 23); and Article 8 of the LDA prohibited, either in fulfilment of the settlement terms or otherwise, *"any discrimination or preferential treatment* among the different categories of debts or *as regards the currencies in which debts are to be paid or in any other respect"* (except, of course, as the settlement terms themselves provided for differing treatment) (emphasis added).

The Tribunal has held that non-discrimination was "the principle" underlying the settlement plan adopted at the LDC: *Swiss Confederation v. Federal Republic of Germany*, (1958) Reports of Decisions and Advisory Opinions, 37 at p. 44. In our opinion, where a provi-

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sion of the LDA requires interpretation and so does not clearly come within the exception to the general principle of Article 8, the provision should be interpreted to give effect to this principle of non-discrimination, rather than otherwise.

8. As certain creditor representatives observed (see M p. 24), "in the case of a loan having tranches expressed in different currencies, an equitable solution should provide for equivalent treatment of all bondholders", and during the settlement negotiations at the LDC this was emphasized with regard to the Young Loan. Representatives of the Bank for International Settlements, the Trustee of the Young Loan, drew the attention of the LDC to the "very precise terms of the Loan Contract" which made it "quite clear that the Young Loan, both in law and in fact, constitutes a single and indivisible loan, giving identical rights to all the holders in all circumstances"; and to the Article (II) of the General Bond which provided that all tranches "shall rank *pari passu* in all respects irrespective of date or place of issue or otherwise", which meant, in the opinion of the Trustee, "that no tranche should be preferred in any way over any other" (A I Annex XX p. 154; A I Annex XXI p. 167). The Trustee's representative ended his statement to the LDC on the Dawes and Young Loans with these words:

> No matter what the final terms of settlement may be the two great principles underlying the issue of these bonds can and must be preserved—that is, their priority and equality of treatment of all Bonds of their respective issues. (A I Annex XXI, p. 169.)

On equality of treatment of all tranches, the Governments of the French Republic, the United Kingdom and the United States of America were agreed. At an Informal Meeting between the Tripartite Commission and creditor representatives of Negotiating Committee "A" (Reich debts and other debts of public authorities) on 30 July 1952, Sir George Rendel, the United Kingdom Member of the Commission and Chairman of the meeting, said this:

> It was important to work out a practical compromise (i.e. on a substitute giving "currency protection" in place of the gold clause) and it was important that the tranches of the Young Loan received equality of treatment, even if they did not receive the full treatment provided for in the General Bond . . . the U.S. Government accepted the U.K. and French point of view on equality of treatment of the tranches. (A I Annex XXXI pp. 290-291.)

This view was shared by the German Delegation to the LDC. At a meeting of Committee A on 11 March 1952, Dr. Granow of that Delegation, speaking on its behalf, had answered his own rhetorical question—"What, then, would be such a practical and equitable solution of the gold clause problem?"—in this way:

> In our view such a solution would only be equitable if it guaranteed the equal treatment of all debts, in other words, the equal treatment of all creditors. In my opinion such equal treatment cannot involve the full application of the gold clause. On the other hand, treatment of debts without any allowance at all being made for the gold clause, which had after all been agreed, in other words payment in currencies at the present rates of exchange, will not come into consideration. (CM para. 57 p. 23; CMAA Annex 5 p. 17.)

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9. The Report of the LDC specifically expressly acknowledged the attitude of the three Governments represented on the Tripartite Commission "with respect to the Young Loan"; the three Governments "regarded it as essential that the equality of treatment for the different issues of that Loan provided for under the loan contract should be maintained" (paragraph 30, second sub-paragraph).

The statement last quoted, from paragraph 30 of the LDC Report, followed immediately the statement in the first sub-paragraph of that paragraph, that "On the question of the gold clause in general . . . the Governments of France, the United Kingdom and the United States of America had decided that, in so far as the German Debt Settlement was concerned, gold clauses should not be maintained but might be replaced by some form of exchange guarantee". The juxtaposition of these two statements is significant.

The Context of the Clause in Dispute

10. By Article 31 (1) and (2) of the VCT, the "context" for the purpose of the interpretation of a treaty comprises (i) the text; (ii) the preamble; (iii) the annexes; (iv) any agreement made by all the parties in connexion with the conclusion of the treaty; and (v) any instrument (a term not defined in the VCT) made by one or more of the parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

The context, for the purposes of interpreting the LDA, therefore includes its ten Annexes and, although not designated as "Annexes", the two Appendices also annexed to the LDA, copying, respectively, the Exchange of Letters of 6 March 1951 and the Report (without its Appendices) of the LDC.

11. We do not consider that the United States Dollar Extension Bonds (the only tranche to have replacement bonds—the bonds of other tranches being the original texts overprinted with an enfacement referring to the LDA) and the Funding Bonds in the various currencies of issue are comprised within "the context" as being instruments within the meaning of Article 31 (1) and (2) (*b*) of the VCT. Although they were instruments "made by one (of the) parties in connexion with the conclusion of the treaty", it is not possible to regard each one of them as having been "accepted by the other parties as an instrument related to the treaty". Nor do we consider that they represent "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" within the meaning of Article 31 (3) (*b*) of the VCT. In any event, the only aspect of the United States Dollar Extension Bonds and the United States Dollar Funding Bonds bearing upon the issue before the Tribunal would be the provisions making (as Article III of the General Bond did for itself and for the Definitive Bonds which also included such a provision) the English text of those bonds decisive in case of divergence between the texts in the three languages

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—English, French and German. Even apart from the fact that these American Extension and Funding Bonds do not set out or describe the provisions of the disputed clause (as the Funding Bonds in other currencies of issue and their coupons do), we agree with the Respondent that the primacy of the English text of those bonds cannot influence or displace the requirement that the Tribunal, in interpreting the disputed clause, must apply the provisions of Article 33 of the VCT in view of the fact that the LDA makes the three texts, in English, French and German, "equally authoritative". We take the same view of the facts that the Conversion Bonds (being reprints, with an enfacement referring to the LDA, of the Definitive Bonds of 1930) provide, as does the General Bond of 1930 (reproduced on the reverse of the Conversion Bonds), that in case of divergence between the texts the English shall prevail; and that the Funding Bonds, containing the disputed clause in its divergent texts, incorporated, subject to the modifications made by the LDA, the terms of the General Bond. This is not to say that we do not consider that the English language text of the disputed clause has no significance in the present case—a matter which is considered later in this dissenting opinion (see paragraphs 37 to 41 below).

12. The LDA has provisions dealing with non-German currency debts (other than those expressed in gold dollars or gold Swiss francs and other than the Young Loan Bonds) which were subject to gold clauses; see LDA: Article 12 (*b*); Annex II, Article V, paragraph 2 (*b*); Annex IV, Section B, Article 7. The provisions define such debts in relation not to gold but to the United States dollar and they differ in this respect from the provision applied to the Young Loan, which was to benefit from "an additional form of exchange guarantee" as the Press Communiqué approved at the Fifth Plenary Session of the LDC on 8 August 1952 stated:

> Payments on loan contracts containing gold clauses will be made as though the currencies of issue of the loan had been defined in relation not to gold but to the United States dollar. The Young Loan agreement contains an additional form of exchange guarantee. (A II Annex XXXIX p. 342).

Those provisions maintained (as the Arbitral Tribunal noted, as regards Annex II, Article V, in *Swiss Confederation v. Federal Republic of Germany, supra*, at p. 46) "equality of treatment" of all non-German debts with gold clauses, That treatment would, under those provisions, have included (if the event had occurred) receiving the benefit of a formal revaluation of the United States dollar after 1 August 1952 resulting in an appreciation above its rate of exchange on that date. In our opinion it would not accord with the object and purpose of the LDA to give to the currency exchange guarantee of the Young Loan Bonds an interpretation which would deny the bondholders of all tranches—those issued in German currency and those issued in non-German currency—similar equality of treatment.

It is clear from the text and the context, as well as from the preparatory work at the LDC, that an object and purpose of the LDA was that an overall settlement of German external debts, which was

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fair and equitable to debtors and creditors alike, should also ensure equality of treatment as between classes of creditors, as between creditors of the same class, as between the currencies in which the obligations were expressed, and as between the various tranches of multiple currency bond issues.

The Clause in Dispute

13. Annex I (Agreed Recommendations for the Settlement of Reich debts and debts of other public authorities), Section A (Debts of the Reich), Article 2 (The 5 1/2 per cent International (Young) Loan 1930), paragraph (*d*) dealt with arrears of interest on that Loan and with the Funding Bonds (20-year Bonds carrying 3 per cent per annum interest and after 5 years 1 per cent sinking fund) representing arrears of interest, recalculated at 4 1/2 per cent, due to 31 December 1944. Paragraph (*e*) of Article 2 in Annex I A has itself two parts: the first is concerned with the "amounts due in respect of the various issues of the 5 1/2 per cent International Loan 1930"; the second is the disputed clause at issue in the present case.

The first part of Annex I A 2 (*e*) provides that:

> The amounts due in respect of the various issues of the 5 1/2 per cent International Loan 1930 are payable only in the currency of the country in which the issue was made.
>
> . . . the basis for calculating the amount of currency so payable shall be the amount in US dollars to which the payment due in the currency of the country in which the issue was made would have been equivalent at the rates of exchange ruling when the Loan was issued.
>
> The nominal amount in US dollars so arrived at will then be reconverted into the respective currencies at the rate of exchange current on 1st August, 1952.

These provisions result in a sum expressed in the currency of the country in which the particular bond was originally issued. The nominal value of the Extension Bonds of the American issue was the same as that of bonds issued in 1930. Bonds issued in 1930 with a nominal value of RM 1000 became bonds with a nominal value of DM 1000.50, the difference of DM 0.50 being paid in cash when the first coupon was paid.

The second part of Annex I A 2 (*e*) expresses the currency exchange guarantee for the Young Loan bondholders as follows:

> Should the rates of exchange ruling any of the currencies of issue on 1st August, 1952, alter thereafter by 5 per cent, or more, the instalments due after that date, while still being made in the currency of the country of issue, shall be calculated on the basis of the least depreciated currency (in relation to the rate of exchange current on 1st August, 1952) reconverted into the currency of issue at the rate of exchange current when the payment in question becomes due.
>
> *Au cas où les taux de change en vigueur le 1er août 1952 entre deux ou plusieurs monnaies d'émission subiraient par la suite une modification égale ou supérieure à 5%, les versements exigibles après cette date, tout en continuant à être effectués dans la monnaie du pays d'émission, seront calculés sur la base de la devise la moins dépréciée par rapport au taux de change en vigueur au 1er août*

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1952, puis reconvertis dans la monnaie d'émission sur la base du taux de change en vigueur lors de l'échéance du paiement.

Sollte sich der am 1. August 1952 für eine der Emissionswährungen maßgebende Wechselkurs später um 5 v.H. oder mehr ändern, so sind die nach diesem Zeitpunkt fälligen Raten zwar nach wie vor in der Währung des Emissionslandes zu leisten; sie sind jedoch auf der Grundlage der Währung mit der geringsten Abwertung (im Verhältnis zu dem Wechselkurs vom 1. August 1952) zu berechnen und zu dem in Zeitpunkt der Fälligkeit der betreffenden Zahlung maßgebenden Wechselkurs wieder in die Emissionswährung umzurechnen.

The Multiple Currency Exchange Guarantee

14. The abandonment of the gold clause in the Young Loan was not the only feature of an "equitable solution". In the view of the Tripartite Commission a second criterion of such a solution was the removal of options, such as the *option de place* provided for by Article VI (*b*) of the General Bond. Indeed, the German Delegation at the LDC was opposed to *options de change* in order "to protect the balance of payments and ensure the execution of the settlement plan" (M para. 182 p. 70).

15. It must be recalled furthermore that, independently of and in addition to the *pari passu* clause in Article II of the General Bond 1930, the gold clause inserted in Article VI (*a*) of that Bond established among all the bondholders of all the tranches of the Loan an equality of treatment assuring that every bondholder, no matter in what currency he was to be paid, would always receive the same gold value as that defined at the time of the issue of the Loan, but each of the currencies of issue was regarded separately and solely in its relation to gold.

16. The guarantee system adopted in London does exactly the opposite. It no longer treats every currency of issue in its relation to gold but solely in its relation to the other currencies which it links, the one to the others, by referring exclusively to their exchange rates. In fact, Article 2 (*e*) of Annex I A of the LDA starts in its first part by re-establishing, with effect from 1 August 1952, between all tranches of issue the equality which they had lost as the result of the abandonment of the gold clause, the nominal amount of the American dollar having been chosen to replace gold in the calculations of adjustment. This amounted to substituting, for the past, a dollar clause for the gold clause.

For the future, Annex I A 2 (*e*) then established in its second part an exchange guarantee among all currencies of issue, including the American dollar, which guarantee was to come into operation in case the exchange rates, in force on 1 August 1952, between two or more currencies of issue sustained an alteration equal to or in excess of 5 per cent.

The Respondent rejects the description of "multiple currency exchange guarantee", which the Applicants use for such a clause, and confines itself to calling it the "5 per cent clause".

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However, the Report of the LDC (Paragraph 30) expressly uses the term "exchange guarantee" and we fail to see how one could, in monetary law, describe otherwise a clause which, in the event of an alteration of the exchange rate, offers to the bondholder the right to receive payment calculated "on the basis of" a currency of issue other than the currency of his issue. In this case such other currency serves as a unit of account and the adjustment is to be calculated according to the new rate of exchange.

17. In *"Les Valeurs Mobilières"* (Librairie du Recueil Sirey, Paris 1939) Olivier Moreau-Néret has studied currency options (vol. I, p. 137 *et seq.*). He writes:

> *... le contrat peut permettre de demander le paiement effectif en différentes monnaies, ce qui implique des domiciles de paiement dans chacune des places dont la monnaie est stipulée; il s'agit en ce cas d'une option de monnaie assortie d'une option de place, que l'on désigne sous le nom d'* option de change.
>
> *Ou bien le contrat ne prévoit qu'une seule monnaie de paiement, les autres monnaies indiquées au contrat servant uniquement de monnaie de compte pour déterminer le nombre d'unités monétaires de la monnaie de paiement à verser à chaque échéance; c'est ce que l'on appelle la* garantie de change.
>
> ...
>
> *a)* Option de change : ... *Le capital du titre, par exemple, est de 500 francs ou 19 livres sterling 16 sh. 6 d. ou 240 florins... Le porteur a le choix... Si, le 15 décembre 1937, il veut se faire rembourser un titre, comme la livre au premier cours vaut 147 fr. 25 et le florin 16 f. 3875, s'il encaisse son titre en France, il reçoit 500 francs; s'il l'encaisse à Londres (19 livres 16 sh. 6 d.) et vend ses livres au premier cours, il reçoit 2.919 fr. 23; s'il se fait payer à Amsterdam dans les mêmes conditions (240 florins), il reçoit 3.933 francs. Il choisit donc le florin.*
>
> ...
>
> *b)* Garantie de change : ... *Dans ce cas le paiement n'est prévu que sur une place mais soit pour le montant stipulé en la monnaie de cette place, soit pour la contre-valeur en cette même monnaie d'une ou de plusieurs autres monnaies. Le porteur, par exemple, d'un titre émis en France aura droit : soit à 500 francs, soit à la contre-valeur en francs français de 19 livres 16 sh. 6 d. ou de 240 florins. Il ne pourra pas se faire payer à Londres ou Amsterdam. Il ne pourra pas recevoir des livres ou des florins, mais il pourra choisir la monnaie qui s'est le moins dépréciée et se faire payer à Paris en francs français la contre-valeur de la monnaie choisie.*
>
> *Le 15 décembre 1937, il calcule que 19 livres 16 sh. 6 d. valent 2.919 fr. 23 et que 240 florins valent 3.933 francs; son choix se portant sur les florins, il reçoit 3.933 francs.*
>
> *Le résultat en francs est donc le même...*

18. Such characteristics are to be found in the text of the Funding Bonds which were issued by the Federal Republic of Germany in implementation of the LDA. Let us take, for example, the 3 per cent Bond of 1953, a photostat copy of which was made available to the Tribunal in the course of the oral hearing.

The heading reads:

> Bond to Bearer for 3.000 French Francs, equivalent at the rate of exchange current on 1st August 1952

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to 8.578 United States Dollars
or 3 Pounds Sterling 1 Shilling 3 Pence
or 37.500 Swiss Francs
or 44.342 Swedish Kronor
or 32.571 Dutch Guilders
or 428.571 Belgian Francs
or 5,355.000 Italian Lire
or 36.000 Deutsche Mark."

Further down we read:

> The Bonds are issued in two series with a nominal amount of 3,000 . . . French Francs . . . or the equivalent of such amount, computed at the rate of exchange current on 1st August 1952, in one of the designated currencies . . .

Finally we read:

> Payment of the coupons and of the bonds . . . will be made in French Francs . . .
>
> . . .
>
> The Bonds due will be payable at the minimum amount of 3,000 French Francs.
>
> Should the rates of exchange applying to any of the currencies mentioned in the text of this Bond on 1st August, 1952, thereafter change to the extent of 5 per cent or more, the instalments due after that date, while still being made in French Francs, shall be calculated on the basis of the least depreciated currency (in relation to the rate of exchange current on 1st August, 1952) reconverted into French Francs at the rate of exchange current when the payment in question becomes due.

Thus, the debt will always be paid in French francs but its amount will be expressed in several currencies linked with each other by the rate of exchange which was effective on the first of August 1952 and on the basis of which the monetary equivalents enumerated in the title have been calculated.

On the due date a minimum amount of 3,000 French francs will be paid to the bearer but, in case of an alteration of the rates of exchange of 5 per cent or more after the first of August 1952, the payments due after that date will be subject to a new calculation.

In fact, the bearer is entitled to the monetary equivalents as fixed on the first of August 1952, that is to say, that the moment the payment is due he is entitled to receive, on the basis of the rate of exchange current at that very moment, the counter value in French francs of 8.578 dollars, or 3 pounds sterling 1 shilling 3 pence, or 37.500 Swiss francs, or 44.342 Swedish crowns, or 32.571 Dutch florins, or 428.571 Belgian francs, or 5,355.000 Italian lire, or 36.000 Deutsche Mark.

Such an adjustment in favour of the bearer will be calculated "on the basis of the least depreciated currency (in relation to the rate of exchange current on 1st August 1952)".

We are, in fact, concerned here with a multi-currency exchange guarantee because the money of account could be any one of the enumerated currencies, with which the French franc will be compared and which will be compared with each other, on the basis of

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the rate of exchange current on the due date for the payment, in order to determine which at that very moment is the least depreciated currency (in relation to the rate of exchange current on 1 August 1952). See Tullio Treves in *Rivista di Diritto Internazionale Privato e Processuale, Anno* VII, 1971, p. 784.

19. It was in a single day, namely 5 August 1952, on the basis of one and the same concept that the clause in dispute was presented for the first time, then redrafted by a working group, then proposed by the Tripartite Commission to Committee A, then accepted by that Committee subject to certain drafting changes, then at last approved in its final version by the Tripartite Commission.

20. Counsel for the Respondent referred the Tribunal to the decision of the Second Chamber of the Arbitral Commission on Property, Rights and Interests in Germany in the case *The Italian Republic v. The Federal Republic of Germany*, reported in Volume III of the Commission's Decisions at page 253, which Counsel described as the principal judicial authority on reference to preparatory work, on which subject the decision had, Counsel added, acquired the status of the fundamental source. (On appeal, the Plenary Session did not find it necessary to resort to the *travaux préparatoires* or to decide their admissibility: see Decisions, vol. VI, pp. 156, 167.) The Commission's judgment considered, in part, "the question whether the *travaux préparatoires* of a multilateral treaty may be set up against a State which acceded to it without having participated in the negotiations or to which these documents have not been accessible" (vol. III, p. 269). The Commission held that there was no "absolute" principle of interpretation barring such use of preparatory work, even against a State which had neither taken part in negotiating nor become a party to a multilateral treaty, and expressed the "opinion that the problem of recourse to the *travaux préparatoires* of a multilateral treaty, even if they were neither published nor made accessible to one of the Parties, should be left to the discretion of the judge and solved in accordance with the circumstances of the case" (p. 271). It was for the Commission, "in the exercise of its unfettered discretion, to decide whether the *travaux préparatoires* should be used for the interpretation" of the treaty in question (p. 271). One of the considerations which led the Commission to make such use of them was "that, even before the conclusion of the . . . Convention, the Italian Government well knew what were, essentially, the solutions which the Governments of the Three Powers contemplated introducing" on the subject in issue (pp. 273-274). The Commission held that an acceding State, "having been so informed", could not oppose the consideration of the *travaux préparatoires*, "especially if one considers that the preliminary documents laid down the guiding principles of the multilateral agreement to be concluded and that their contents became known" to the acceding State (p. 275). In its decision in the case *The Government of the Kingdom of Greece v. The Federal Republic of Germany* (Decisions, vol. III, p. 329), the Second Chamber of the Arbitral Commission confirmed "the long argumentation" on *travaux préparatoires*

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in its decision in the Italian case and confined itself to pointing out that it was not an absolute rule of international law that the *travaux préparatoires* of a multilateral treaty cannot be set up against a State which acceded to it without having taken part in the negotiations or without having had access to these *travaux préparatoires* (p. 349). The Commission also reaffirmed its opinion that the question "must be left to the discretion of the judge and solved according to the special circumstances of the case at issue" (p. 350). In this case also the Commission took into account, "in the exercise of its power of judgment to decide" on use of the *travaux* (p. 350), "the fact that the complainant Government well knew, even before the conclusion of the . . . Convention, what essentially would be the solutions which the Three Powers contemplated introducing . . ." (p. 351).

In our opinion, without in any way impugning the good faith of the Federal Government of Germany in the present proceedings, that Government "well knew", before it signed and ratified the LDA, what were, "essentially", the solutions contemplated for replacement of the abandoned gold clause in the Young Loan; the "guiding principles" had been made plain at the LDC and in its Report.

We therefore consider that the Tribunal, "in the exercise of its unfettered discretion", should apply to a signatory State which participated in the negotiation of a multilateral treaty the considerations which led the Arbitral Commission to set up *travaux préparatoires* against an acceding State which had not participated in the negotiation of the treaty in question. Just as the Arbitral Commission would not "encourage an interpretation . . . which would lead to distinguishing between the Signatory Parties against whom the *travaux préparatoires* may undoubtedly be set up, and the Acceding Parties who (argue for) the right to oppose any resort" to them (see Decisions, vol. III, p. 351), we cannot accept an argument which would allow the preparatory work on the disputed clause on 5 August 1952 to be set up against the Three Powers, but deny resort to them when the obligations of the Federal Republic of Germany are in issue. With the Arbitral Commission, we consider "such a duality of interpretation contrary to the equal status" *(id.)* of the States parties to the LDA. Accordingly, we consider the drafts of the disputed clause which were prepared at the LDC in the course of 5 August 1952.

21. One reads, indeed, in the Minutes of the 99th Meeting of the Tripartite Commission on Tuesday, 5 August 1952, at 10 a.m., under the presidency of Sir George Rendel (CMAA Annex 13 p. 71):

> 6. There was, however, one other alternative, to which reference had been made in previous meetings, namely the adoption of a multiple currency exchange guarantee. The Commission had not worked out a draft of such a guarantee, but . . . the Chairman had himself attempted a first draft which he would like to submit to his . . . colleagues.

The draft dated 4 August 1952 appended as Annex 1 of those Minutes was as follows:

> 1. In view of the present economic and financial position in Germany, it is agreed that payments in respect of the various issues of the (Young) Loan will

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be made only in the currency in which each issue is denominated. But the basis for calculating the amount of currency so payable shall be the amount in U.S. Dollars to which the payment due in the currency of denomination would have been equivalent at the rates of exchange ruling when the Loan was first issued, (and specified in the General Bond or in the individual bonds). The nominal amount in U.S. Dollars so arrived at will then be reconverted into the respective currencies at the rate of exchange current on the date when each payment becomes due.

2. Should the rates of exchange ruling between the various currencies of issue at the date when the Intergovernmental Agreement on German Debts comes into force materially alter thereafter, it will be open to any bondholder to ask that any payment due to him after that date, while still being made in the currency in which his bonds are denominated, shall be calculated on the basis of the amount of any other currency of issue to which it would have been equivalent at the rate of exchange current when the loan was first issued, reconverted into the currency of his bond at the rate of exchange current when the payment in question becomes due."

The Minutes of the same Meeting also state:

8. Mr. Gunter said that he would be prepared to consider something on the lines of the draft submitted by the Chairman . . . which he understood to be to provide for the future a multiple currency guarantee. If this were so . . . it might be better to relate the calculation of depreciated currencies to the value of the currencies as at 1st August, 1952 . . . and he would propose that a tripartite working party should be asked to look into this without delay.

9. The Commission set up a working party to work immediately on the preparation of a draft multiple currency exchange guarantee to apply to the Young Loan . . .

Then come the Minutes of the 100th Meeting of the Tripartite Commission on Tuesday, 5 August 1952, at 2.30 p.m. (A II Annex XXXV at p. 315) which begin as follows:

Multiple Currency Exchange Guarantee

1. The Commission considered a draft text, prepared by the Working Party set up that morning, of a Multiple Currency Exchange Guarantee for the Young Loan. The Commission agreed to put forward this text, subject to certain minor amendments, at the ensuing meeting with Creditor Representatives of Negotiating Committee "A". The text as amended is given in Appendix 1 to these minutes.

That text was as follows:

1. In view of the present economic and financial position in Germany, it is agreed that amounts due in respect of the various issues of the 5 1/2 per cent International Loan 1930 will be paid only in the currency of the country in which the issue was made. But the basis for calculating the amount of currency so payable shall be the amount in U.S. Dollars to which the payment due in the currency of the country in which the issue was made would have been equivalent at the rates of exchange ruling when the loan was issued. The nominal amount in U.S. Dollars so arrived at will then be reconverted into the respective currencies at the rate of exchange current on 1st August, 1952.

2. Should the rates of exchange ruling between the various currencies of issue on 1st August, 1952, alter thereafter by 5 per cent or more, any bondholder shall be entitled to demand that any payment due to him after that date, while still being made in the currency of the country of issue, shall be calculated on the basis of the amount of any currency of issue to which it was equivalent at the rate of

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exchange current on 1st August, 1952, reconverted into the currency of issue at the rate of exchange current when the payment in question becomes due.

Finally, there are the Minutes of the Meeting, of the Tripartite Commission with Committee "A" on Tuesday, 5 August 1952, at 3 p.m. —Chairman: Sir George Rendel (A II Annex XXXIV at p. 307)—in which one reads in particular:

> The Chairman said that the purpose of the present meeting was to give the Tripartite Commission's reply to Committee A's formula on the Young Loan which Committee A had submitted to the Commission on Friday, August 1st. The Commission had heard that morning . . . that . . . the U.S. Government could not accept that formula. . . . Under the circumstances, the Commission had considered that the bondholders might find it worthwhile to give further thought to the possibility of a Multiple Currency Exchange Guarantee which the U.S. Delegation had said they could agree to in principle. The Commission had attempted to draft a paragraph along those lines which it submitted to Committee A . . .
>
> . . . Sir Otto Niemeyer said that Committee A regretted that the Commission had not been able to accept the formula which it had suggested . . .
>
> . . . that Committee A would recess for 15 minutes to consider the Commission's formula . . .
>
> . . . On the resumption of the meeting, Sir Otto said that Committee A had several drafting points to suggest in the Commission's proposal which did not appreciably alter the sense but were merely inserted for purposes of clarification. . . .
>
> . . . Mr. Vieli, the Swiss representative, said that Committee A was prepared to agree the Commission's formula, subject to slight drafting changes. . . .
>
> . . . The Commission agreed to accept the following redraft . . .:

22. It is this latest version of the multiple currency exchange guarantee (see para. 13) which contains in its second paragraph the disputed clause.

It is contrary to common sense to suggest that the drafting changes thus made in the aforementioned second paragraph of the draft currency exchange guarantee at the request of Committee A, which had always shown its concern for the interests of the creditors, should have had the object and purpose of bringing about a fundamental amendment *contrary* to the interests of the creditors by depriving the clause—as is contended by the Respondent—of its character of an exchange guarantee, reducing it to a simple promise of protection for the sole event of a devaluation *(Abwertung)* of the currency of issue in which payment could be demanded. The preliminary work leading to the adoption of the disputed clause has been made available and it shows in precise detail each step of the drafting process. In particular it discloses that in its initial formulation the 5 per cent triggering device gave a bondholder the right to choose any of the currencies of issue as the basis for computation as of 1 August 1952. The version eventually adopted substituting "least depreciated currency" for "any currency of issue" was not, in our opinion, a diminution of the bondholders' benefits. Rather, it was simply designed to facilitate the mechanics of payment by giving all of the bondholders, automatically, the rate of exchange most advantageous to them, without the need for notification of a chosen currency by every bondholder to the paying agents on the occasion of every payment.

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Three witnesses (Baron van Lynden, Mr. Spang and Mr. Gunter) who were leading participants in the relevant negotiations on 5 August 1952 gave testimony that fully supports our opinion in this regard.

The fact that the bondholder is not given the choice among several currencies on the basis of one of which he will be paid and that a payment to him is automatically calculated by the Trustee on the basis of "the least depreciated currency", *"la devise la moins dépréciée"*, *"der Währung mit der geringsten Abwertung"* does not reduce to any extent the guarantee. Such a situation is not unknown in loans which offer to the bondholder an *option de change* between several currencies. A modern example is the Republic of South Africa loan of European Currency Units (ECU) 25 M. 1971-86 which combines both the mechanism of the creditor's choice among six currencies and, if he has not chosen by a certain date, the automatic mechanism of a decision by the paying agent, which is then obliged to choose for the calculation of the amount due the currency "which it considers in its sole discretion to be [*sic*] the best interest of the Bondholders . . ." (*"la monnaie qui selon lui est la plus intéressante pour les détenteurs des titres"*).

See Jacquemont: *L'Emission des Emprunts Euro-Obligataires*, Paris 1976, vol. 3, pp. 279-280.

23. Moreover, the Respondent's contention is inconsistent with an analysis of the text of the disputed clause itself.

Indeed, the second part of Annex I A 2 (*e*), which consists of one sentence only, does not refer at any time to the value of the currencies in relation to an external and fixed standard but refers exclusively—and this on three occasions—to the rates of exchange, that is to say solely to the relationships of the currencies of issue *inter se*.

The sentence defines, at first, the contingency in which the alteration of exchange rates gives rise to a calculation of re-adjustment, in order that each bondholder of the Young Loan, no matter the currency in which he receives payment, stands assured that the equality, re-established as of 1 August 1952 on a dollar basis, will be preserved among all the tranches. This contingency is described as follows:

> Should the rates of exchange ruling any of the currencies of issue on 1st August 1952, alter thereafter by 5 per cent or more . . .

We agree with the majority of the Members of the Arbitral Tribunal that the use of the words "alter", *"ändern"* and *"subiraient . . . une modification"* is the use, in each text, of a neutral word which could indicate either a rise or a fall in a rate of exchange. Moreover, as we are concerned with exchange rates, it is evident that if the exchange rate of one currency of issue improves the exchange rates of the other currencies of issue deteriorate correspondingly. If, for example, the exchange rate of the DM improves in relation to the dollar the exchange rate of the dollar deteriorates in relation to the DM. In other words, as the result of this alteration of the exchange rate more dollars are needed in order to buy the same quantity of

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DM just as fewer DM are needed to buy the same quantity of dollars as before. The dollar has depreciated in relation to the DM while the DM has appreciated in relation to the dollar.

The same applies, *mutatis mutandis*, to all the other currencies of issue, since—to repeat—every currency is, according to the text, not regarded with respect to its own value but solely in its relation to the other currencies, which relationship is expressed by the rate of exchange.

In case the alteration of the exchange rates is equal to or exceeds 5 per cent, on which basis should the calculation of re-adjustment be made? That basis is indicated by the second part of the sentence which reads as follows:

> . . . on the basis of the least depreciated currency (in relation to the rate of exchange current on 1st August 1952) . . .

According to the Respondent, the very use in the second part of the sentence of the words "the least depreciated currency", *"Währung mit der geringsten Abwertung"*, *"la devise la moins dépréciée"*, for specifying in the three languages the basis of calculation, operates to restrict the ordinary meaning of the first part of the sentence by limiting its scope to the sole contingency of a devaluation *(Abwertung)* of the currency of payment.

Now, the first part of the sentence appears to us to be the more important one, since it is that which defines the sphere of application of the clause by envisaging—as we have seen—the appreciation as well as the depreciation of the various currencies of issue in their exchange relationships.

That is why the theory of the Respondent which deprives this first part of the sentence of much of its normal effect is, in our opinion, inconsistent with a rule of interpretation generally accepted in international law, the so-called rule of *"l'effet utile"* (Charles Rousseau, *Droit International Public*, 1970, vol. I, p. 270, No. 240).

24. According to the terms of the first paragraph of Article 31 of the VCT, a treaty must be interpreted in good faith; and as a corollary of this essential directive the principle is

> *qualifié par certains auteurs* (Ehrlich) *de règle de l'efficacité du traité ou de règle de l'interprétation utile* (Ch. Rousseau, *ibid.*).
>
> *Les applications jurisprudentielles du principe sont nombreuses, tant en ce qui concerne les traités bilatéraux que les traités collectifs. Quelques décisions l'ont rattaché à la maxime du droit romain:* ut res magis valeat quam pereat. (Ch. Rousseau, *ibid.*).

In the VCT the principle of effectiveness expressed in this maxim is subsumed in the references to "good faith" and to the "object and purpose" in Article 31 (Sinclair, *The Vienna Convention on the Law of Treaties*, 1973, p. 75). Thus

> When a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects

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and purposes of the treaty demand that the former interpretation should be adopted. (*Yearbook of the International Law Commission*, 1966, vol. II, p. 219.)

In *Problèmes d'Interprétation Judiciaire en Droit International Public*, 1963 (p. 86) Charles de Visscher wrote:

> ... *de façon générale, entre deux interprétations dont l'une assure au traité une efficacité qui correspond à son objet certain tandis que l'autre tend à l'en dépouiller, préférence doit être donnée à la première sur la seconde, ce qui peut parfois conduire à donner aux termes employés une portée plus large que celle qui est apparue au premier abord.*

Sir Gerald Fitzmaurice (*The Law and Procedure of the International Court of Justice, 1951-54: Treaty Interpretation and Other Treaty Points*, British Yearbook of International Law 1957, vol. 33, p. 211) regards as a *major* principle of interpretation the principle of effectiveness (*ut res magis valeat quam pereat*):

> Treaties are to be interpreted with reference to their declared or apparent objects and purposes; and particular provisions are to be interpreted so as to give them the fullest weight and effect consistent with the normal sense of the words and with other parts of the text, and in such a way that a reason and a meaning can be attributed to every part of the text.

In the case of *Swiss Confederation v. Federal Republic of Germany* (*supra*, p. 38) the Arbitral Tribunal already pointed out that the practice followed by the International Court of Justice in interpreting the terms of a treaty coincides with the resolution which the Institute of International Law adopted in Granada in April 1958 according to which:

> 1) *L'accord des parties s'étant réalisé sur le texte du traité, il y a lieu de prendre le sens naturel et ordinaire des termes de ce texte comme base d'interprétation. Les termes des dispositions du traité doivent être interprétés dans le contexte entier, selon la bonne foi et à la lumière des principes du droit international.*
>
> 2) *Toutefois, s'il est établi que les termes employés doivent se comprendre dans un autre sens, le sens naturel et ordinaire de ce terme est écarté.*

In the same decision (p. 50) the Arbitral Tribunal pointed out that "the usual practice in interpreting words and phrases in a treaty is to give them a reasonable, as distinguished from a restricted or technical meaning".

In the case of *Kingdom of Greece v. Federal Republic of Germany* (1970/1972 Reports of Decisions and Advisory Opinions, p. 12) the Arbitral Tribunal, which said it was guided by the general rule of interpretation as stated in Article 31 paragraph 1 of the VCT, stressed that:

> The Agreement must be considered as a whole. The different clauses must so be interpreted as to avoid depriving any one of them of practical effect in order to credit others with a literal meaning. (P. 50.)

25. It appears to us to be contrary to the principle thus expressed to curtail, in the present case, the completely clear and general sense of the first part of the sentence on the pretext that the expression "the least depreciated", "*mit der geringsten Abwertung*", "*la moins*

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dépréciée", which appears in the second part, should be understood in a restrictive and technical sense.

Indeed, the first part of the sentence manifestly had in view the establishment of an exchange guarantee among all currencies of issue, as we have outlined in paragraphs 16 to 22 above.

A limitation, without regard to the context, of the guarantee only in the case of an *Abwertung*, that is to say, according to the Respondent, an official and formal devaluation of the currency of issue, would thus be tantamount to depriving the first part of the sentence of its ordinary and normal meaning.

The Young Loan, the tranches of which comprise nine currencies of issue, constitutes an international multiple currency loan of an exceptional but not unique nature.

One must not, therefore, show surprise—as does the Respondent—at the so-called unknown character of a "multiple currency" exchange guarantee.

The number of the currencies involved does not alter the nature or the principle of such a guarantee.

26. The triggering of the system is in no way dependent on the formal devaluation *(Abwertung)* of a currency of issue. To advance such an assertion leads to a complete distortion not only of the sense but even of the construction of the sentence.

The application of the guarantee, promised to the bondholder, comes into operation as soon as there is an "alteration" of the exchange rate of 5 per cent or more.

It matters little whether this alteration originated from a formal devaluation *(Abwertung)* or formal revaluation *(Aufwertung)* or from some other cause of depreciation or appreciation.

The only thing that matters is the objective fact that after 1 August 1952 an alteration of the exchange rate equal to or in excess of 5 per cent has occurred, no matter for what reason.

The search for the least depreciated currency arises only later for the calculation to be made.

Contrary to the order and the logic of the sentence which constitutes the clause in dispute the Respondent argues as if the clause in dispute began as follows:

> Should one of the currencies of issue sustain a devaluation equal to or in excess of 5 per cent in relation to the par value in force on 1 August 1952, the instalments due . . .

One sees how far that would depart from the text which is before us.

27. The misconception of the Respondent is, in our opinion, caused by concentrating on the gold or the gold dollar standard—by its insisting on regarding each of the currencies of issue separately. The Respondent considers that the guarantee given to the bondholders in replacement of the gold clause gives only that protection which

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the gold clause gave to bondholders, namely protection against a formal devaluation of the currency of issue of the bonds which they held.

If one starts with the preconceived idea that the new guarantee must not give the bondholders of the various tranches a protection other and, possibly, better than that which was accorded to them by the gold clause, it would mean leaving out of consideration that the guarantee system, which was adopted, *in extremis*, in London when the representatives of the European bondholders were compelled to renounce the gold clause (*cf.* LDC Report, para. 30), constitutes a legal situation entirely different from that which governed when the gold clause applied.

One can compare only that which is comparable, and when one is concerned with clauses which have different bases, one must not be surprised at reaching differing results. This is the inevitable result of the change of system.

Under the protection system as it was accorded in the General Bond of 1930 the bondholder would not, in case the currencies of issue were depreciated or devalued, irrespective of his tranche, have suffered any loss since he would always have received the same gold value.

If one or more currencies of issue were revalued, the bondholders of the tranches made payable in those currencies would have benefited by the revaluation as the result of the application of the so-called nominal value clause, which constituted an exception, in favour of the creditors, to the normal operation of the gold guarantee.

If under the system of the multiple currency exchange guarantee all currencies of issue are depreciated or devalued in the same proportion the bondholders receive no compensation for the loss which they suffer.

If one or more of the currencies of issue are revalued the bondholders, irrespective of the currency of their tranche, benefit by the revaluation since they have the right to the most favourable exchange. That is the normal effect of the operation of the system.

The Federal Debt Administration was under no misapprehension in this respect when it wrote to the *Schweizerische Kreditanstalt* on 8 August 1953 regarding the wording of the Funding Bonds of the Swiss tranche, and when in describing the possible application in favour of the Swiss franc of the guarantee contained in the second part of Article 2 (*e*) of Annex I A it expressed itself as follows:

> For the purposes of this calculation the currency most favourable to bondholders will be selected. (A II Annex XLVIII, at p. 385.)

Such a phrase takes full account of the normal operation of the exchange guarantee instituted among all currencies of issue.

28. Having adopted the principle on which an exchange guarantee is founded, one cannot reject a result which follows from the

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very nature of the principle, on the ground that that result was not expressly mentioned at the time of agreement on its adoption.

Ch. de Visscher wrote specifically in his above-mentioned work, at p. 101:

> *Interprétation par recours aux principes généraux régissant la matière : Certains traités, par les intérêts qu'ils réglementent, par les principes dont ils s'inspirent, par le mouvement général des idées auxquels ils se rattachent, se présentent* prima facie *comme appartenant à une catégorie connue.*

The same author has also written (p. 30):

> *... l'interprétation consiste non pas simplement à retrouver la signification primitive d'un instrument juridique mais à lui donner, sous réserve toujours du respect du texte, la signification spécifique que postule son application pratique...*

In the *Employment of Women during the Night Case* the Permanent Court of International Justice declared that an international treaty which sets up a rule of general application cannot be limited to the particular cases envisaged by one party or the other.

(P.C.I.J. 1932, Series A/B No. 50 p. 377).

It follows from the foregoing that the expression "on the basis of the least depreciated currency", *"auf der Grundlage der Währung mit der geringsten Abwertung"*, *"sur la base de la devise la moins dépréciée"*, used to designate the manner of calculation, must not, if one considers it in its context and in the light of its object and purpose, be given a limited interpretation in the restrictive and technical sense which the Respondent places on the word *"Abwertung"*.

29. Our conviction on this point is reinforced if one considers the practice followed, since the signing of the LDA, in the application of the clause in dispute.

Although, as mentioned in paragraph 11 above, actions of the Respondent after the entry into force of the LDA and in fulfilment of its obligations thereunder cannot be within either Article 31 (2) (*b*) or Article 31 (3) (*b*) of the VCT, recourse may nevertheless be had to them as "supplementary means of interpretation" under Article 32 for one of the purposes permitted by that Article (to confirm the meaning resulting from the application of Article 31, or when such application fails to yield a clear and reasonable result).

As the International Law Commission commented on its draft article which became, with some changes, Article 32 of the VCT:

> The practice of individual States in the application of a treaty . . . may be taken into account only as one of the "further" means of interpretation mentioned in article 70 [which became Article 32 of the VCT with the word "supplementary" replacing the word "further"]. (Report of the International Law Commission to the United Nations General Assembly, *Yearbook of the International Law Commission 1964*, vol. II, p. 204.)

"The practice of an individual State may", the Commission added, "have special relevance when it relates to the performance of an obligation which particularly concerns that State" *(ibid.)*. In the *Status of South West Africa Opinion* the International Court of Justice said:

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> Interpretations placed upon legal instruments by the parties to them, though not conclusive as to their meaning, have considerable probative value when they contain recognition by a party of its own obligations under an instrument. (*I.C.J. Reports 1950*, pp. 135-136.)

In the present case we consider that some actions by the Respondent after the entry into force of the LDA and in fulfilment of its obligations arising therefrom in respect of the Young Loan Bonds have value in the assessment of the arguments advanced on behalf of the Respondent.

30. Before the revaluation of the DM in 1961, the exchange guarantee was put to the test by the French franc in 1957 and in 1958. It is important to recall that France, which had become a member of the IMF on 27 December 1945, had no longer a par value agreed with the Fund between 26 January 1948 and 29 December 1958.

Following a decree of 10 August 1957, which introduced an internal tax on the currency settlements between France and foreign countries, the French franc sustained a *de facto* alteration on the foreign markets, in that it fell by more than 5 per cent of its exchange rate.

We note that there was no alteration of the par value agreed with the IMF since at that time there was no agreed par value in force for the French franc; there was not even a change of the "official" rate of the franc in relation to other currencies.

Yet, this purely *de facto* depreciation was taken into account in connection with the payments on the Young Loan Bonds and the payments that subsequently fell due for the French tranche were consequently increased.

The application of the clause in dispute thus made shows that there was an unequivocal acceptance that the word "*Abwertung*" was to be understood in a wider sense than "devaluation" in its strict sense (that is to say voluntary, formal and official reduction by a government of the external value of its currency) which the Respondent now assigns to it.

The import of the precedent does not stop here.

On the basis of which currency was, then, the adjusting calculation made for the payments on the French tranche?

The basis was the US dollar which between 1952 and 1958 did not suffer any depreciation.

That it was nevertheless chosen as the currency of reference is attributable to the fact that the parties concerned were in agreement that this "non-depreciated" currency was at the relevant time "the least depreciated currency" within the meaning of the guarantee clause.

31. The Respondent contends that, as the dollar had, in 1957, served for the basis of calculation as being "the least depreciated currency", when it was not depreciated, this means that the depreciation of the dollar was then minus zero. We might add that if this

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analysis is correct it would be equally correct to say that the dollar had then appreciated by plus zero.

But such an explanation in the abstract, which is based on the absence of movement of the dollar in relation to its gold standard, departs from the context since one must, again, recall that one is dealing here with exchange rates and that the clause refers for its application solely to "exchange rates", that is to say, the relative values of currencies among themselves and not to the value of each, taken separately, in relation to a fixed standard.

When the French franc lost value (depreciated) in 1957 the exchange market automatically quoted a corresponding "appreciation" of the dollar (and the other currencies of issue) in relation to the franc.

One needed more French francs in order to buy the same quantity of dollars as before while, correspondingly, one needed fewer dollars to buy the same quantity of francs.

Thus, the dollar was not only a "depreciated" currency at the rate of zero, it was "appreciated" in relation to the French franc.

The debtor, the creditor and the trustee accepted it as "the least depreciated currency" within the meaning of the clause in dispute.

Such a precedent, as the Bank of International Settlements, the trustee of the Young Loan, emphasized in its memorandum of 17 April 1961 (A II Annex LIII p. 457), appears to us to furnish the guide for examining the situation created by the revaluations of the DM in March 1961 and October 1969.

32. According to the monetary system then in force, the official revaluation of a currency of issue by the alteration of its par value (to use the terminology of the IMF) did not entail any formal devaluation of the other currencies, unless there were voluntary interventions by the respective governments.

The Committee of Governmental Experts of the Council of Europe, commenting in 1968 on the text of a draft European Convention on Obligations in Foreign Currency, stated (*Rapport Explicatif*, p. 7) that

> *Le Comité d'experts estime opportun de préciser que le concept de "dépréciation" utilisé dans la Convention et dans l'annexe n'a pas un sens technique. Il se réfère à tous les cas où la valeur d'une monnaie diminue par rapport à la valeur d'une autre monnaie,* même si l'une des monnaies est réévaluée par rapport à l'autre. (Emphasis added).

In his work *The Legal Aspect of Money*, third edition, p. 194, note 5, Professor Dr. F. A. Mann, in considering the alteration of the exchange rate between the Pound Sterling and the Dollar as the result of a revaluation of the latter, wrote:

> . . . the appreciation of the dollar means that sterling depreciates in terms of the dollar, although its own monetary system has not been subject to any direct action by the British authorities.

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Such an analysis seems to us to be self-evident since (to use again the concepts of the IMF) each change of the par value of a currency provokes by itself an alteration of the rate of exchange with regard to other currencies.

33. In the present case it cannot be denied that there was a fall in the value of the currencies of issue in relation to the DM on the exchange market.

It suffices to look back to the earlier situation and, in particular, to make a comparison with the exchange rates which existed among each of the said currencies, on the one hand, and the DM, on the other, on 1 August 1952, the date of reference contained in the disputed clause.

It results from this comparison that, in terms of rates of exchange, all the other currencies of issue were depreciated in relation to the DM.

It is, therefore, on the basis of the only "non-depreciated" currency in relation to the other Young Loan currencies that one must, in conformity with the interpretation given in 1957 by the Respondent itself, make the calculation of adjustment, subject to the condition, of course, that the requirement of the threshold of 5 per cent or more alteration has been met.

The Respondent's contrary view sanctions, to the benefit of the holders of the German tranche of the Young Loan, an inequality of treatment such as could have occurred under the system of the gold clause included in the General Bond of 1930. That Bond provided in Article VI (*a*) that the sum paid to the bondholder should never be less than the nominal amount. So the revalued nominal amount would buy more gold.

The Respondent's argument against the Applicants' case involves a persistent return to the abolished gold clause system and it overlooks the equality of treatment among all bondholders and all tranches of the Loan which was one of the essential objects and purposes of the negotiations and the agreements of the LDC.

34. In order to deny an adjustment to the holders of the non-German tranches to correspond to the position of the holders of the German currency tranche, the Respondent argues that the bonds held by the former have not, in themselves, lost anything of their value.

It appears to us purely theoretical and not in conformity with reality to state that the revaluation of the DM, by which the bondholders of the DM tranche of the Young Loan profited, did not entail any loss for the bondholders of the tranches issued in non-German currencies.

The Respondent itself explained that when the *Bundesbank*, following the revaluation of the DM in 1961, proceeded to make a new assessment of its reserves in foreign currency, there appeared a loss of DM 1,265 million for the Federal Budget and that the same operation in 1969 had caused a loss of DM 4.099 million (see Rj para. 8).

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What is true for the *Bundesbank* must be true for the bondholders of non-German currencies, particularly for those who reside inside the Federal Republic.

As the result of the revaluation of the DM all bonds expressed in non-German currencies were automatically depreciated in terms of DM.

35. We are not called upon to examine how the payments on the Young Loan have operated since the "floating" of the currencies and since the official abolition in 1978 of the par values which led to the revision of the Articles of the IMF and the creation of another monetary system.

However, limiting ourselves to the period which was submitted for the Tribunal's decision, we observe, in conclusion, that the interpretation which the Respondent would put upon the disputed clause would lead not only to unjustifiable inequalities but, on occasion, to unreasonable results or to impasses which would frustrate the operation of the disputed clause.

For example, let it be assumed that at the same time as the DM the other currencies of issue hald also been revalued with the exception of one and that this last one was subsequently devalued by at least 5 per cent.

In that case one would not find any currency of issue on the basis of which the adjustment could be calculated since, according to the Respondent, every revalued currency of issue—no matter how small above zero the percentage of its revaluation—would be disqualified as the currency of reference for that calculation.

36. During the oral hearing one of the members of the Tribunal suggested a case in which only the DM was revalued and all the other currencies of issue devalued at exactly 5 per cent by formal acts of governments. The representatives of the parties were asked whether "even in those circumstances" the DM would not have been regarded as the least depreciated currency.

The question was answered by the Agent of the Government of the Federal Republic of Germany in the following terms:

> We consider this to be a purely theoretical question to which we can only give a theoretical answer. In this case the devalued currencies would be fully compensated for their 5 per cent devaluation.

Such a result of the Respondent's theory seeks to return to a kind of fixed level or standard, like gold, which was abandoned by the LDA, and amounts to a denial that the terms of the disputed clause apply at all. The disputed clause requires that the adjustment be calculated on the basis of a "currency", but in the Respondent's reply in the suggested example there is no currency serving as the basis of calculation.

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Resort to the Original Language

37. The assertion in Article 33 paragraph 3 of the VCT that the terms of the treaty are presumed to have the same meaning in each authentic text is, of course, a presumption only and can be rebutted.

Article 33 paragraph 4 provides:

> 4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the *object and purpose* of the treaty, shall be adopted. (Emphasis added.)

In cases where it is obvious that the terms used in the different authentic languages have different meanings that can be "reconciled" only by adopting one or the other, it becomes necessary to apply rules of interpretation not specifically codified by the Convention. For this purpose the rules of customary International Law will govern. Resort to such customary rules is specifically affirmed in the last paragraph of the preamble of the Convention which reads:

> *Affirming* that the rules of customary international law will continue to govern questions not regulated by the provisions of the present Convention . . .

In the operative part of the VCT its authors were "careful to preserve, where appropriate, the operation of rules of customary international law relating to treaties" (Sinclair, *The Vienna Convention on the Law of Treaties*, 1973, p. 8, referring to Articles 3 (*b*), 4, 38 and 43 of the VCT). We do not accept the view that, even apart from the fact that the VCT does not apply in the present case, the codification effected by Article 33 (1) renders incompatible with its terms other customary rules relating to the interpretation of multilingual treaties. Article 33 (1) does no more than re-state a customary rule which existed, in the same terms, before the VCT was drafted. When a treaty was signed or otherwise adopted in more than one language and no provision was made on which was to be the authoritative text, "the generally accepted rule" was "that of the equality of the languages employed" (*Manual of Public International Law*, ed. by Max Sorensen, 1968, Ch. 4, Section Four, 4.37); "the equal authenticity of the texts derives from the mere fact that the instrument has been concluded in this and that language" (Hardy, *L'interprétation des traités internationaux rédigés dans plusieurs langues*, typewritten thesis, Paris 1960, and *The Interpretation of Plurilingual Treaties by International Courts and Tribunals*, British Yearbook of International Law, 1961, vol. 37, p. 74).

Furthermore, writers (Germer, *Interpretation of Plurilingual Treaties: A Study of Article 35 of the Vienna Convention on the Law of Treaties*, 11 Harvard International Law Journal (1970) 400; Hilf, *Die Auslegung mehrsprachiger Verträge*, Berlin 1973) who take the view that to seem to give any precedence or superiority to the original text "in the working language in which the treaty was negotiated" (McNair, *Law of Treaties*, 1961, p. 434) would be incompatible with

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the principle of equality of authentic texts enunciated in Article 33 (1), and with the comparison of texts called for by Article 33 (4), do not exclude *any* reference to the original text in the process of interpretation under Articles 31 and 32. Germer accepts that

> An examination of the preparatory work of a treaty and the circumstances of its conclusion may, however, display the causes of a divergence between the different language versions and thus help to establish the meaning intended by the parties to be attached to the provision in question. (*Op. cit.*, p. 418.)

Hilf envisages such a case as when only one text was negotiated in common and the provision of other texts, designated as binding, was left to a separate group of translators:

> *Im Einzelfall kann sich gleichwohl ergeben, daß nur ein Text gemeinsam ausgehandelt wurde, wobei die Erstellung der übrigen als verbindlich bezeichneten Texte entweder den einzelnen Partnern oder einer gesonderten Gruppe von Übersetzern überlassen wurde . . . so wird man, wenn andere Auslegungsregeln versagen, den Urtext bei der Auslegung berücksichtigen können.* (*Op. cit.*, pp. 93, 94; example omitted.)

38. The method to follow in the present case is to ascertain the true object and purpose of the clause from the original language in which its *travaux préparatoires* were drafted.

The practice of resorting to the original language in which the negotiations were conducted has been adopted by international tribunals as an aid to the ascertainment of the true intent of the parties. As one commentary summarised the practice:

> unless the treaty provides otherwise, *all* the texts or versions are authoritative (but) where a treaty has been drafted in one language and later translated into several versions of equal authority Courts have shown a tendency to resort to the "basic" language when confronted with a divergence. (Original emphasis. *Harvard Research Draft Convention on the Law of Treaties*, 29 American Journal of International Law Supplement, 1935, pp. 971, 972; see, to the same effect, McNair, *Law of Treaties*, 1961, p. 434.)

This procedure becomes most useful when in its ordinary sense the term or expression is more restricted in one text than in the other or others. Necessary adjustments may then be made by modifying the scope of the term or expression either by extending it in one text or restricting it in the other or others.

The Permanent Court of International Justice, in its Advisory Opinion on the *Competence of the International Labour Organisation with respect to Agricultural Labour*, adopted the above-mentioned method and extended the scope of a limited expression found in the French text to the more general meaning of the term used in the English. The issue before the Court was whether or not the competence of the ILO extended to the regulation of the working conditions of persons employed in agriculture. The French Government contended that the Treaty of Versailles, which defined the competence of the ILO, did not refer to agriculture, but that, on the contrary, the terms *"industrie"* and *"industriel"* appeared in several places in the treaty. On the other hand it was submitted that in the preparation of the treaty the Commission on International Labour Legisla-

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tion had taken, as a basis of its discussion, an English text prepared by the British delegation, and that the word "industrial", as used in that text, applied to both industry and agriculture. In answering the question put to it in the affirmative, the Court observed that notwithstanding the validity of the principle, according to which conventions involving the abandonment of certain rights inherent in sovereignty must be interpreted restrictively, one must in every case resolve issues in terms of what a treaty actually meant. (PCIJ, Series B Nos. 2 and 3, pp. 23-27 and 33-41).

The equality of texts in international treaties is neither a bar to establishing an order of precedence among them with regard to specific points nor a bar to recognizing the superiority of an original version (Hardy, *op. cit.*, p. 98). A reference to the preparatory work generally enables the judge to determine from the original text the true intentions of the parties.

In its Advisory Opinion on the interpretation of the *Convention* (of 1919) *concerning Employment of Women during the Night*, the Permanent Court of International Justice held that there was no reason to believe that the Convention in its application was limited to working women despite the fact that the authentic French text spoke of "*ouvrières*". It noted that the original report submitted to the drafting committee was in the English language. Presumably the Court concluded that the English text of the report was a more accurate expression of the committee's opinion (PCIJ, Series A/B, No. 50, pp. 378-379).

In the *Guastini Case*, confronted with equally authoritative English and Italian versions, the Umpire said:

> The text of the Protocol is in English and in Italian. It was the result of long negotiations between the representatives of England, Germany, and Italy on the one hand, and Mr. Bowen, Venezuela's representative, on the other. These negotiations were carried on almost altogether in English, and the drafts (afterwards becoming protocols) were in English. It is therefore evident that the basic language is English, and in case of difference of translation resort should be had to it. (Ralston, *Venezuelan Arbitrations of 1903*, pp. 730, 749.)

In a case involving patent rights in Alsace-Lorraine the French Civil Tribunal of Strasbourg pointed out that the relevant provision —Article 311 of the Treaty of Versailles—had been drawn up originally in English and held that the English text should be given greater weight than the French in reaching the proper construction of the provision (*Société Audiffren-Singrun v. Liquidation Morlang, Binger et Société Atlas*, Annual Digest, 1927-28, Case No. 294; 55 Journal du Droit International (1928) 734).

39. The *Mavrommatis Case* is often cited as an authority for the principle that versions of all languages of a treaty must be considered together with a view to finding a common meaning which harmonizes with the provisions in the several languages. In that case the Permanent Court held:

> Where two versions possessing equal authority exist one of which appears to have a wider bearing than the other, it is bound to adopt the more limited

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interpretation which can be made to harmonize with both versions and which, as far as it goes, is doubtless in accordance with the common intention of the Parties. In the present case this conclusion is indicated with especial force because the question concerns an instrument laying down the obligations of Great Britain in her capacity as Mandatory for Palestine and because the original draft of this instrument was probably made in English. (PCIJ, Series A, No. 2, p. 19.)

Hardy explains at length that the assertion of certain authors that the Permanent Court thus endorsed "limited interpretation" as a rule for solving discrepancies between authentic texts is erroneous (Hardy, *op. cit.*, p. 80).

In a report of the International Law Commission to the General Assembly the Hardy view was cited with approval. The Commission then added that although "the Permanent Court was thought by some jurists to lay down a general rule of restrictive interpretation in cases of divergencies between authentic texts . . ." the *Mavrommatis Case* "is not thought to call for a general rule laying down a presumption in favour of restrictive interpretation in the case of an ambiguity in plurilingual texts" (*Yearbook of the International Law Commission 1964*, vol. II, p. 208). There is certainly no rule that "a species of lowest common denominator of the texts is to be sought—a hybrid version imposing the least obligation" (*Manual of Public International Law*, 1968, ed. by Max Sørensen, Ch. 4, Section Four, 4.37).

For our purpose it suffices to point out that in the *Mavrommatis Case* the Court considered that the original draft of the disputed instrument was "probably" made in English and that that played a significant role in adopting the English version.

The value of the original text as evidence was discussed, at length, by Hardy in his exhaustive work. He expressed it this way:

. . . it is agreed that for purposes of interpretation the "critical moment" is the moment of the conclusion of the treaty. To that extent—and to that extent only—it can be said that all the incidents of the negotiation—initial proposals, counter-proposals, amendments, sub-amendments, declarations pertaining to interpretation, and the like—merge in the final text (the merger theory). But it does not follow that that text always and necessarily expresses the common intention of the parties at the time of signature. The authority attaching to the text does not derive from its intrinsic superiority but from the fact that it marks the moment of the conclusion of the treaty and that there is a presumption, for that very reason, that the negotiators drew it up with a full knowledge of the facts and all the necessary care, using the appropriate words in the knowledge that the instrument would be interpreted and applied. They may, however, have expressed themselves badly or failed, through inadvertence, to say what seemed to them obvious. Accordingly, strong as it is, the presumption in favour of the text is *always* rebuttable. In principle, it can be rebutted by any form of evidence that may be available, including a study of the successive phases in the preparation of the instrument; and nothing could be more arbitrary than the automatic rejection of the preparatory work on the pretext that it is rarely conclusive and often gives rise to abuse. (Original emphasis.)

Hardy continued:

If the texts prove incompatible, it must be supposed that, as far as the provision in question is concerned, the parties made a mistake as to the equivalence of the texts and erroneously conferred the same authority on them all. The com-

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mon intention of the parties at the time of the conclusion may in principle be established by any means available, but first and foremost, for the reasons stated above, on the basis of the texts themselves; the fact that one text is defective on a given point is not enough to justify the automatic rejection of all the texts. A choice must then be made between incompatible texts; and it is only normal that the presumption should be in favour of the original version, because that was the basis on which the negotiators in fact first reached agreement and the authoritative value of the other texts is subordinated to their equivalence to the original. The strength of the presumption in favour of the original version depends on the circumstances in which the other versions were drawn up. It will be weak if the negotiators all participated directly in the elaboration of those texts; stronger if they only exercised partial control over it, as, for example, by entrusting the task to a small drafting committee; and decisive if they left the entire job of drawing up those texts to one of the parties or to some specified body. Since the drafting process may assume any one of many varied forms, the evidential value of the original text tends to depend on the facts of each case; and only a study of the preparatory work, in the widest sense of that expression, will enable the judge to appraise it in each particular instance. (Hardy, *op. cit.*, pp. 104-105.)

40. In the present case only the English language was employed during the negotiating process that resulted in an agreement on a clause that became Annex I A 2 (*e*). There is no dispute that the written text shown to Herr Abs on 5 August 1952 was in the English language.

The evidence does not disclose the identity of the person responsible for the German version of the disputed clause. We do not know what may have passed through the mind of that unidentified individual when he translated the words "depreciated" and "*dépréciée*" but we do know what material was available for a translation of those words into German. According to the chief translator at the LDC, glossaries entitled "*Consultations on German Debts Vocabulary English—French—German* (Unofficial)" were prepared by the secretariat for its own use. Though not official documents these glossaries "were in constant use by the translation section for the purpose of translating technical terms between English, French and German".

In his evidence Mr. Cridland, the Secretary General of the LDC for most of its duration, testified that the glossary was always available for use by the translators.

In the English section of the glossary the following appears:

depreciation (of currency) — *dépréciation (d'une monnaie)* — *Währungsabwertung, Abschreibung*

The French section contains the following:

dépréciation (d'une monnaie) — depreciation (of currency) — *Währungsabwertung, Abschreibung*

The German section contains the following:

Währungsabwertung — *dépréciation (d'une monnaie)* — depreciation (of currency)

Währungsentwertung — *dépréciation (d'une monnaie)* — depreciation (of currency)

It is significant that the German section draws no distinction between an "*Abwertung*" and an "*Entwertung*". It is idle to speculate

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why, in translating "depreciation" into German *"Entwertung"* had not been chosen, since according to the glossary it had the same meaning as *"Abwertung"*.

What is significant is that the strength of the presumption in favour of the original English use of "depreciated" is particularly great because here the negotiators did not participate in the translation process. On the contrary, the entire task of drafting the authentic non-English texts was left to the translation section, which in turn could rely on the glossaries prepared by it for use in translating.

Those professionals who are engaged in the exacting task of putting into one language that which is the exact effect of another can undoubtedly feel gratified that judicial recognition of their product, once it is termed "authentic", has been given in some cases. But it cannot be responsibly contended that simply because one language is as authentic as another, no argument can be entertained which seeks to show that it does not correctly reflect the meaning of the other, particularly when the other was the basic language in the negotiations. The affairs of sovereign States cannot, and should not, be influenced by the fortuitous choice of words selected by a nameless translator.

41. Under the circumstances of this case, resort to the preliminary work has to be made and special weight may be given to the original language in which the disputed term is used. The meaning of that term, as used in the original language, should be given pre-eminence.

Article 13 of the London Debts Agreement

42. In support of its interpretation of the clause in dispute and its interpretation of the words *"Abwertung"*, "depreciated", *"dépréciée"*, the Respondent relies on Article 13 of the LDA, entitled "Rates of Exchange", which reads as follows:

> Wherever it is provided in the present Agreement and the Annexes thereto that an amount shall be calculated on the basis of a rate of exchange, such rate shall, except in the cases provided for in Annex III and in Article 8 of Annex IV of the present Agreement, be—
>
> (*a*) determined by the par values of the currencies concerned in force on the appropriate date as agreed with the International Monetary Fund under Article IV, Section 1, of the Articles of Agreement of the International Monetary Fund; or
>
> (*b*) if no such par values are or were in force on the appropriate date, the rate of exchange agreed for current payments in a bilateral payments agreement between the Governments concerned or their monetary authorities; or
>
> (*c*) if neither par values nor rates in bilateral payments agreements are or were in force on the appropriate date, the middle rate of exchange generally applicable for transactions ruling for cable transfers in the currency of the country in which payment is to be made in the principal exchange market of the other country on that date, or on the last date before that date on which such rate was ruling; or

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(*d*) if there is or was no rate of exchange as specified under (*a*), (*b*) or (*c*) at the appropriate date, the cross-rate of exchange resulting from the middle rates of exchange ruling for the currencies in question in the principal exchange market of a third country dealing in those currencies on that date or the last date before the said date upon which such rates were ruling.

43. Paragraphs (*b*), (*c*) and (*d*) are apparently of no interest to the Respondent which bases its entire reasoning exclusively on paragraph (*a*).

In the CM it is said in fact (paragraph 35):

> (*bb*) The question of an alteration in the rate of exchange must be decided pursuant to Art. 13 LDA. It appears that the Applicants themselves admit this in para. 138 (under "18") of the Memorial but apparently they disregard it in their interpretation of the 5 per cent clause. Just as the new amounts payable were calculated pursuant to Art. 13 (for details see the statement made in paras. 18 to 24 above), the determination when and in what manner the alteration in the rate of exchange occurred can only be made on the basis of that provision.
>
> To the extent to which a par value was agreed with the International Monetary Fund, an alteration in the rate of exchange within the meaning of the 5 per cent clause therefore presupposes that in respect of the currency concerned a different par value was agreed with the International Monetary Fund. Such changes of the par value constitute a devaluation or revaluation of the currency concerned. From this, too, it follows that in the case of the 5 per cent clause "depreciate" (*"déprécier"*) should be understood as "devalue" (*"dévaluer"*).

Thus, according to the Respondent, the terms of Article 13, on the one hand, restrict the scope of the clause in dispute and, on the other, clearly indicate the meaning to be attached to the "least depreciated currency", for:

(1) the "alteration" referred to in the first part of the clause must be a change in "par value", that is to say, either a devaluation or a revaluation;

(2) the verb "depreciate" in the second part of the clause must be understood to mean "devalue".

44. The same arguments have been advanced with particular emphasis during the oral hearing by the Respondent's Counsel who, at the beginning of the first pleading on the merits of the case stated:

> It is my belief that the solution of this case lies within a very narrow compass of monetary law,

and he distributed to the members of the Tribunal the plan which he intended to follow, the first two points of which are as follows:

> 1) The alteration which is the generating event is reduction (as opposed to increase) of value of any of the currencies.
>
> 2) The reduction must occur in the "rate of exchange" as defined in Art. 13 (*a*).

Counsel later said that there is

> an essential point for your appreciation of the situation—the word "rate of exchange" in the London Agreement has a special meaning, a special meaning which is defined by Clause 13.

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Then, after having analysed the Articles of the IMF and having commented upon the monetary system then in force, he closed by saying:

> I can tell you now in one sentence my overall submission. My overall submission will be that, under the IMF System of international currencies, every depreciation—if you prefer the word—presuppose(s) a devaluation in the strict sense, that the one is not possible without the other and that, if you please, the two words are synonymous.

In his third and last pleading Counsel reverted to this point to state once more:

> . . . The rate of exchange could not change without a change of gold parity, of the par value, and therefore it is the same, which term you employ.

45. It appears that the arguments put forward by the Respondent with respect to Article 13 of the LDA lead to the following conclusions:

(1) Article 13 paragraph (*a*) gives a particular and special definition of "rate of exchange".

(2) It follows directly from the terms of the said Article 13 (*a*) that "rate of exchange" and "par value" in the LDA are synonymous.

(3) This also follows indirectly from the reference made in article 13 (*a*) to Article IV, Section 1, of the Articles of the IMF.

Thus, the Respondent's Counsel claims that, in order to interpret the disputed clause,

(*a*) the term "alter" in the first part of the sentence must be understood to mean "change in gold parity (par value)";

(*b*) the expression "the least depreciated currency" in the second part of the sentence must be understood to mean the "least devalued currency".

46. We can neither accept the argument nor the results derived from it as they do not take into account the terms of the text.

First of all, it is unacceptable to us to place the concept of alteration of the rate of exchange on the same footing as the concept of an alteration of gold parity (par value). Article 13 of the Agreement does not contain in any of its four paragraphs a definition of the expression "rate of exchange", nor does it attribute to this expression a special and particular meaning which would differ from its ordinary and normal meaning.

This article is limited to stating in precise terms the particular rate of exchange to be used as a basis of calculation in individual cases.

It is well known, in fact, that in international financial practice there is not a single rate of exchange between two currencies but several categories (traveller's cheques, bank notes, telegraphic transfers etc.) of rates of exchange each of which comprises various rates (*cf.* in particular *Le Cambisme et le Jeu Monétaire International*, Presses

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Universitaires de France, 1970, pp. 32-35, by Bertrand Munier, preface by Oskar Morgenstern).

Each time a calculation had to be made in execution of the Agreement and its Annexes it was therefore necessary to indicate clearly the rate of exchange to be taken into consideration.

This is what Article 13 of the Agreement does in its four paragraphs.

Paragraph (*a*) thus does not lay down a general principle in the light of which the other paragraphs should be understood and interpreted.

Each paragraph relates to a different case, but in all of them the meaning of "rate of exchange" remains the same.

47. From the outset, paragraph (*a*) rightly emphasises the fact that *the* rate of exchange is a relation *between currencies* in that the said paragraph lays down that the rate of exchange to be applied for the calculations shall be that "*determined by* the par values of the currencies concerned in force on the appropriate date . . ." (emphasis added).

The words "determined by" have escaped the attention of the Respondent which wrongly curtails the text when it stated in its analysis of Article 13 (paragraph 19 of the CM):

> Pursuant to the said provision the decisive factors are:
>
> (*a*) firstly,
> the par values agreed with the International Monetary Fund (IMF);
>
> (*b*) secondly,
> the rates of exchange agreed in a bilateral payments agreement;
>
> (*c*) thirdly,
> the rate of exchange applicable for transactions ruling for cable transfers;
>
> (*d*) finally,
> the rate of exchange called the cross-rate.

Likewise, when the Respondent later declared in the CM (paragraph 35, already cited):

> . . . an alteration in the rate of exchange within the meaning of the 5 per cent clause therefore presupposes that in respect of *the currency concerned* a different par value was agreed . . . (emphasis added).

upon with the IMF and that such an alteration constitutes

> a devaluation or a revaluation of the currency concerned,

the Respondent commits the same error for it always considers each currency separately, taken in its relation to gold or the gold dollar, whereas the text speaks of "the *currencies* concerned" (emphasis added).

Two currencies and, accordingly, two par values effective on the date in question are thus necessary to produce a rate of exchange. That is what is expressed unequivocally in Article 13 (*a*).

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If one assumes that the par values of two currencies are reduced, both in exactly the same proportion, such an alteration of the par values will not entail an alteration of the rate of exchange between the said currencies.

The disputed clause thus corresponds to Article 13 (*a*) in the following manner: the alteration which the clause has in view is calculated in relation to a rate of exchange, and that rate of exchange is calculated in relation to the par values in force.

Moreover, the relationship between rates of exchange and par values disappears completely in paragraphs (*b*), (*c*) and (*d*) of Article 13, which fact shows that the guarantee provided by the disputed clause is a pure exchange guarantee without any link to gold or the gold dollar, as the agreement of the three Powers on the unacceptability of any provision resembling a gold clause required it to be.

48. The exclusive importance attached by the Respondent to paragraph (*a*) of Article 13 appears to us to be unjustified, and we observe, moreover, that in 1952 and 1953, that is to say, at the time of the negotiations on and the signing of the Agreement and its Annexes, two of the nine currencies of the Young Loan, the Swiss franc and the French franc could not be within the provisions of the said paragraph (*a*).

It is therefore not possible to speak of a general rule for all the Young Loan currencies.

The mere reference to Article IV, Section 1, of the Articles of the IMF does not make the provisions of that Article applicable to the case in point. The reference made in Article 13 (*a*) to Article IV, Section 1, of the Articles of Agreement of the IMF has no other purpose than to indicate clearly the par values which will determine the rate of exchange. The IMF Articles do not thereby become applicable in the present case nor are the provisions of the LDA thereby subordinated to those of the IMF Agreement.

In any event, no provision of the Articles of the IMF justifies the conclusion that "rate of exchange" and "par value" could be synonymous expressions. Each of these expressions must always be employed according to its proper meaning.

"Rate of exchange" and "par value" being two different concepts, it follows that we cannot accept the restricted meaning of "devalued"—*"dévalué"*—*"Abwertung"* (by official alteration of the par value) which the Respondent attributes to the word "depreciated" *(dépréciée)* in the clause in dispute.

The juxtaposition in the disputed clause of the expressions "rate of exchange" and "depreciated" shows, in fact, that the depreciation within the meaning of the text is definitely an alteration of the rate of exchange and not an alteration of the par value.

49. It is this interpretation alone which allows us to reconcile the two parts of the multiple currency exchange guarantee—alteration

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of "the rates of exchange" and "the least depreciated currency (in relation to the rate of exchange current on 1st August 1952)"—and which gives to the expression "rate of exchange" the ordinary meaning attached to it by Article 13 of the LDA.

Any other interpretation would not respect the terms of the disputed clause.

Conclusion

50. In reaching our conclusion, we recall the word of the late Judge Sir Hersch Lauterpacht:

> . . . there may be no common intention for the reason that the parties, although using identical language, did not intend the same result. Such cases may be due to the fact that the parties, acting in good faith, attached differing meanings to the language of the treaty. Thus, for instance, a party may have attached to a term a meaning dictated by the peculiarity of its own language or of its own law or practice; the other party may have done the same . . . In such cases it would be idle to speak of the common intention of the parties, and the judge may legitimately have recourse to what may be considered the common intention of the treaty taken in its entirety, by reference to the historical circumstances of its creation, to its object as ascertained by the general tendency of its clauses, and, in cases of discrepancy of versions in different languages, to an analysis of the history of the adoption and of the meaning of all relevant versions.[1]
>
> [1] See the method adopted by the Permanent Court of International Justice in the case relating to the *Competence of the International Labour Organisation* (Series B, No. 2, pp. 35 ff.) and in the *Mavrommatis Palestine Concessions Case* (Series A, No. 2, pp. 19, 20).
>
> (*Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties*, vol. XXVI (1949), British Yearbook of International Law, p. 48, at p. 76.)

This is what we have done.

We reach the conclusion that a currency of issue which has appreciated, whether by formal governmental act or otherwise, in relation to other currencies of issue may be "the least depreciated currency", *"la devise la moins dépréciée"*, *"Währung mit der geringsten Abwertung"*, for the purposes of the application of Annex I A 2 (*e*) of the LDA.

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