PERMANENT COURT OF ARBITRATION

RADIO CORPORATION OF AMERICA

v.

THE NATIONAL GOVERNMENT OF THE REPUBLIC OF CHINA

AWARD OF THE TRIBUNAL

Arbitrators:

VAN HAMEL
A. HUBERT
FURRER

The Hague, April 13, 1935

RADIO CORPORATION OF AMERICA
The Plaintiff
represented by Dr. HEINRICH SCHULOFF, Advocate, Vienna, and
Mr. MANTON DAVIS, General Counsel, New York

versus

THE NATIONAL GOVERNMENT OF THE REPUBLIC OF CHINA
The Defendant
represented by Mr. MODDERMAN,
Advocate, Amsterdam.

Arbitrators:

Dr. J.A. VAN HAMEL (Holland), Member of the Amsterdam Bar, Neutral Judge in the Hungaro-Yougoslav Mixed Arbitral Tribunal, some time High Commissioner in Danzig and Professor of Law at the University of Amsterdam;

M. AUGUSTE HUBERT (Belgium), Président du Comité International Radio-Maritime;

Dr. REINHOLD FURRER (Switzerland), Directeur Général des Postes et des Télégraphes Suisses.

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The question submitted for decision by the arbitrators is the following:

Whether the Chinese Government, by concluding with the Mackay Radio and Telegraph Company (California) the Radio Traffic Agreement of June 27th, 1932, and the supplemental agreement of April 7th, 1933, and by establishing jointly with them a direct radio circuit between China and the United States of America, which has been in operation since May 17th, 1933, has violated and still violates the Traffic Agreement of November 10th, 1928, existing between the Radio Corporation of America and the Defendant Government?

The Plaintiff has urged that the Board of Arbitration may:

I. Answer this question in the affirmative,
II. Order the Defendant Government
    a) to cease operating the above-mentioned radio-telegraph circuit;
    b) to give the Radio Corporation account of all the telegrams which, up to the moment of suppression of the radio-telegraph circuit above mentioned, have been transmitted over it;
    c) pay to the Plaintiff all the sums which would have accrued to them if

these telegrams had been transmitted over the circuit jointly operated by the Defendant Government and the Radio Corporation of America.

III. Order the Defendant Government to defray all the costs of the arbitration and to reimburse the Plaintiff's expenses.

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The Defendant has requested that the Board of Arbitration should reject the demands of the Plaintiff, and should declare that the Chinese Government has not violated the contract with the Radio Corporation through their contract with the Mackay Radio and Telegraph Company and through the operation of the Mackay circuit, and that the Plaintiff should be condemned to pay the costs of the arbitration as well as compensate the Defendant for its costs hereunder.

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The Board of Arbitration has been constituted under par. 10 the Traffic Agreement of November 10th, 1928, the arbitrator M. HUBERT having been appointed by the Plaintiff, Dr. FURRER by the Defendant, the two arbitrators having selected as a third their chairman Dr. VAN HAMEL.

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The procedure has taken place in conformity with the "Plan de procedure," as fixed by decision of the Board of Arbitration.

The Plaintiff has presented its Brief (with 30 Exhibits and Power of Attorney);

The Defendant its *Antwort* (Answer) with 5 Exhibits;

The Plaintiff its Reply Brief, renewing the prayers for relief contained in the Conclusion of its original brief;

The Defendant its *Duplik* (Reply Brief), maintaining the position taken in its original brief.

Sittings of the Board have been held in one of the rooms of the Peace Palace, the Hague, on April 11th, and 12th, 1935 – the *Bureau International de la Cour Permanente d'Arbitrage* having kindly given the assistance of its organisation for the functioning of this special jurisdiction of arbitration.

Both parties have pleaded their case orally, Counsel for the Plaintiff had handed in "Notes on China's Reply Brief," by Colonel Manton Davis, as annotations to his pleading. Counsel for the Defendant has handed in written annotations of his pleading. Thereupon the discussions have been declared to be closed, and the arbitrators have deliberated in order to establish their finding.

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The decision which has been taken partly by a majority-vote, partly unanimously and signed by the three arbitrators, is based on the following grounds.

* * *

I. By the Traffic Agreement, concluded the 10th of November 1928 between the Radio Corporation of America, a corporation organised under the laws of the State of Delaware, U.S.A., and the National Council of Reconstruction, representing the National Government of the Republic of China, it was stated that (Preamble) "whereas the Radio Corporation owns and is operating certain radio stations on the Pacific and Atlantic Coasts of the U.S.A. in connection with its international communication system, and whereas the Chinese Government contemplates the erection at an early date of a radio station in Shanghai suitable for commercial communication with the station or stations of the Radio Corporation; and whereas both parties desire to operate one or more of the said stations as a direct radio circuit between the U.S.A. and China for the purpose of furnishing a manual and high speed automatic and duplex commercial radio communication service," a number of stipulations, contained in 14 paragraphs, were covenanted and agreed between them.

In execution of the Traffic Agreement a radio circuit service has been brought into operation, between China and the U.S.A., and worked by the parties concerned.

On June 27th, 1932, the Chinese Government concluded a contract (radio traffic agreement) with the Mackay Radio and Telegraph Company (California), in which it was stated that both parties desired to establish, by means of the radio stations owned by them, public service radio circuits between China and the Pacific Coast of the U.S.A. A supplemental radio traffic agreement was concluded by the two parties on April 7th, 1933, modifying in several points the agreement of June 27th, 1932.

The agreement, thus concluded with the Mackay Company, was officially notified to the Plaintiff by the Chinese Ministry of Communications by letter dated April 8th, 1933, and radio messages were sent "Via Mackay" between the station at Shanghai and that at San Francisco, parallel to the "R.C.A." circuit, established by the Agreement between the Plaintiff and the Defendant.

The original Mackay Agreement (1932) has not been practically applied, and the Board must, in accordance with the pleadings of both parties, take the agreement in its final shape (April 1933) as the only basis for the decision.

The terms of the agreement, concluded between China and the Mackay Company, in 1933, are in their actual wording practically similar to those of the Agreement concluded with the Radio Corporation in 1928. Both agreements are stated to terminate in 1940.

The paragraphs of the agreements refer to:

a) due maintenance and working of radio stations; gear and appliances, trained staff, means for transmission and reception, service hours for handling of traffic (Par. 1 Radio Traffic Agreement)
b) general transmission of messages, including transit (Par. 2 and 3)

c) settlement and accounting of services in accordance with the Regulations of the International Telegraph Convention; conduct of the service, division of revenue, tolls, and settlement of accounts (Par. 4)
d) rates; quotation of rates; special rates (Par. 5)
e) diversion and interruption of communications (Par. 6)
f) transmission of through-messages (Par. 7)
g) general cooperation (Par. 8)
h) case of war or public danger (Par. 9)
i) adjustment of differences; arbitration (Par. 10)
j) traffic agreements with any other nation or nations, for radio communications (Par. 11)
k) beginning and ending of the effect of the agreement (Par. 12)
l) binding effect of the agreement; to be enforced according to the laws of the State of New York, U.S.A. and of China (Par. 13)
m) copies and language (Par. 14)

II. In the view of the Plaintiff, the Chinese Government, by the terms of its Traffic Agreement of 1928 with the Radio Corporation, was not at liberty to conclude with the Mackay Company the Agreement (1933), establishing a parallel direct radio circuit, nor to operate jointly with them this radio service, competing with the R.C.A. circuit. The Radio Corporation sees here a case of the most flagrant violation of the terms of the Radio Corporation Traffic Agreement, as it leaves no right for China to establish another parallel direct radio telegraph circuit between China and the United States. In their view China had been backed in this action by the Mackay Company, who had given them a declaration of guarantee. The pre-existing R.C.A. service was more than sufficient for the available traffic; and by the creation of the Mackay circuit traffic will be diverted from the R.C.A. circuit. China's cooperation with Mackay made more difficult the Plaintiff's task in cooperating with China, and placed its equipments a.s.o. at the service of its competitor. For the Chinese Government, loyal cooperation with the two competing radio-telegraph concerns at the same time will be impossible. According to Chinese Law as well as to American Law, relations of *partnership* or *joint adventure*, of *agency* and of *bona fides* as existing between the two parties concerned, preclude participation in another cooperative enterprise of the same kind.

The Plaintiff moreover has called attention to a previous arbitral decision, given between the Radio Corporation and the Czechoslovakian Republic, which dealt with a similar controversy, and wherein the Plaintiff's viewpoint had been adopted.

III. The Defendant, admitting the relations, established with the Mackay circuit, but declaring the question of the Mackay Guarantee totally irrelevant, has taken the position that it has always been entirely fulfilling its obligations under the Radio Corporation Agreement, and has cooperated to secure successful and remunerative working of the jointly operated circuit. As a public service, it was and is the Chinese Government's duty to give the public the opportunity to avail itself of any other special facilities, and the R.C.A. contract leaves such liberty with regard to the establishment of other circuits. In the Czechoslovakian case, the Chinese Government is of opinion that the issue was not entirely analogous, and moreover the decision given by the majority not correct. The

existence of a relation of partnership could not be admitted; and China's right was reserved. The effect of the Plaintiff's contention would be that the Traffic Agreement would create a *monopoly* in its favour; such creation of a monopoly of radio-telegraph traffic would have been illegal and void under the laws of the U.S.A.

As far as the last point is concerned, the Plaintiff, in its Reply Brief, has categorically denied that it invoked the existence of such a monopoly; adding that it considers China entitled to authorize as many competitors in the radio business as she pleases, but not herself to cooperate with a competitor in an exactly parallel service.

The Defendant has also invoked the eventual invalidity of the restrictive terms of the Agreement, as sustained by the Plaintiff, on the ground of the Anti-Trust and Monopolies Laws, existing in the U.S.A.

IV. The Board of Arbitration has in the first place considered whether an obligation not to cooperate in the establishment and in the operation of a direct radio-circuit, parallel with the R.C.A. circuit, has been *explicitly* imposed upon the Chinese Government, either by the very object of the agreement concluded between the parties, or by its special character.

The Board is of the opinion that such is not the case. As will be explained in detail hereafter, the R.C.A. Traffic Agreement can *not* be held to be exclusive by nature (No. V) or by its special character (No. VI). *Nor* has the Board found that any of the separate articles or provisions have expressed in so many words a limitative obligation, not to cooperate in the establishment of another direct radio circuit between China and the U.S.A. More particularly the Board is of opinion that none of the articles, chiefly relied on by the Plaintiff, notably art. 3, 8, or 11, contains explicit wordings to that effect. Its considerations on those points will be found exposed in detail under No. VII.

The Board would not have hesitated to pronounce the action of the Defendant Government to be illegal towards the Radio Corporation, and to constitute a violation of the Traffic Agreement, if in any way that Government could have been proved to have expressly undertaken the obligation to deal with the Radio Corporation exclusively. Coming to the conclusion, however, that such is not the case, the remaining question is one of implicit interpretation of the terms of the agreement, and of construction of its meaning. Should, in the absence of any explicit stipulation, the agreement be construed in such a manner as to convey nevertheless implicitly and virtually the obligation for the Chinese Government to refrain from the cooperation into which they have entered with the Mackay Company?

Here the Board is of opinion that under the circumstances the *implicit* existence of such a limitative obligation should have been very distinctly shown. The Chinese Government can certainly sign away a part of its liberty of action, and this also in the field of the establishment of international radio-telegraphic communications, and of its cooperation therein. It can do so as well in an *implicit* manner, if a reasonable construction of its undertakings leads up to that conclusion. It will, as any other party, be bound by law and by any obligations, legally accepted. But as a sovereign government, on principle free in its action for the public interest as it sees it, it cannot be presumed to have accepted such restriction of its freedom of action, unless the acceptance of such restriction can be ascertained distinctly and beyond reasonable doubt.

This, in the view of the Board, it has not been possible for the Plaintiff to establish. The opinion of the Board on this point has been explained in detail under No. VII. It sees no difference, in this respect, between a Government, acting in the execution of sovereign rights, and a Governmental Administration, acting in due exercise of its public function for the public interest.

It is a correct rule, known and recognized in common law as well as in international law, that any restriction of a contracting Government's rights must be effected in a clear and distinct manner; "Contracts affecting the public interest are to be construed liberally in favour of the public." The Plaintiff, dealing with a Government as its contracting party, will have born this point in mind, in negotiating the terms of the agreement.

Under these circumstances, the Board did not have to consider the question of the applicability of U.S.A. Anti-Trust and Monopolies Laws, dwelt upon in detail between the parties; or to deal with the proceedings instituted in connection herewith against the Plaintiff.

V. The Traffic Agreement is not exclusive by the inherent nature of its object. There may doubtless be established between public authorities and private organisations, with regard to certain matters, arrangements (by grant, concession or agreement) the effects of which are essentially and practically *exclusive*, leaving no proper place for competitive activities. In those cases no serious question can arise as to the nature of the obligations incurred by Governmental authorities or a Government, and these obligations may not be disregarded. In most countries experience has shown the existence of arrangements of that kind. The practice has been developed particularly in the United States of America. It is known in China as well.

The establishment of a radio circuit with other countries, however, is not of such an *exclusive nature*. Telegraph communications between two countries or continents can be established along various direct routes at the same time; they can be worked through various installations. There is nothing, in theory nor in practice, to prevent that. The Traffic Agreement between China and the R.C.A. refers more than once to possibilities of that kind, mentioning existing cable lines, and the existence of various "routes." The Plaintiff, moreover, in its reply brief has admitted the possibility of other radio-circuits being established by concession, granted by the Chinese Government.

It has also not been shown that the Radio Corporation, in view of the establishment of its direct radio-circuit with China, had made financial sacrifices or investments of such a nature and such an importance that the object of its dealings with China should thereby have been made practically and reasonably exclusive. The Radio Corporation has certainly rendered valuable services in setting up the circuit and in making it efficient; nor should the contribution and the value of its long previous experiences be underrated. But no facts have been brought to the cognizance of the Board, to justify the conclusion that the services rendered by the Radio Corporation could only have been placed at the disposal of the Chinese Government *in consideration* of an obligation on the part of that Government not to cooperate in the establishment of any other circuit.

The establishment of the radio-circuit with China has not become in reality and necessarily exclusive by its very nature; preventing thereby China from making any

arrangements with any other concern. A Government, on its side, may see an advantage in keeping open the possibility of having relations with several circuits at the same time, because of the competition and emulation encouraged thereby.

VI. As far as concerns the special character of the Traffic Agreement, the Plaintiff has submitted that it constitutes between the Radio Corporation and the Chinese Government *a contract of partnership*, or of *joint-adventure*. The complex of rights and obligations involved in such a contract would make it a violation thereof on the part of the Defendant Government, to enter into a similar agreement with another competing radio concern, such as Mackay.

The Defendant has maintained that the Traffic Agreement does not constitute such a contract of partnership, or of joint-adventure.

The Board agrees with the Plaintiff that, if a specific contract of partnership or of joint-adventure has been concluded between the parties, a limitative obligation, prohibiting the conclusion and joint operation of the Mackay Traffic Agreement, would implicitly rest upon the Chinese Government. Indeed, the utmost *bona fides* of contracts is to be observed between the parties to a contract of partnership (or of joint-adventure). Such a contract is violated, if one of the parties initiates a direct joint activity on parallel lines with a competing third party. Even if not explicitly stipulated, such an obligation will then have to be implied. It is one of the essential obligations, included in contracts of partnership. It will also make no difference, if one of the parties to such contract is a Government. By entering into a contract of partnership (or: joint adventure) with a private concern – which under circumstances a Government may quite well do – such Government will take upon itself the obligations which rest upon the parties to a contract of partnership. Although no *explicit*, restrictive or exclusive obligations were in existence, the Board would then recognize the implicit existence of such obligations, as maintained by the Plaintiff.

It becomes first necessary, therefore, to prove that the Traffic Agreement does indeed constitute such a contract of partnership or an analogous contract. If this contention fails, no argument can be drawn from the rules of law, concerning that kind of contract. The interpretation of the agreement will then have to revert to the principle, stated above, that the Government cannot be held to have given up to the Radio Corporation a larger part of its freedom of action, than results beyond reasonable doubt from the very wording of the agreement. There will then be no room for presumptive construction.

Thus, the importance of the issue: partnership *yes*, or *no*, is obvious. If *yes*, then the Government must be considered to have accepted implicitly the restrictive obligation in question. If: *no*, no such obligation can be construed, unless it is clearly laid down by the terms of the agreement itself. Silence in the one case will be in favour of the Defendant, in the other case in favour of the Plaintiff.

In the opinion of the Board, it has not been shown that the Traffic Agreement constituted, either according to American or to Chinese Law, a relation of partnership or of joint adventure between the parties concerned. Nor is their agreement of a nature analogous to this kind of contract; although there may be certain similarities, such as activities organised in common and revenues earned in common.

The legal position established between the two parties is the following: it is an arrangement, agreed upon between them, for a period of 10 years, in order to establish and to regulate satisfactory connections between their respective radio-telegraph centres, which could not serve their purpose unless those connections are properly provided for. This position has been distinctly described by the Preamble of the Agreement, which is quoted above under No. I.

The parties in the present case cannot be held, in making their agreement, to have acted with the intention to start a common enterprise with the object of making profits together (the *animus contrahendae societatis*), which is essential to the contract of partnership. This can certainly not be assumed to have been the attitude of the Chinese Government. In making useful provisions for the working of a radio-telegraphic circuit between its territory and another country, the Government envisages the establishment of a public service, in order to promote the interests of its people, to encourage their international communications (business relations and personal relations), and to make them enjoy the advantages of modern scientific development in this field. It makes no difference that the Government will desire to make such a service pay, cover the expenses and, if possible, yield surplus advantages. The Radio Corporation on their part will of course look upon the enterprise as a business interest. But in dealing with a Government, they will be fully aware that the other party is acting from a more general point of view. It might well be that both parties might consider that their objects could be attained in the most satisfactory manner by concluding a contract of partnership or joint-adventure. They would then make this quite clear, beyond reasonable doubt. If a party, like the Radio Corporation, wants to establish with the Government the entire complex of obligations and rights, included in the technical contract of partnership or joint-adventure, they will have to see that this relation is clearly established, excluding every reasonable doubt on the subject. Otherwise, the Government has only to be assumed to have entered into the rights and duties definitely established, and which it has judged advantageous to the general interests of which it is in charge. It will be bound, of course, by the obligations which it is thereby duly accepting; a side of the question dealt with in detail in No. VIII.

It may be recalled that in Chinese Law as well as in American terminology the term "*agreement*" seems to convey the notion of a less rigid, less concise and less technical legal structure, than is indicated by the term *contract*. "Agreement is in some respects a wider term than contract." The Chinese Civil Code (Translation in English by Ching-lin Hsia d.o.) in its art. 972 mentions an "agreement" to marry, establishing legal obligations in a less definite way. In the present case, the parties have adopted, to describe the nature of the covenant concluded between them, the word "agreement" (Heading, Preamble, art. 11, 12, 13, 14) – the word "contract" occurs only once, in art. 10. This confirms the view that the present "Traffic Agreement" does not implicitly comprise the obligations implied in such a specific contract of civil law as the contract of partnership.

The use of the term "commercial" such as "commercial purposes," in par. 2, 3, and the Preamble, to which the Plaintiff has called attention, does not seem to have a conclusive bearing on this side of the question.

VII. It must now be ascertained whether any of the separate paragraphs or stipulations, contained in the "Traffic Agreement," have placed upon the Chinese Government a restrictive obligation, as alleged by the Plaintiff, particularly paragraphs 3, 8 and 11.

In the view of the Board:

Par. 3 has established for the Radio Corporation a privileged position with regard to other possible circuits;

Par. 8 has imposed upon the Chinese Government obligations of efficient cooperation with the Radio Corporation;

Par. 11, whilst admitting the possibility of radio-agreements with other nationalities, has at the same time confirmed the privileged position of the Radio Corporation.

None of the said paragraphs goes further in the sense of establishing exclusive obligations.

The text, to be considered in the first place as a basis for the aim of the Radio Corporation, is par. 8 of its Traffic Agreement, concluded with the Chinese Government.

This paragraph reads as follows: "*Generally each party hereto shall cooperate with the other to secure the successful and remunerative working of the jointly operated circuit or circuits*."

In the view of the Plaintiff, this stipulation obliges both parties to refrain from doing anything which would or might prejudice the success or the revenues of the jointly operated service. The establishment and operation of an exactly parallel enterprise with a third party must, in the Plaintiff's view, be absolutely incompatible with such an undertaking; and the working of the Mackay circuit will necessarily prejudice the success and financial results of the R.C.A. circuit. Traffic will be diverted; cooperation between R.C.A. and China will become more difficult; the Mackay Company will profit by the use of equipment, inventions, experience and training supplied by the Radio Corporation; and China, in pledging itself to cooperate with Mackay, will not extend to the development of the R.C.A. circuit every effort which it could make.

According to the Defendant, the rule of par. 8 relates to the technical operation of the circuit only, and does not impose general obligations on the parties. This is concluded from the very location of paragraph 8, in the midst of other clauses relating to the manner of operating the circuit.

In the opinion of the Board, the paragraph has a broader and more general meaning, creating to a considerable extent a general duty of correct collaboration between Defendant and Plaintiff. The Board agrees that the working of the Mackay circuit will to a certain degree take away revenues from the R.C.A. circuit and be thereby a cause of prejudice to its results; and it certainly agrees that by accepting par. 8 in its Agreement with R.C.A., the Chinese Government has accepted towards the Radio Corporation unmistakable obligations and liabilities, which should not lightly be fettered. The Board is not satisfied, however, that these obligations go as far as to place upon the Chinese Government the limitative restriction which is claimed by the Plaintiff.

The establishment of such a limitative restriction does not follow from the wording of the present article. "Successful and remunerative working of the R.C.A." is not fatally doomed by the working, as such, of the Mackay circuit on parallel lines. The Plaintiff itself has not maintained before the Board that, by the establishment of the Mackay circuit, the success of the R.C.A. circuit has been excluded. The Radio Corporation circuit has not thereby become a failure and a loss. If that should be the case,

or even if it should seriously threaten, the Chinese Government's relations with the Mackay Company would certainly, by the force of the Agreement with the Radio Corporation, have to come up for reconsideration. It could not carry on its cooperation in the Mackay circuit as if nothing had happened. It certainly must contribute loyally to the proper working and to the success of the R.C.A. circuit. As long as this is secured, however, the Defendant is not, by the terms of paragraph 8, compelled to refrain from every action with regard to the continuation of a circuit like the Mackay circuit. The Board must again emphasize that, in order to create such a limitation, the obligation placed upon the Defendant Government should have been more explicitly stringent than the Plaintiff has established. The conclusion, as explained above under No. IV, must be repeated: that the Government can only be deemed to have undertaken such a restrictive obligation, if the existence of such obligation is proved distinctly and beyond reasonable doubt.

The use of the word "secure" also, to which the Plaintiff has called attention, does not seem conclusive in this respect.

The wording of paragraph 8 might have established such a limitative obligation, if it were more categoric. It is interesting to note that in par. 8 of the blank draft for Traffic Agreements, used by the Plaintiff, in opening negotiations with possible parties – copy of which form was handed in by it to the Board at its session of April 12th, 1935 – par. 8 is worded somewhat differently; namely as follows: "the parties agree to co-operate and to use their best endeavours to procure and develop the maximum volume of traffic to be handled over the circuit or circuits maintained pursuant to this agreement." Without having to pronounce itself as to the possible legal effects of a clause so drafted, the Board has found here another indication that the Traffic Agreement with the Chinese Government has not, by its par. 8, placed upon this Government with sufficient and express indication an obligation with the maximum of restriction, involving the consequences claimed by the Plaintiff.

The same has to be said of par. 3, which it is alleged must be read in the light of par. 8 (Brief of the Radio Corporation, p. 29 and 30).

Par. 3 runs as follows: "*the Council (the Chinese Government) shall transmit every message within its control destined to the United States of America or intended for transit through the United States unless routed otherwise by sender; provided, however, that the Corporation (R.C.A.) maintains their central control office already established in San Francisco, in a situation at least as convenient as similar offices of competing cable companies, and further provided that the Corporation shall reserve the operation of the said station exclusively for commercial purposes*."

In the view of the Plaintiff, this paragraph must be interpreted in the same sense that the Chinese Government *must* send over the circuit, operated jointly with R.C.A., *every* telegram which, under the International Telegraph Regulation, it *could* properly send over the said circuit. The words "*unless routed otherwise by sender*" leave a liberty to the sender, to choose other routes. They do not, says the Plaintiff, grant any freedom of action to the Chinese Government to take part in the establishment of other circuits. The sender could only choose another route which is already in existence By establishing, jointly with the Mackay Company, a circuit non-existent at the time of conclusion of its agreement with R.C.A., the Chinese Government itself created means of violating that agreement. In the view of the Plaintiff, only this interpretation would be in harmony with

the text of par. 8 of the Agreement.

In the view of the Board, par. 3 should be construed as establishing for the Radio Corporation a *privileged* position, in so far that it shall be given all the radio traffic which is not being routed otherwise. The natural meaning does not go further. In this way, paragraph 3 has made the R.C.A. circuit the *main* direct radio-telegraph circuit between China and the United States. This position should be respected in every respect by China, and the Board proposes to deal with that matter in detail.

The paragraph does not deal with the establishment of new lines or new radio-connections. It does not exclude the establishment or other telegraph connections; nor can it be so construed as to exclude them implicitly. It pre-supposes the possible existence of other telegraph routes and of competing telegraph connections. The Plaintiff, in its Reply Brief, has admitted the possibility for China to grant concessions for the establishment of other radio-circuits. The paragraph cannot be understood as meaning that China is forbidden to take a more direct part in the establishment of new radio-connections, subject, of course, to its duty to recognize the privileged position of R.C.A., as stipulated in the paragraph.

Here again, if the text of the agreement should have the legal effect of prohibiting China from taking any such action, this could and should have been more definitely expressed. The Board cannot agree that the words "unless routed otherwise by sender," are in this respect totally indifferent. These words distinctly refer to the possible existence of other telegraphic connections, radio circuits not excepted. They do not *grant* to China the liberty of taking an active part in the establishment of such circuits. Nor does the paragraph take any such liberty away.

The Traffic Agreement, concluded by the Radio Corporation with the Administration of Posts and Telegraphs of Czechoslovakia (November 10th, 1928), communicated to the Board, has on this point a somewhat different wording. It says (par. 2) that "the Administration shall transmit *exclusively* over the said circuit every message within its control." The word "exclusively" is here inserted. The Board has not had to go into the construction of that Traffic Agreement. The parties in the present case do not seem to have attached importance to the absence of the term *exclusive* in the case of China. Nevertheless, its absence constitutes an interesting difference between the Chinese and the Czechoslovakian case; a difference which might even lead to a more restrictive construction of the Czechoslovakian Traffic Agreement than of the Chinese one.

At any rate the wording of the latter, now under consideration, does not lead the Board to find such an exclusive bearing sufficiently expressed.

The third particular paragraph which the Plaintiff has invoked is par. 11, which reads as follows: "*Either contracting party hereto is free to make any other traffic agreement with any other nation or nations for radio communication, provided that paragraphs two (2) and three (3) of this agreement are observed*."

According to this paragraph, says the Plaintiff, both parties are free to conclude other traffic agreements with *other* countries. "*Qui de uno dicit, de altero negat*." It follows that the Chinese Government may not conclude an agreement with any partner belonging to the *same* country, other than the Radio Corporation.

The Defendant, on the contrary, concludes that art. 11 has obviously confirmed the liberty for China to make new radio agreements with any juridical person, engaged in the radio-telegraph business, provided only that the provision of par. 3 of the R.C.A.

contract should always be observed. As the Defendant thinks moreover that by the performance of the Traffic Agreement with Mackay, par. 3 has in no way been violated, par. 11 would categorically establish China's right to establish a circuit with Mackay.

In the opinion of the Board, par. 11 cannot be quoted by either party in favour of its argument. The paragraph does not deal in one way or another with the question of a restrictive obligation put upon the Chinese Government in favour of the Radio Corporation circuit. It is intended to reserve China's (and the other party's) liberty to conclude traffic agreements with other nations; "other nations" in this context meaning "parties belonging to another nationality," is being indifferent whether that should be private or governmental organisations. The idea is that China, in the system of its radio-communications, shall not be considered as being linked exclusively to one particular, national influence, the nationality of the Radio Corporation. From a political point of view, such national influence might be the result of relations with powerful private organisations, as well as with governments.

Par. 11 is a clause inserted evidently in view of China's desire to express fidelity to the international principle of the "open door." Both parties have adhered to it. Par. 3 (and 2) were repeated for the sake of completeness in order to avoid misinterpretation and of maintaining the preferential principle mentioned above in favour of the Radio Corporation.

The paragraph has no bearing upon China's relations with parties belonging to the *same* nationality. It leaves that question open. It would not be in accordance with the generally recognized rules of interpretation and construction of contracts, to derive from the paragraph any conclusion, restrictive or liberative, in this respect. If any construction should be derived from it, it must be that the restrictive tenor of paras. 3 and 8, as sustained by the Plaintiff, cannot easily be admitted. Par. 11 seems to assume the possibility, in general, that China may conclude other traffic agreements for radio communication with other parties – a possibility which, according to the Plaintiff's interpretation of par. 8 and 3, would be excluded, by virtue of those paragraphs.

No other provisions have been found in the text of the agreement which offer special ground for consideration with regard to the problem before the Board. Sometimes a wording seems rather to strengthen the view that a limitative restriction has been envisaged. There are paragraph 6: ("*the* radio service") and part of the Preamble ("a radio station in Shanghai suitable for commercial communications with the station or stations of the R.C.A."). Sometimes, however, the possibility of a competing service is clearly admitted (par. 2 and 3, 5).

On the whole, it seems that at the moment of the conclusion of the Traffic Agreement the parties considered the R.C.A. circuit as being practically the only circuit through which direct radio-connections would be maintained between China and the U.S.A. The Radio Corporation reckoned with this state of affairs and hoped for its continuation. This is, however, a different thing from the legal, contractual fixation of such a special position. In order to impose such a position upon the Chinese Government, prohibiting direct cooperation with Mackay, and causing the conclusion and operation of an agreement such as the Mackay Agreement to be a violation of the Agreement with the Radio Corporation, other terms should have been chosen.

VIII. The Traffic Agreement with the Radio Corporation, as it is worded, has not left to the Defendant Government a complete liberty of action in its dealings with the Mackay Company. It has to observe in those dealings the positive limitations which it *has* unmistakably undertaken *vis à vis* the Radio Corporation by the acceptance of the Traffic Agreement; and in order to make such limitations effective, instruct its personnel accordingly with all due precision.

In the view of the Board, the parties have in the present litigation confined the object submitted for its decision to two questions of principle: "Whether according to the terms of the Radio Traffic Agreement of November 10th, 1928, a violation of this agreement is to be found (a) in the conclusion of the Mackay Traffic Agreement of 1933, (b) in the establishment, as such, of the Mackay circuit," concentrating on either side their pleading entirely on those legal aspects of the case apart from any questions of moral obligation, or of practical performance. Such questions of practical detail and of a technical nature, concerning the practical operation of the radio circuits, the avoidance of possible interference a.o. have only been incidentally dealt with in the course of the pleadings, *in transitu*, without such complete and adequate discussion as would have been necessary if they were submitted for a decision. The present finding must therefore leave those questions open. Under this reservation, the Board has desired to dwell also on this part of the interpretation of the agreement at length, in order to complete the argumentation and eventually to serve as a guidance for the parties concerned.

As has already been pointed out, the Chinese Government, through the conclusion of its Traffic Agreement with the Radio Corporation, has agreed to let the R.C.A. circuit be the *main* direct circuit between China and the United States, enjoying a routing privilege, and as such a preferential treatment. Agreements, concluded with other parties *after* the conclusion of the Agreement with the Radio Corporation, cannot alter this position. Certain activities, for instance, foreseen by the Radio Traffic Agreement with Mackay of June 27th, 1932, before it had been amended by the additional Agreement of April 7th, 1933, would not have been in conformity with the Traffic Agreement with the Radio Corporation, of November 10th, 1928.

Having promised to transmit over the R.C.A. circuit the total bulk of the unrouted traffic, and, of course, also the traffic routed for R.C.A., it would be against the spirit of the Agreement if the Chinese Government were to participate directly or indirectly in any canvassing activity for the second wireless circuit, which would obviously be to the detriment of the R.C.A. circuit and to the advantage of the Mackay circuit. Such canvassing, like that for the cable routes, must be left to the interested company. The Chinese Government would not be free to make, or assist in any propaganda, directly or indirectly, for the Mackay circuit. It could not directly or indirectly solicit, or assist in soliciting, traffic for that circuit. It could not take part in, or permit, any measures aiming at a routing of telegrams to the detriment of the direct R.C.A. route.

The technical and practical arrangements concerning the operation of the radio circuits on the part of the Chinese Government should be such as not to impair in any way the competing power of the R.C.A. circuit. In its operation of the Mackay circuit, the Chinese Government could not take or permit any measures which would be intended to hinder the R.C.A. circuit from being successful or remunerative. Over other routes than R.C.A., only those telegrams may be transmitted which have been distinctly marked for those routes by sender. In the service of accepting, collecting and delivering traffic to the

R.C.A. circuit by the personnel of the Chinese Administration, confusion with the accepting, collecting or delivering of traffic to the Mackay circuit should be carefully avoided.

The continuous flow of traffic of any classification over the R.C.A. circuit may not be interrupted, delayed or hindered in consequence of the manner of the operation of the Mackay circuit by the Chinese Government.

The transmitting and receiving stations, terminal apparatus, and the operating staff, used for the operation of the R.C.A. route, may not be used by the Chinese Government for the operation of the competing route, if the efficiency and competing power of the R.C.A. circuit is prejudiced thereby, or if the operation of the R.C.A. circuit is thereby delayed or hindered. The Board has carefully considered in how far it will be possible for the Chinese Government to comply with this condition, if the traffic for the Mackay circuit is being handled over the same installation and its operating equipment, which also serves for the R.C.A. traffic. In view of the facts referred to in the course of the proceedings, the Board does not think this possible. Modern international radio-telegraphic traffic requires punctuality and rapidity to such an extent that the delays necessarily caused by the operation of two circuits over the same installation will be detrimental to the results. Waiting time for the messages to be delivered through one of the circuits will be practically unavoidable, if at the same time messages are being transmitted by the other circuit. Every change of transmission from one receiving station to another means additional loss of time. Atmospheric disturbances and fadings, the necessity to change waves, and other technical eventualities will to a much larger extent cause loss of time, if one installation is used for the operation of two circuits.

The Board has, therefore, come to the conclusion that, in order to prevent the prompt communication with the R.C.A. counter-station from suffering through this twofold use, and its competing power from being impaired, the two services should be operated by the Chinese Government separately, by means of separate, properly equipped and staffed installations.

It should also under all circumstances be avoided that essential operating data and technical information, supplied by the Radio Corporation to the Chinese Administration, for the operation of the R.C.A. circuit, are made available for or used in the operation of the Mackay circuit.

* * *

For these reasons, the Board of Arbitration decides:

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I. The answer to the questions, as submitted, whether the conclusion with the Mackay Radio and Telegraph Company (California) of the Radio Traffic Agreement of June 27th, 1932, such as it has been finally shaped by the supplemental agreement of April 7th, 1933, and the fact, as such, of establishing jointly with the Mackay Radio and Telegraph Company (California) a direct radio circuit between China and the United States of America, which has been in operation since May 17th, 1933, constitute on the

part of the Defendant Government violations of the Traffic Agreement concluded by it on November 10th, 1928 with the Radio Corporation of America, is in the negative;

II. The demands, made by the Plaintiff under No. 2 of its conclusions, do not come up for consideration;

III. With regard to any other question, concerning the Defendant Government's practical observance of its positive obligations established by the Radio Corporation Traffic Agreement, the Board's Recommendations to the parties concerned have been formulated under Heading VIII of the above finding. Such questions have not been specifically discussed and brought before the Board for a decision. They may, if they should arise, be subsequently submitted for arbitration by either party, if desired.

IV. It is equitable that the costs incident to the arbitration shall be apportioned between both parties in equal parts.

The Hague, April 13th, 1935.

VAN HAMEL
A. HUBERT
FURRER