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 Type: Judgment  
 Full Title: *Case of the S.S. "Wimbledon"*  
 Requested by: Application filed by Britain, France, Italy & Japan  
 Party(ies): Britain, France, Italy & Japan (with Poland as Intervener) vs. Germany  
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<sup>1</sup> date when the request for an advisory opinion or application was filed with the court Registry

[15] Permanent Court of International Justice.

<i>Before:</i>	Mm. Loder,	<i>President,</i>
	Weiss	<i>Vice-President</i>
Lord	Finlay,	<i>Judges.</i>
Mm.	Nyholm,	
	Moore,	
	De Bustamante	
	Altamira,	
	Oda,	
	Anzilotti,	
	Huber,	
	Wang,	<i>Deputy-judge.</i>
	Schücking	<i>German national judge.</i>

The Government of His Britannic Majesty, represented by Sir Cecil Hurst, legal adviser to the Foreign Office,

The Government of the French Republic, represented by M. Basdevant, Professor at the Faculty of Law at Paris,

The Government of His Majesty the King of Italy represented by Commendatore Pilotti, former judge of the Court of Rome, and

The Government of His Majesty the Emperor of Japan represented by M. N. Ito, first Secretary of Legation, Japanese Charge d'Affaires a.i. at The Hague ;

*Applicants,*

and the Government of the Polish Republic, represented by M. Gustave Olechowski, First Secretary of Legation, temporarily detached from the Ministry of Foreign Affairs and attached to the Polish Legation at The Hague;

*Intervener,*

[16] *versus*

The Government of the German Empire, represented by M. Schiffer, former Minister of Justice,

*Respondent,*

## THE COURT

composed as above,  
having heard the observations and conclusions of the parties,  
delivers the following judgment:

### I.

The Governments of His Britannic Majesty, of the French Republic, of His Majesty the King of Italy and of His Majesty the Emperor of Japan, by means of an application instituting proceedings filed with the Registry of the Court on January 16th, 1923, in accordance with Article 40 of the Statute and Article 35 of the Rules of Court, brought before the Court the dispute which had arisen between these Governments and the Government of the German Empire by reason of the fact that on March 21st, 1921, the steamship "Wimbledon" was refused permission to pass through the Kiel Canal.

By this application it was submitted that:

1. The German authorities, on March 21st, 1921, were wrong in refusing free access to the Kiel Canal to the steamship "Wimbledon";
2. The German Government is under an obligation to make good the prejudice sustained as a result of this action by the said vessel and which is estimated at the sum of 174.082 Frs. 86 centimes, with interest at six per cent 'per annum from March 20th, 1921.

The conclusions contained in the application were developed in the Case submitted by the Applicants to the Court on March 17th, 1923; it is therein specified that the amount of the compensation shall be remitted to the Government of the [17] French Republic within one month from the date on which judgment is given and that, should the German Government fail to make payment within this time, it shall pay interest at ten per cent, upon the sum due, both as principal and as interest, from the expiration of this time.

On the other hand, the German Government, the respondent in this suit, requested the Court, in the conclusions contained in the Counter-case submitted by it on April 20th, 1923:

1. To declare that the German authorities were within their rights in refusing on March 21st, 1921, to allow the steamship "Wimbledon" to pass through the Kiel Canal.
2. To reject the claim for compensation.

In the course of the written proceedings the respective conclusions of the Parties were to some extent modified or supplemented. They appear in their final form in the Reply of the Applicant States, filed on May 18th, 1923, and in the German Rejoinder, filed on June 15th following.

In the reply it is submitted:

That the German authorities on March 21st, 1921, were wrong in refusing access to the Kiel Canal to the steamship "Wimbledon";

That consequently the German Government is under an obligation to make good the prejudice sustained as a result of this action by the said vessel and her charterers; that this loss may be estimated at 174.082 Frs. 68 centimes, together with interest at 6 per cent per annum from March 20th, 1921, unless the Court should consider that it would be more equitable to calculate that part of the indemnity destined to cover demurrage and deviation in pounds sterling in accordance with the principle enunciated . in the Reply;

That the Government of the German Empire shall remit the amount of the said compensation to the Government of the French Republic within one month from the date on which judgment is given;

And that, should the German Government fail to effect payment within this time, it shall pay interest at 10 % on the sum due, both as principal and as interest, from the expiration of the time limit of one month above-mentioned. [18]

During the oral proceedings, the Government of the Polish Republic, intervening under Article 63 of the Statute, declared itself in agreement with the submissions of the applicants.

On the other hand, the Rejoinder submitted by the German Government supplements and further defines the submissions presented in the Counter-case in the following manner; it is submitted:

1. (a) that Article 380 of the Treaty of Peace of Versailles could not prevent Germany from applying to the Kiel Canal, during the Russo-Polish War of 1920-1921, a neutrality regulation, admissible in itself, like the order of July 25th, 1920;

(b) that the application of this Order of July 25th, 1920, was not rendered impossible by the coming into force of the preliminary Treaty of Peace dated November

2nd, 1920, but only by the coming into force of the final Treaty of Peace dated April 30th, 1921; and

2. that in consequence the claim for compensation should be rejected.

In support of their conclusions, a number of documents have been submitted to the Court by the Parties, either as annexes to the Case, Counter-Case, Reply and Rejoinder, or during the hearing.

The Court has further heard, in the course of public sittings held on the 5th, 6th, 7th, 9th and 10th July, 1923, the statements of the Agents of the six Powers concerned.

## II.

### *The Facts.*

The facts, as stated in the course of the proceedings and in regard to which there appears to be no disagreement between the Parties, may be summarised as follows:

An English steamship, the "Wimbledon", had been time chartered by the French Company, "Les Affréteurs réunis", whose offices are at Paris.

According to the terms of the charter party signed on January 28th, 1919, this vessel had been demised to the [19] Company for a period of 18 months, commencing on May 3rd, 1919, the date of its delivery; but a rider dated July 15th, 1920, had extended this period by six months as from November 3rd following. The freight agreed upon was 17sh. 6d. per ton per month.

The vessel, having been chartered in the manner indicated, had taken on board at Salonica 4,200 tons of munitions and artillery stores consigned to the Polish Naval Base at Danzig. On the morning of March 21st, 1921, it presented itself at the entrance to the Kiel Canal, but the Director of Canal Traffic refused to allow it to pass, basing his refusal upon the neutrality Orders issued by Germany in connection with the Russo-Polish war, and upon instructions which he had received.

On the next day but one, March 23rd, the French Ambassador at Berlin requested the German Government to withdraw this prohibition and to allow the S.S. "Wimbledon" to pass through the Kiel Canal in conformity with Article 380 of the Treaty of Versailles. Some days later, on March 26th, a reply was given to the effect that the German Government was unable to allow a vessel which had on board a cargo of munitions and artillery stores consigned to the Polish Military Mission at Danzig, to pass through the Canal, because the German Neutrality

Orders of July 25th and 30th, 1920, prohibited the transit of cargoes of this kind destined for Poland or Russia, and Article 380 of the Treaty of Versailles was not an obstacle to the application of these Orders to the Kiel Canal.

On the evening of March 30th, the "Société des Affréteurs réunis" telegraphed to the captain of the S.S. "Wimbledon" ordering him to continue his voyage by the Danish Straits. The vessel weighed anchor on April 1st and, proceeding by Skagen, reached Danzig, its port of destination, on April 6th; it had been detained for eleven days, to which must be added two days for deviation.

In the meantime the "Wimbledon" incident had not failed to give rise to active negotiations between the Conference of Ambassadors and the Berlin Government; but these negotiations, in the course of which the contrast between the [20] opposing standpoints had become apparent and the Allied Powers' protest had been met by a statement of Germany's alleged rights and obligations as a neutral in the war between Russia and Poland, led to no result, whereupon the Governments of His Britannic Majesty, the French Republic, His Majesty the King of Italy and His Majesty the Emperor of Japan decided to bring the matter which had given rise to the negotiations - thereby adopting a course suggested by the German Government itself in a letter from its Minister of Foreign Affairs, dated January 28th, 1922 - before the jurisdiction instituted by the League of Nations to deal with, amongst other matters, any violation of Articles 380 to 386 of the Treaty of Versailles or any dispute as to their interpretation. This jurisdiction is the Permanent Court of International Justice which entered upon its duties at The Hague on February 15th, 1922.

### III.

#### *The Suit.*

The first question to be considered is whether proceedings could be instituted by the four Governments above mentioned in the terms of the Application filed. The Respondent has left this point to the appreciation of the Court.

The Court has no doubt that it can take cognizance of the application instituting proceedings in the form in which it has been submitted. It will suffice to observe for the purposes of this case that each of the four Applicant Powers has a clear interest in the execution of the provisions relating to the Kiel Canal, since they all possess fleets and merchant vessels

flying their respective flags. They are therefore, even though they may be unable to adduce a prejudice to any pecuniary interest, covered by the terms of Article 386, Paragraph 1 of which is as follows :

"In the event of violation of any of the conditions of Articles 380 to 386, or of disputes as to the interpretation of these articles, any interested Power can appeal to the jurisdiction instituted for the purpose by the League of Nations." [21]

#### IV.

##### *The Law.*

##### A.

The question upon which the whole case depends is whether the German authorities were entitled to refuse access to and passage through the Kiel Canal to the S.S. "Wimbledon" on March 21st, 1921, under the conditions and circumstances in which they did so.

The reply to this question must be sought in the provisions devoted by the Peace Treaty of Versailles to the Kiel Canal, in Part XII, entitled "Ports, Waterways and Railways", Section VI. This Section commences with a provision of a general and peremptory character, contained in Article 380, which is as follows:

"The Kiel Canal and its approaches shall be maintained free and open to the vessels of commerce and of war of all nations at peace with Germany on terms of entire equality".

Then follow various provisions intended to facilitate and regulate the exercise of this right of free passage.

Article 381, after mentioning that "the nationals, property and vessels of all Powers, shall, in respect of charges, facilities, and in all other respects, be treated on a footing of perfect equality in the use of the canal...", adds that "no impediment shall be placed on the movement of persons or vessels other than those arising out of police, customs, sanitary, emigration or immigration regulations, and those relating to the import and export of prohibited goods, and that such regulations must be reasonable and uniform and must not unnecessarily impede traffic."

Again, Article 382 forbids the levying of charges upon vessels using the canal or its approaches other than those intended to cover, in an equitable manner, the cost of maintaining in a navigable condition, or of improving, the canal or its approaches, or to meet expenses incurred in the interests of navigation; furthermore, Article 383 provides for the [22] placing of goods in transit under seal or in the custody of customs' agents, and Article 385 places Germany under the obligation to take all suitable measures to remove any obstacle or danger to navigation and to ensure the maintenance of good conditions of navigation, whilst, at the same time, forbidding Germany to undertake any works of a nature to impede navigation on the canal or its approaches.

The claim advanced by the Applicants, that the S.S. "Wimbledon" should have enjoyed the right of free passage through the Kiel Canal, is based on the general rule embodied in Article 380 of the Treaty of Versailles.

This clause, they say, could not be more clear as regards the provision to the effect that the canal shall be maintained free and open to the vessels of commerce and of war of all nations at peace with Germany; it follows therefore, that the S.S. "Wimbledon", belonging to a nation at that moment at peace with Germany, was entitled to free passage through the Canal.

The Applicants have also maintained that this interpretation of Article 380 is confirmed by the terms of paragraph 2 of the following Article, providing for certain restrictions or impediments which may be placed by the German Government upon free movement in the canal, since none of these restrictions or impediments, which are enumerated exclusively, can be applied to the S.S. "Wimbledon" by reason of the nature of her cargo.

The Court considers that the terms of article 380 are categorical and give rise to no doubt. It follows that the canal has ceased to be an internal and national navigable waterway, the use of which by the vessels of states other than the riparian state is left entirely to the discretion of that state, and that it has become an international waterway intended to provide under treaty guarantee easier access to the Baltic for the benefit of all nations of the world. Under its new regime, the Kiel Canal must be open, on a footing of equality, to all vessels, without making any distinction between war vessels and vessels of commerce, but on one express condition, namely, that these vessels must belong to nations at peace with Germany. [23] The right of the Empire to defend herself against her enemies by refusing to allow their vessels to pass through the canal is therefore proclaimed and recognised. In making this reservation in the event of Germany not

being at peace with the nation whose vessels of war or of commerce claim access to the canal, the Peace Treaty clearly contemplated the possibility of a future war in which Germany was involved. If the conditions of access to the canal were also to be modified in the event of a conflict between two Powers remaining at peace with the German Empire, the Treaty would not have failed to say so. It has not said so and this omission was no doubt intentional.

The intention of the authors of the Treaty of Versailles to facilitate access to the Baltic by establishing an international regime, and consequently to keep the canal open at all times to foreign vessels of every kind, appears with still greater force from a comparison of the wording of Article 380 with that of the other provisions to be found in Part XII.

Although the Kiel Canal, having been constructed by Germany in German territory, was, until 1919, an internal waterway of the state holding both banks, the Treaty has taken care not to assimilate it to the other internal navigable waterways of the German Empire. A special section has been created at the end of Part XII, dealing with ports, waterways and railways, and in this special section rules exclusively designed for the Kiel Canal have been inserted ; these rules differ on more than one point from those to which other internal navigable waterways of the Empire are subjected by Articles 321 to 327. This difference appears more especially from the fact that the Kiel Canal is open to the war vessels and transit traffic of all nations at peace with Germany, whereas free access to the other German navigable waterways referred to above is limited to the Allied and Associated Powers alone. This comparison furnishes a further argument with regard to the construction of Article 380, over and above those already deduced from its letter and spirit.

The provisions relating to the Kiel Canal in the Treaty of [24] Versailles are therefore self-contained; if they had to be supplemented and interpreted by the aid of those referring to the inland navigable waterways of Germany in the previous Sections of Part XII, they would lose their "raison d'être", such repetitions as are found in them would be superfluous and there would be every justification for surprise at the fact that, in certain cases, when the provisions of Articles 321 to 327 might be applicable to the canal, the authors of the Treaty should have taken the trouble to repeat their terms or re-produce their substance.

The idea which underlies Article 380 and the following articles of the Treaty is not to be sought by drawing an analogy from these provisions but rather by arguing *a contrario*, a method of argument which excludes them.

In order to dispute, in this case, the right of the S.S. "Wimbledon" to free passage through the Kiel Canal under the terms of Article 380, the argument has been urged upon the Court that this right really amounts to a servitude by inter-national law resting upon Germany and that, like all restrictions or limitations upon the exercise of sovereignty, this servitude must be construed as restrictively as possible and confined within its narrowest limits, more especially in the sense that it should not be allowed to affect the rights consequent upon neutrality in an armed conflict. The Court is not called upon to take a definite attitude with regard to the question, which is moreover of a very controversial nature, whether in the domain of international law, there really exist servitudes analogous to the servitudes of private law. Whether the German, Government is bound by virtue of a servitude or by virtue of a contractual obligation undertaken towards the Powers entitled to benefit by the terms of the Treaty of Versailles, to allow free access to the Kiel Canal in time of war as in time of peace to the vessels of all nations, the fact remains that Germany has to submit to an important limitation of the exercise of the sovereign rights which no one disputes that she possesses over the Kiel Canal. This fact constitutes a sufficient reason for the restrictive interpretation, in case of doubt, of the clause which produces such a limitation. But the Court feels obliged to stop at the point where the so-called [25] restrictive interpretation would be contrary to the plain terms of the article and would destroy what has been clearly granted.

The argument has also been advanced that the general grant of a right of passage to vessels of all nationalities through the Kiel Canal cannot deprive Germany of the exercise of her rights as a neutral power in time of war, and place her under an obligation to allow the passage through the canal of contraband destined for one of the belligerents; for, in this wide sense, this grant would imply the abandonment by Germany of a personal and imprescriptible right, which forms an essential part of her sovereignty and which she neither could nor intended to renounce by anticipation. This contention has not convinced the Court; it conflicts with general considerations of the highest order. It is also gainsaid by consistent international practice and is at the same time contrary to the wording of Article 380 which clearly contemplates time of war as well as time of peace. The Court declines to see in the conclusion of any Treaty by which a

State undertakes to perform or refrain from performing a particular act an abandonment of its sovereignty. No doubt any convention creating an obligation of this kind places a restriction upon the exercise of the sovereign rights of the State, in the sense that it requires them to be exercised in a certain way. But the right of entering into international engagements is an attribute of State sovereignty.

As examples of international agreements placing upon the exercise of the sovereignty of certain states restrictions which though partial are intended to be perpetual, the rules established with regard to the Suez and Panama Canals were cited before the Court. These rules are not the same in both cases; but they are of equal importance in that they demonstrate that the use of the great international waterways, whether by belligerent men-of-war, or by belligerent or neutral merchant ships carrying contraband, is not regarded as incompatible with the neutrality of the riparian sovereign.

By the Convention of Constantinople of October 29th, [26] 1888 the Governments of Austria-Hungary, France, Germany, Great Britain, Italy, Holland, Russia, Spain and Turkey, declared, on the one hand, that the Suez Maritime Canal should "always be free and open, in time of war as in time of peace, to every vessel of commerce or of war without distinction of flag" including even the vessels of countries at war with Turkey, the territorial sovereign, and on the other hand, that they would not in any way "interfere with the free use of the canal, in time of war as in time of peace", the right of self-defence on the part of the territorial sovereign being nevertheless reserved up to a certain point; no fortifications commanding the canal may be erected. In fact under this regime belligerent men-of-war and ships carrying contraband have been permitted in many different circumstances to pass freely through the Canal; and such passage has never been regarded by anyone as violating the neutrality of the Ottoman Empire.

For the régime established at Panama, it is necessary to consult the Treaty between Great Britain and the United States of November 18th, 1901, commonly called the Hay-Pauncefote Treaty, and the Treaty between the United States and the Republic of Panama of November 18th, 1903. In the former, while there are various stipulations relating to the "neutralisation" of the Canal, these stipulations being to a great extent declaratory of the rules which a neutral State is

bound to observe, there is no clause guaranteeing the free passage of the canal in time of war as in time of peace without distinction of flag and without reference to the possible belligerency of the United States, nor is there any clause forbidding the United States to erect fortifications commanding the Canal. On the other hand, by the Treaty of November 18th, 1903, the Republic of Panama granted to the United States "in perpetuity the use, occupation and control" of a zone of territory for the purposes of the canal, together with the use, occupation and control in perpetuity of any lands and waters outside the zone which might be necessary and convenient for the same purposes; and further granted to the United States in such zone and in the auxiliary lands and waters "all the rights, power and authority ... which the United [27] States would possess and exercise if it were the sovereign of the territory... to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power or authority". The Treaty further conceded to the United States the right to police the specified lands and waters with its land and naval forces "and to establish fortifications for these purposes". In view of these facts, it will be instructive to consider the view which the United States and the nations, of the world have taken of the rights and the liabilities of the United States as the builder and owner of the Panama Canal exercising, subject always to the stipulations of existing treaties, sovereign powers and exclusive jurisdiction over the Canal and the auxiliary territory and waters.

By the Proclamation issued by the President of the United States on November 13th, 1914, for the regulation of the use of the Panama Canal and its approaches in the world war, express provision was made for the passage of men-of-war of belligerents as well as of prizes of war, and no restriction whatever was placed upon the passage of merchant ships of any nationality carrying contraband of war. But, by the Proclamation of May 23rd, 1917, issued after the entrance of the United States into the war, the use of the canal by ships, whether public or private, of an enemy or the allies of an enemy, was forbidden, just as, by Article 380 of the Treaty of Versailles, the Kiel Canal is closed to the vessels of war and of commerce of nations not at peace with Germany.

In the Proclamation of May 23rd, 1917, the carriage of contraband is not mentioned; but, by the Proclamation of December 3rd, 1917, issued under the Act of Congress of June 15th, 1917, the Secretary of the Treasury was authorised to make regulations governing the movement

of vessels in territorial waters of the United States ; and by a subsequent Executive Order, issued under the same law, the Governor of the Panama Canal was authorised to exercise within the territory and waters of the canal the same powers as were conferred by the law upon the Secretary of the Treasury. By [28] a Proclamation of August 27th, 1917, it was made unlawful to take munitions of war out of the United States or its territorial possessions to its enemies without licence.

It has never been alleged that the neutrality of the United States, before their entry into the war, was in any way compromised by the fact that the Panama Canal was used by belligerent men-of-war or by belligerent or neutral merchant vessels carrying contraband of war.

The precedents therefore afforded by the Suez and Panama Canals invalidate in advance the argument that Germany's neutrality would have necessarily been imperilled if her authorities had allowed the passage of the "Wimbledon" through the Kiel Canal, because that vessel was carrying contraband of war consigned to a state then engaged in an armed conflict. Moreover they are merely illustrations of the general opinion according to which when an artificial waterway connecting two open seas has been permanently dedicated to the use of the whole world, such waterway is assimilated to natural straits in the sense that even the passage of a belligerent man-of-war does not compromise the neutrality of the sovereign State under whose jurisdiction the waters in question lie.

The next question to be considered is whether Germany was entitled to invoke her rights and duties as a neutral power and the provisions of her Neutrality Orders issued in connection with the Russo-Polish war as a ground for her refusal to allow the "Wimbledon" to enter the Kiel Canal, in spite of the categorical terms of Article 380 of the Treaty of Versailles.

The first of the Orders above mentioned dated July 25th, 1920, contains the following:

"In consequence of Germany's neutrality in the war which has arisen between the Republic of Poland and the, Federal Socialist Republic of the Russian Soviets ... the Government enacts as follows:

"Article 1 : The export and transit of arms, munitions, [29] powder and explosives and other articles of war material is prohibited in so far as these articles are consigned to the

territories of the Polish Republic or of the Federal Socialist Republic of the Russian Soviets".

A detailed list of the substances and articles, the export and transit of which are forbidden, was given some days later in a further Order, dated July 30th, 1920.

The export prohibition contained in the German Neutrality Orders clearly could not apply to the passage through the Canal of the articles enumerated when such articles were despatched from one foreign country and consigned to another foreign country. Nor does the word "transit" appear to refer to the Kiel Canal; it no doubt only refers to the German territory to which the stipulations of Article 380 are not applicable. In any case a neutrality order, issued by an individual State, could not prevail over the provisions of the Treaty of Peace.

Since Article 380 of the Treaty of Versailles lays down that the Kiel Canal shall be maintained free and open to the vessels of commerce and war of all nations at peace with Germany, it is impossible to allege that the terms of this article preclude, in the interests of the protection of Germany's neutrality, the transport of contraband of war. The German Government had not at the time when the "Wimbledon" incident took place claimed any right to close the Canal to ships of war of belligerent nations at peace with Germany. On the contrary, in the note of the President of the German Delegation to the President of the Conference of Ambassadors of April 20th, 1921, it is expressly stated that the German Government claimed to apply its neutrality orders only to vessels of commerce and; not to vessels of war. The Court is not called upon to give an opinion in regard to the legal effect of such statement; but if, as seems certain, it contains, in regard to the passage of belligerent war vessels through the Kiel Canal, an accurate interpretation of the Treaty of Versailles, it follows *a fortiori* that the passage of neutral vessels carrying contraband of war is authorised by Article 380, and cannot be [30] imputed to Germany as a failure to fulfil its duties as a neutral. If, therefore, the "Wimbledon", making use of the permission granted it by Article 380, had passed through the Kiel Canal, Germany's neutrality would have remained intact and irreproachable.

From the foregoing, therefore, it appears clearly established that Germany not only did not, in consequence of her neutrality, incur the obligation to prohibit the passage of the

"Wimbledon" through the Kiel Canal, but, on the contrary, was entitled to permit it. Moreover under Article 380 of the Treaty of Versailles, it was her definite duty to allow it. She could not advance her neutrality orders against the obligations which she had accepted under this Article. Germany was perfectly free to declare and regulate her neutrality in the Russo-Polish war, but subject to the condition that she respected and maintained intact the contractual obligations which she entered into at Versailles on June 28th, 1919.

In these circumstances it will readily be seen that it would be useless to consider in this case whether the state of war between Russia and Poland, and with it Germany's neutrality, had or had not terminated at the date on which the "Wimbledon" incident occurred. In war time as in peace time the Kiel Canal should have been open to the "Wimbledon" just as to every vessel of every nation at peace with Germany.

B.

The Court having arrived at the conclusion that the respondent, Germany, wrongfully refused passage through the Canal to the vessel "Wimbledon", that country is responsible for the loss occasioned by this refusal, and must compensate the French Government, acting on behalf of the Company known as "Les Affréteurs réunis", which sustained the loss.

The claim for compensation formulated is tabulated as follows in the Case filed by the Applicants: [31]

1. Demurrage: 11 days freight from March 21st to April 1st inclusive. The rate at which the vessel was chartered being 17/6 per ton per month and the vessel being of 6,200 tons dead-weight, the monthly freight is £ 5,425; on the basis of the mean rate of exchange from March 20th to April 1st, 1921, that is to say, 56 francs 284 the amount equivalent to 11 days freight is:	111.956.20
2. Deviation: 2 days estimated in the same manner	20.355.65
3. Fuel	8.437.50
4. Contribution of the vessel to the general expenses of the Company and compensation for loss of profit	33.333.33
	<hr/>
Total:	174.082.68

with interest at 6 % per annum from March 21st, 1921.

After the statements by Counsel the claim under heading (4) was reduced to Frs. 25.000, and was finally composed as follows:

4a. Contribution of the vessel to the general expenses	13.508.35
4b. Stamp duty, etc	9.491.65
Other costs of recovery	2.000.00
	<hr/>
Total: francs	25,000.00

And the total claim is thus reduced to 165.749.35. As regards the first three items of the claim, which refer to the sums payable for freight during eleven days demurrage and two days deviation and the cost of fuel, the Court approves the estimates submitted. The respondent has not questioned their correctness; moreover these estimates are for the most part borne out by the evidence produced during the proceedings. As regards the number of days it appears to be clear that the vessel, in order to obtain recognition of its right, was justified in awaiting for a reasonable time the result of the diplomatic negotiations entered into on the subject, before continuing its voyage. [32]

The fourth item, which relates to the claim for repayment of the share of the vessel in the general expenses of the Company, has been contested by the respondent; the Court considers that he is justified in doing so. The expenses in question are not connected with the refusal of passage.

The Court has arrived at the same conclusion with regard to the claim for Government stamp duty and other costs of recovery included under the same heading.

As regards the rate of interest, the Court considers that in the present financial situation of the world and having regard to the conditions prevailing for public loans, the 6 % claimed is fair; this interest, however, should run, not from the day of the arrival of the "Wimbledon" at the entrance to the Kiel Canal, as claimed by the applicants, but from the date of the present judgment, that is to say from the moment when the amount of the sum due has been fixed and the obligation to pay has been established.

The Court does not award interim interest at a higher rate in the event of the judgment not being complied with at the expiration of the time fixed for compliance. The Court neither can nor should contemplate such a contingency.

With regard to the limit of time for compliance, the Court is of opinion that the exigencies of the organisation of government services and financial and administrative regulations necessitate a longer time than that suggested by the applicants for the payment of the sum for which Germany is liable. For this reason the Court has fixed the time at three months.

Payment shall be effected in French francs. This is the currency of the applicant in which his financial operations and accounts are conducted, and it may therefore be said that this currency gives the exact measure of the loss to be made good.

Article 64 of the Statute lays down that each party shall bear its own costs unless otherwise decided by the Court. The Court sees no reason for departing from this general rule.  
[33]

V.

*For these reasons*

the Court,

having heard both parties,

Declares that the suit brought before it by the Governments of His Britannic Majesty, of the French Republic, of His Majesty the King of Italy and of His Majesty the Emperor of Japan, and in which the Government of the Polish Republic has intervened, has been validly submitted by all the parties;

and passes judgment to the following effect:

1. that the German authorities on March. 21st, 1921, were wrong in refusing access to the Kiel Canal to the S.S. "Wimbledon" ; .
2. that Article 380 of the Treaty signed at Versailles on June 28th, 1919 between the Allied and Associated Powers and Germany, should have prevented Germany from applying to the Kiel Canal the Neutrality Order promulgated by heron July 25th, 1920 ;
3. that the German Government is bound to make good the prejudice sustained by the vessel and her charterers as the result of this action;
4. that the prejudice sustained may be estimated at the sum of 140, 749 frs. 35 centimes, together with interest at 6 % per annum from the date of the present judgment;
5. that the German Government shall therefore pay to the Government of the French Republic, at Paris, in French francs, the sum of 140, 749 frs. 35 centimes with interest at 6 % per annum from the date of this judgment; payment to be effected within three months from this day;
6. and that each party shall bear its own costs.

Done in French and English, the French text being authoritative. [34]

At the Peace Palace, The Hague, this seventeenth day of August one thousand nine hundred and twenty three, in seven copies, one of which is to be placed in the archives of the

Court and the others to be forwarded to the Agents of the Governments of the Applicant, Intervening and Respondent Powers, respectively.

*(Signed)* Loder,

President.

*(Signed)* Å. Hammarskjöld,

Registrar.

MM. Anzilotti and Huber, Judges, and M. Schücking, German National Judge, declaring that they are unable to concur in the judgment delivered by the Court, and availing themselves of the right conferred on them by Article 57 of the Court Statute, have delivered the separate opinions which follow hereafter.

*(Initialed)* L.

*(Initialed)* A. H.

[35] Dissenting Opinion by Mm. Anzilotti and Huber.

1. WE, THE UNDERSIGNED, are unable to concur in the judgment delivered by the Court on August 17th, 1923, in the case of the "Wimbledon", for reasons the most important of which are hereinafter set forth. As the essential difference between our standpoint and that of the majority concerns a point which affects the interpretation of international conventions in general, we feel it to be our duty to avail ourselves of the right conferred upon us by the Statute to deliver a separate opinion.

In our opinion, the question to be decided is not whether Germany was in a position to advance, in justification of her refusal to allow the passage through the Kiel Canal of the steamship "Wimbledon", a neutral duty taking precedence over the contractual obligation in favour of the shipping of States at peace with Germany, arising out of Article 380 and the following articles. The question is rather as follows : Do the clauses of the Treaty of Versailles relating to the Kiel Canal also apply in the event, of Germany's neutrality, or do they only contemplate normal circumstances, that is to say, a state of peace, without affecting the rights and duties of neutrality ? The question thus stated appears to be in harmony with the submissions of the Respondent.

2. Before proceeding to present our argument, one fact which is of no importance from the standpoint adopted in the judgment, must be noted. At the time when the steamship "Wimbledon" was refused the right of passage, a state of war still prevailed between Poland and Russia, and Germany was therefore still in the position of a neutral. That this was the case is shown, apart from any considerations with regard to the external and internal situation of Germany, by the actual terms of the peace preliminaries and of article 1 of the final Peace Treaty between Poland and Russia, and more especially by the fact that an armistice forming an integral part of the Peace preliminaries under Article 13 of those preliminaries, was in force until the ratification of the final Treaty; this ratification, however, had not yet taken place at the time in question. [36]

3. It must in the first place be observed that, for the purposes of the interpretation of contracts which take the form of international conventions, account must be taken of the complexity of interstate relations and of the fact that the contracting parties are independent

political entities. Though it is true that when the wording of a treaty is clear its literal meaning must be accepted as it stands, without limitation or extension, it is equally true that the words have no value except in so far as they express an idea ; but it must not be presumed that the intention was to express an idea which leads to contradictory or impossible consequences or which, in the circumstances, must be regarded as going beyond the intention of the parties. The purely grammatical interpretation of every contract, and more especially of international treaties, must stop at this point.

In this respect, it must be remembered that international conventions and more particularly those relating to commerce and communications are generally concluded having regard to normal peace conditions. If, as the result of a war, a neutral or belligerent State is faced with the necessity of taking extraordinary measures temporarily affecting the application of such conventions in order to protect its neutrality or for the purposes of national defence, it is entitled to do so even if no express reservations are made in the convention. This right possessed by all nations, which is based on generally accepted usage, cannot lose its *raison d'être* simply because it may in some cases have been abused; it has more-over been recognised by a clause inserted in the Barcelona conventions concluded for the purpose of giving effect to the principle of freedom of communications which was enunciated in Article 23 of the Covenant of the League of Nations.

This clause runs as follows:

"This Statute does not prescribe the rights and duties of belligerents and neutrals in time of war. The Statute shall, however, continue in force in time of war, so far as such rights and duties permit."

The absence of a similar clause in a particular convention cannot be construed in the sense that the convention must<sup>[37]</sup>be applied without regard to the special requirements of a state of war or neutrality. On the contrary, the object of the clause is rather to afford a certain guarantee against possible abuses designed to restrict the application of the convention to an extent not justified by the special conditions attaching to a state of neutrality or of war.

At this point, it must be stated that a State may enter into engagements affecting its freedom of action as regards wars between third States. But engagements of this kind, having

regard to the gravity of the consequences which may ensue, can never be assumed ; they must always result from provisions expressly contemplating the situations arising out of a war. The right of a State to adopt the course which it considers best suited to the exigencies of its security and to the maintenance of its integrity, is so essential a right that, in case of doubt, treaty stipulations cannot be interpreted as limiting it, even though these stipulations do not conflict with such an interpretation.

This consideration applies with particular force in the case of perpetual provisions without reciprocity which affect the interests of third States.

4. The foregoing considerations could not be effective against a definite provision expressly referring to the circumstances arising out of a war. But no such provision is to be found in Part XII, Section VI of the Treaty of Versailles; on the contrary, this section taken by itself and compared with the other sections of the same part of this Treaty, or with other treaties, rather suggests an interpretation in accordance with the general principles enunciated above.

The main argument of the Applicants upon which the judgment is based, is taken from the final sentence of Article 380, according to which the Kiel Canal shall be maintained free and open to the vessels of commerce and war "of all nations at peace with Germany". It has been deduced from this that the obligation entered into by Germany is only capable of one limitation, that is to say, that Germany may refuse access to the canal to the vessels of nations with which she is at war. In all other circumstances the canal must be maintained free and open, for a state of war is expressly [38] referred to as well as a state of peace, since the article contemplates the possibility of Germany being herself a belligerent.

Nevertheless, the words "nations at peace with Germany" by no means necessarily mean that States which are not at war with her are entitled to avail themselves in all possible circumstances of the provisions of Article 380 and the following Articles ; they rather mean that a state of peace is the condition upon which the application of these provisions is dependent. This condition, which is almost self-evident and is of no material importance, is very naturally inserted in a treaty, the provisions of which are connected with the reestablishment of a state of peace. It seems difficult to deduce from it any very far reaching consequences.

Moreover, Article 380 must not be considered alone but in connection with the other provisions of the same section. It will then be seen that this Article, the first of the section, lays down the general rule which is supplemented and limited in the following articles. But it is clear

that these Articles only lay down rules for passage through the canal in so far as ordinary peace time traffic is concerned. This applies more particularly with regard to paragraph 2 of Article 381, according to which Germany may place certain impediments upon the movement of vessels. None of these impediments relate to the measures which Germany might take in the capacity of a belligerent or neutral power, so that the alter-native has to be faced of acknowledging either that Germany is not entitled in this capacity to take any special measures, or that in this respect her freedom of action has not been limited by the Treaty. It appears to us, however, difficult to believe that there was an intention to prohibit Germany from taking the measures necessary to protect the paramount interests which may be at stake for her in the event of war or neutrality, whilst her right to take the necessary measures to ensure respect for her police, customs and sanitary regulations etc. that is to say, to protect relatively unimportant interests was formally recognised.

5. A comparison between article 380 to 386 an Section II of the same part of the Treaty, relating to navigation on the internal waterways of Germany, clearly shows that these [39] articles, though they occupy a place apart in the Treaty and possess characteristics of their own, much resemble the provisions of that section. And whereas the differences relate mainly to the duration of the obligations undertaken by Germany and to the beneficiaries of these obligations, the general rule laid down in para. 2 of Article 381 is simply a word for word reproduction of the rule laid down in paragraph 4 of Article 327; moreover, Section II like Section VI, contains no provision expressly dealing with a state of war or neutrality. It seems, however, hardly possible to suppose that, because Germany has undertaken to allow to the Allied and Associated Powers freedom of transit by her navigable waterways, without imposing any restrictions other than those exclusively enumerated in para. 4 of Article 327, she has lost the right of taking such measures as may be indicated by circumstances in time of war. Indeed the contrary has been explicitly recognised in the Act for the regulation of navigation on the Elbe drawn up in execution of the provisions of the Treaty of Versailles.

6. Again, if Article 380 should be taken in its strictly literal sense, it would follow that Germany as a belligerent, would have to allow the canal to be free and open to the vessels of neutral nations, since such vessels would belong to nations at peace with Germany. But an obligation of this kind is hardly conceivable without a corresponding obligation on the part of the States with which Germany was at war to respect the right of free passage through the Canal.

An obligation imposed upon a State to leave open a waterway in time of war is only comprehensible in so far as such waterway is protected from the action of belligerents. This is the case as regards the Conventions relating to the Suez and Panama Canals. Moreover, whatever may be the points of semblance and of difference between these two Conventions, the fact remains that they have taken care to ensure respect for these maritime waterways in time of war, as being a matter of supreme importance. The blockade of the canal and enemy acts, either in the canal or in the adjacent waters, are expressly forbidden; the conditions and regulations for the transit of belligerent war vessels are precisely laid down, etc. On [40] the other hand, no provision of this kind is to be found in the section of the Treaty of Versailles dealing with the Kiel Canal, and it is difficult to understand why it has been omitted, if it is true that the Treaty was intended to institute a régime similar to that established by the conventions relating to the Suez and Panama Canals. A comparison, therefore, between these three international agreements strikingly confirms the conclusion which we have felt obliged to draw from the interpretation of the various provisions of Section VI and from the relation between that Section and Section II of Part XII of the Treaty of Versailles. The fact that certain States which are peculiarly interested in the régime obtaining in the Baltic are not parties to the Treaty of Versailles furnishes a further argument tending in the same direction.

7. The conclusion, therefore, which appears to follow from the foregoing considerations is that the obligations under-taken by Germany to maintain the Kiel Canal free and open to vessels of nations at peace with her does not exclude her right to take the measures necessary to protect her interests as a belligerent or neutral power. This does not mean that the Canal is not also free in time of war, but this freedom will then necessarily be limited either by the exigencies of national defence, if Germany is a belligerent, or, if she is neutral, by the measures - differing according to circumstances - which she may take. This principle corresponds exactly to the rule already mentioned which was adopted in the Barcelona Conventions. The legal status of the Kiel Canal, therefore, resembles that of the internal navigable waterways of international concern. Such indeed would appear to have been the intention of the authors of the Treaty of Versailles in so far as it can be discerned from the correspondence exchanged on the subject between the two contracting parties. An indication in the same direction might also be seen in the fact that whilst Germany was, under Clause 25 of the Armistice Conditions of November 11th, 1918, debarred

from pleading neutrality, this provision does not reappear either in the text of the Treaty or in the notes exchanged.

For these reasons, we are of opinion that the only question [41] to be decided is whether the application to the Kiel Canal of the neutrality regulations adopted by Germany was an arbitrary act calculated unnecessarily to impede traffic. Such a contention appears impossible, having regard to the statements made during the hearing by the German Agent, which show the gravity of the international and internal political situation at that time.

8. The basis of the arguments developed above would be essentially modified if we were to take as a starting point the fact that Germany herself has admitted an obligation to allow the men-of-war of belligerents to pass through the Canal, in spite of her neutrality, and consequently to fail to comply with an essential obligation of every neutral State, namely the duty of prohibiting the passage of belligerent forces through her territory. Such an admission might perhaps be deduced from a passage in the Note of the German Delegation to the Conference of Ambassadors dated April 20th, 1921, from explanations given in the speech of the German Agent before the Court, and, above all, from an argument on page 8 of the Rejoinder. These passages are, however, far from being very clear. At all events, this admission, which is based incorrectly on the extritoriality of war vessels and on the material impossibility of preventing their passage, is in complete contradiction with the conclusions of the Respondent and with his essential argument based on the alleged personal and imprescriptible rights of neutrality. It is even doubtful whether such an admission would not be contrary to Article 380itself, since the presence of the war vessels of belligerents might seriously compromise the essential object of this provision, that is to say, the right of peaceful shipping to pass freely through the Canal.

Even if the German statements above-mentioned were more conclusive with regard to the admission in question, it would hardly be possible to consider them as having the value of an authoritative statement which it would be possible to adduce.

9. If the view be adopted that the passage through the [42] Kiel Canal of any ship - even if it were a "convoy" within the meaning of Article 2 of the Fifth Hague Convention of 1907 - could not infringe the neutrality of Germany, the undersigned feel called upon to make a reservation with regard to the recognition of a right to international protection for the transport of contraband. It is not disputed that present international law allows neutrals the option of

suppressing or tolerating in their territory commerce in and transport of contraband, and more especially of arms and munitions. Again the transport of such commodities, even under a neutral flag, is not protected against a belligerent, and the latter is entitled, in certain conditions, to confiscate as a penalty even the neutral vessel and that part of its cargo which is not contraband. This is explained by the fact that commerce in and transport of contraband, although not necessarily affecting the neutrality of States, is regarded under the law of nations as unlawful because it assumes the guise of peaceful commerce for warlike purposes. This idea seems to acquire still greater force when considered in the light of the Covenant of the League of Nations, and more especially of its Articles 8 and 23 paragraph (d).

For this reason it seems difficult to admit a right, as between neutral States, enforceable at law to trade in and to transport contraband, whereas the same interests are unprotected as against a belligerent.

*(Signed)* Anzilotti.

*(Signed)* Huber.

[43] Dissenting Opinion by M. Schücking.

I. THE UNDERSIGNED, am also unable to concur in the judgment of the Court, for the following reasons:

I. The right to free passage through the Kiel Canal, in my opinion, undoubtedly assumes the form of a *servitus juris publici voluntuaria*. This conception, which for centuries has proved extremely useful in international law, is, it is true, at the present time the subject of controversy amongst writers on international law, but its importance has in fact been increased by the peace treaties following the World War. For in these treaties many legal situations have been created which can be placed in no other category than that of servitudes of international law.

If the right in question is regarded as a servitude, important consequences ensue with respect to the present case.

a) According to the teaching of writers on international law, all treaties concerning servitudes must be interpreted restrictively in the sense that the servitude, being an exceptional right resting upon the territory of a foreign State, should limit as little as possible the sovereignty of that State. According to a purely literal construction of Article 380, the servitude is excluded from application only in cases where ships are concerned which belong to nations themselves at war with Germany. Serious doubts, however, arise as to whether Germany, in order to safeguard her interests, when placed in the position of a belligerent or neutral, should in fact, under Article 380, lose the right to take special measures as regards the canal, not provided for under Article 381, para. 2, also as against ships belonging to States other than her enemies. The canal is under the jurisdiction of Germany and it has not been neutralised as the Suez Canal had been, nor even in a still less complete form like the Panama Canal. Its use has rather been internationalised, like that of the great inland waterways. The right to take special measures in times of war or neutrality has not been expressly renounced ; nor can such renunciation be inferred from the fact that the Canal [44] is to be "maintained free and open." The fact that the right is granted in perpetuity does not in itself exclude the possibility of regulating or even of temporarily suspending its exercise, and the essential words which were used to provide for the neutralisation of the Suez Canal and which were reproduced in the treaty relating to the Panama Canal namely "in time of war as in time of peace", do not appear in Article 380. It is possible that a restrictive

interpretation of the treaty establishing the servitude may infringe the purely literal meaning of Article 380, an interpretation, that is to say, according to which in time of war and neutrality the Reich, as possessing sovereignty over the canal zone, is entitled to take such measures against shipping as in normal times may not be taken by her under Article 380 and the following Articles. This interpretation, how-ever, is imposed by two further considerations : In the first place there is the fact that Article 381, para. 2 proves the willingness of the victorious States to guarantee in normal times the interests of the administration of the riparian State even as against the right of free passage, a fact which makes it possible to argue that when provision is made for these less important interests, it is to be inferred that the more important interests are also covered. In the second place there is the circumstance that during the peace negotiations Germany, with regard to the clearly inadequate provisions of Article 380, made the express proposal "a conclure des arrangements précis", though, it is true, on condition of reciprocity. Seeing that the victorious States did not accept this suggestion, they must allow the principle of Roman law "*obscuritas pacti nocet ei qui apertius loqui potuit*" to prevail against them.

b) Again, according to the teaching of writers on international law the States benefiting by the servitude are under the obligation *civiliter uti* as regards the State under servitude. The vital interests of the State under servitude must in all circumstances be respected. From this standpoint the benefiting State must allow its rights at times to be temporarily impaired. The vital interests of Germany at the moment made it necessary for her to observe a strict and absolute [45] neutrality with regard to the war which was being waged in the immediate vicinity of her frontiers. In this respect the internal political situation of Germany at the time plays no unimportant part. Already on several occasions the transit of eastward bound trains loaded with munitions had given rise in Germany, for instance at Giessen, Marburg and Untertürkheim, to local disturbances which it had not always been possible for the police and Reichswehr to master. In several localities the workers' organisations had decided to use force in order to stop the transit of war material. Similar occurrences might also have taken place in the Kiel Canal where, owing to the existence of locks and gates, a ship could only pass with the assistance of German labour. It is certain that the principle of respect for treaties requires that the State which has accepted an obligation should not lightly invoke internal difficulties as an excuse for disregarding external engagements. But the German Government at that time was faced with quite exceptional difficulties arising out of Germany's internal political situation. If it is possible

to apply the doctrine of *civiliter uti* to a servitude of international law, then the German Government, in applying also to the Kiel Canal the prohibition against transit of contraband, did so in order to safeguard its vital interests. In doing this Germany did not allow a special right of necessity to prevail over her contractual obligations ; she merely made use of the natural limitations to which every servitude is subjected.

II. Considerations of another kind also justified Germany in prohibiting, in spite of Article 380, the passage of the "Wimbledon" through the Kiel Canal. One of the two belligerent States - Russia - did not participate in the Versailles Treaty; in my opinion, Germany therefore remained under an obligation to fulfil her duties as a neutral towards her. In refutation of this contention, it has been asserted that there is a general consensus of legal opinion to the effect that when an artificial waterway connecting two open seas has been permanently dedicated to the use of the whole world, such waterway is assimilated to natural straits, in the sense that the neutral riparian State can no longer be held [46] responsible either for the passage of ships belonging to belligerents or, probably, for the passage of ships carrying munitions, and this even when such dedication has taken place only by means of a special agreement. The existence of such a consensus of opinion, however, does not seem to me to be sufficiently proved. The practice as regards the Suez and Panama Canals is adduced as a basis for the opinion in question. In refutation of this argument, it must once more be stated that the legal situation of the Suez and Panama Canals is entirely different from that of the Kiel Canal, in that, as regards the former Canals, neutralisation has taken place in the sense of a general "Befriedung" (negative neutralisation) of the Canal Zone, whereas such a neutralisation is not established by Article 380 as regards the Kiel Canal. Even admitting that the Panama Canal is placed under the exclusive control of the United States, it is nevertheless true that the Hay-Pauncefote Treaty of November 18th, 1901, mentions this general neutralisation and contains a number of provisions in the same sense. In these circumstances it would appear open to objection to apply *de plano* to the Kiel Canal conceptions of international law which have been developed in connection with the Suez and Panama Canals, when, as has already been stated, the use only of this Canal has been internationalised, a fact which undoubtedly tends rather to create a resemblance between it and international inland waterways.

In these circumstances it is in my opinion at all events necessary to answer the question whether the passage of the "Wimbledon" was compatible with Germany's duties as a neutral towards Russia. The answer to this question must for the following reasons be in the negative.

A close examination of the origin of Articles 2 and 7 of the fifth Hague Convention of 1907 concerning the rights and duties of Neutral Powers and persons in land warfare, and of the application of these articles, during the World War, in particular by Holland in her capacity as a neutral, shows that the despatch of war material, even when not under military control or escort, is to be considered as a convoy in the sense of Article 2 of the Convention when it does not [47] take place as the result of a commercial transaction, but when the belligerent himself assumes the double capacity of consignor and consignee, no matter whether the transport is such a convoy. It follows that the German Reich had not the right to grant the "Wimbledon" passage through the Kiel Canal seeing that the munitions in question were despatched by a effected by means of private ships. No neutral may tolerate the transit through its territory of Polish Mission in Salonika, were consigned to the Naval Base of the Polish State in Danzig and were the property of that country; moreover, at that date a state of peace had not yet been reestablished. As Holland, in the capacity of a neutral, rightly emphasised in connection with the sand and gravel transport on the Rhine, and having regard to the fact that one belligerent had in that matter invoked the Rhine Navigation Act, neutral duties must take precedence over any contractual obligations. Such is also the doctrine of the writers on international law (see Richard Kleen: *Lois et usages de la neutralité*. Paris 1898. Vol I: pp. 223, 224). The violation of the duties of a neutral no doubt constitutes an offence under international law even when treaty obligations assumed towards third States can be put forward in support of such an act. It cannot have been the intention of the victorious States to bind the Reich, by means of the Versailles Treaty, to commit such offences as against third States. It would, moreover, have been impossible to give effect to such an intention, because a legally binding contractual obligation cannot be undertaken to perform acts which would violate the rights of third parties.

(Signed) Walther Schücking.