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[65] Permanent Court of International Justice

<i>Before:</i>	M. Guerrero,	<i>Vice-President (officiating President);</i>
Baron	Rolin-Jaequemyns,	<i>Judges. [66]</i>
Count	Rostworowski,	
Mm.	Fromageot,	
	Altamira,	
	Anzilotti,	
	Urrutia,	
Sir	Cecil Hurst,	
Mm.	Schücking,	
	Negulesco,	
Jhr.	Van Eysinga,	

In the case concerning reparation for loss and damage alleged to have been sustained by Mr. Oscar Chinn, a British subject, as the result of certain measures taken by the Belgian Government,

Between the Government of the United Kingdom of Great Britain and Northern Ireland, represented by Mr. W. E. Beckett, Second Legal Adviser to the Foreign Office, as Agent,

and the Belgian Government, represented by M. de Ruelle, Legal Adviser to the Ministry for Foreign Affairs, as Agent,

The Court,

composed as above - the President of the Court being a national of one of the countries parties to the case, and the functions of President having therefore, in accordance with Article 13 of: the Rules of Court, passed in respect of this case to the Vice-President,

delivers the following judgment:

By a Special Agreement, signed at Brussels on April 13th, 1934, the Belgian Government and the Government of the United Kingdom agreed to submit to the Court a dispute which had arisen between them with regard to a claim made by the Government of the United Kingdom in respect of loss and damage alleged to have been sustained by Mr. Oscar Chinn, a British subject, as the result of certain measures taken and applied in the month of June 1931 and subsequently thereto by the Belgian Government in connection with the limited liability Company "*Union nationale des Transports fluviaux*" (commonly known as "Unatra") in relation to fluvial transport on the waterways of the Belgian Congo.

Under its third Article, this Special Agreement, which came into force on the date of signature, might "be notified to the Registrar of the Court forthwith by either Party". It was actually notified on May 1st, 1934, on which date the diplomatic representatives at The Hague of the two Governments concerned forwarded to the Registrar certified copies of the Special Agreement.

Under Article 1 of the Special Agreement, the Court is called upon to give judgment on the following questions:

"1. Having regard to all the circumstances of the case, were the above-mentioned measures complained of by the Government of the United Kingdom in conflict with the international obligations of the Belgian Government towards the Government of the United Kingdom? [67]

2. If the answer to question i above is in the affirmative, and if Mr. Oscar Chinn has suffered damage on account of the non-observance by the Belgian Government of the above-mentioned obligations, what is the reparation to be paid by the Belgian Government to the Government of the United Kingdom?"

Article 1, however, adds that the Court is requested, before fixing the amount of any reparation that may be payable, to indicate the principles upon which such reparation shall be calculated and to determine the procedure whereby the said amount shall be ascertained, if within a time-limit to be fixed by the Court the contracting Governments have not reached an agreement on the sum to be paid.

The subject of the dispute is thus indicated in accordance with Article 40 of the Statute of the Court.

The communications provided for in Article 40 of the Statute and Article 36 of the Rules of Court were duly despatched on May 3rd and 4th, 1934. Furthermore, on May 3rd, 1934, the

Registrar, pursuant to Article 63 of the Statute and Article 60 of the Rules, gave notice of the institution of these proceedings to the States which, together with Belgium and the United Kingdom of Great Britain and Northern Ireland, had signed the Convention of September 10th, 1919, revising the General Act of Berlin, of February 26th, 1885, and the General Act and Declaration of Brussels, July 2nd, 1890; when transmitting to the Court the text of the Special Agreement, the Government of the United Kingdom had drawn its attention to the fact that the case would raise questions as to the construction of certain articles of that Convention.

In Article 2 of the Special Agreement, the contracting Governments agreed, in accordance with Article 39 of the Rules of Court, that the written proceedings in the suit should comprise the successive presentation of a Case, Counter-Case, and, if necessary, a Reply and a Rejoinder, the Case to be filed by the Government of the United Kingdom, the Counter-Case by the Belgian Government, and so on. In the same Article the two Governments also agreed in proposing the duration of the time-limits to be fixed by the Court for the filing of the documents above mentioned.

The time-limits were fixed in accordance with the Parties' proposal by an Order made on May 2nd, 1934; after an extension granted at the request of both Parties by an Order dated July 14th, 1934, the time-limit for the filing of the Belgian Government's Rejoinder ultimately expired on September 24th, 1934. The documents of the written proceedings having been duly presented within the periods fixed, the case became ready for hearing on that date.

The Government of the United Kingdom, in its Case, asks the Court to adjudge and declare: [68]

"(1) that the measures complained of by the Government of the United Kingdom were in conflict (*a*) with the obligations of the Belgian Government towards the Government of the United Kingdom under the Convention of Saint-Germain ; and (*b*) with the obligations of the Belgian Government towards the Government of the United Kingdom under general international law;

(2) that Mr. Oscar Chinn has suffered damage on account of the non-observance by the Belgian Government of its international obligations towards the Government of the United Kingdom, and that the Belgian Government is accordingly liable to make reparation to the Government of the United Kingdom".

Other submissions are presented with regard to the manner in which the reparation claimed should, if necessary, be calculated, with regard to the ascertainment of the amount of

reparation by an expert, if the Parties have not reached an agreement within a specified time; and lastly, with regard to the fixing by the Court, on receipt of the expert's report and after considering" the observations of the Parties, of the sum to be paid by the Belgian Government to the Government of the United Kingdom.

These submissions are maintained unchanged in the written Reply of the Government of the United Kingdom, which simply adds thereto a request for the rejection of the submissions of the Belgian Government.

As worded in the Counter-Case of the Belgian Government, these submissions are as follows:

"May it please the Court,

To adjudge and declare:

that the measures for which the Belgian Government is blamed are in conflict neither with its international obligations under the Convention of Saint-Germain-en-Laye, nor with those ensuing from general international law ; that accordingly the Belgian Government is not called upon to make any reparation;

alternatively, and should the Court not adopt the views of the Belgian Government with regard to the character of the measures complained of:

that, insufficient proof having been produced to establish according to law that the loss and damage complained of by Mr. Oscar Chinn are the outcome of the measures for which the Belgian Government is blamed, no reparation is due by the latter;

alternatively again :

that in any case the responsibility of the Belgian Government was only partial and a secondary factor, the economic crisis and the decision taken of his own account by Mr. Chinn to close down certain branches of his business which were not affected by the tariff measures adopted by the Belgian Colonial Administration being other and more important factors in the losses which are alleged." [69]

These submissions are not amended in the written Rejoinder of the Belgian Government, but a request is added for the rejection of "all submissions to the contrary".

In the course of public sittings held from October 23rd to October 26th, 1934, the Court heard observations on the procedure to be followed, oral statements and a reply and rejoinder, presented:

on behalf of the Government of the United Kingdom, by Mr. Beckett, Agent, and by Mr. Fachiri, Barrister-at-law, Counsel for that Government;

on behalf of the Belgian Government, by M. de Ruelle, Agent, and by M. Dumont, Director at the Belgian Ministry for the Colonies.

The Agents informed the Court, in accordance with Article 46 of the Rules of Court, that they were agreed that the Agent for the Government of the United Kingdom should be called upon to speak first; accordingly, Mr. Beckett opened the case.

The submissions presented on either side in the written proceedings were not amended in the course of the oral proceedings.

At the beginning of the hearing, the Agent for the Government of the United Kingdom observed that, at the conclusion of the written proceedings, there was still a considerable divergence between the Parties in regard to several matters of fact; he suggested that, in the first place, the Court should decide in a judgment the questions of law in respect of which the two Governments were in dispute; in its judgment the Court might direct an enquiry to be held into the facts if the nature of the Court's judgment on the questions of law was such as to render it necessary and if the Court did not feel able upon the evidence already before it to hold that the effect of the Belgian measures in question was to create a "*de facto* monopoly". The Agent for the Belgian Government, for his part, pointed to the power possessed by the Court under Article 50 of the Statute to order an enquiry at any time and stated that, subject to certain reservations, he saw no reason why the Court should not take note of the wish of the representatives of the United Kingdom. As the proposal made by the latter did not raise a preliminary issue, the Court reserved its decision.

A certain number of documents in support of their contentions were filed on behalf of each of the Parties as annexes to the documents of the written proceedings. With the consent of the Belgian Agent, the Agent for the United Kingdom submitted some additional documents in the course of the hearings¹. [70]

These are the circumstances in which the Court is now called upon to give judgment in the case submitted to it by the Special Agreement of April 13th, 1934.

¹ See list in the Annex.

* * *

According to the statements of the Parties, the dispute forming the subject of these proceedings originated as follows:

Before the war of 1914-1918 and also afterwards until 1925, transport services on the Congo had been operated by, or under the auspices of, the Belgian Government, though not in any way to the exclusion of private enterprises. In 1921 it abandoned this business and transferred it to a Company known as the "Sonatra" Company, which it formed and which was under its management. In 1925, the Sonatra Company combined with a private Company known as "Citas" and became the "*Union nationale des Transports fluviaux*" known as "*Unatra*". According to the statutes of this Company, the State owned more than 70,000 shares out of 120,000; it still at the present time owns more than one-half of the shares (128,987 out of 243,000 shares).

According to the terms of the "*Cahier des charges*" agreement, which was made the subject of a Royal Decree dated March 12th, 1925, and to which the statutes were appended, the Company is under an obligation to the Colony to keep permanently in service a fleet capable of meeting the present needs and future expansion of transport traffic and to establish regular services with fixed time-tables on the Congo and on the Kasaï, as well as on the navigable tributaries of those rivers. Transport rates are to be approved by the Minister for the Colonies or by the Governor-General before being put into force. The Colony has the right to insist on the maintenance of services even though they show a deficit, but is bound to make up the receipts to an amount equal to the running expenses. The Company can not grant exceptional rates without the special permission of the Colony. The State, for its part, is bound to entrust the Company with the transport by water of its officials and goods. It also guarantees interest at 6 per cent, on the debentures of the Company and the amortization of these debentures. The debentures are free of all taxes, whether state or colonial, over and above 2 per cent.

On October 18th, 1928, the Company wrote to the Government, drawing its attention to the adverse results shown for some time past by its business, to the falling off in its receipts though expenses remained practically at the same level, to its obligation to provide regular

services regardless of the cargoes obtainable, to the expenses arising from its obligation to [71] increase its fleet as provided in the *cahier des charges*, and, finally, to the competition of trading companies, which, - according to the Company - , "pursuing a policy which seems to us to be economically unsound, prefer to undertake their own transport by water and, furthermore, place their surplus cargo space, when available, at the disposal of others at rates much lower than those of our tariff". Pointing out that in this way a large proportion of the transport traffic was being diverted into other hands and that, restricted by the *cahier des charges* and by the obligation to maintain fixed rates, it could not compete, the Company asked that its existing rates should be regarded as maximum rates, so that it might enjoy the same freedom as its competitors to grant special rates to regular and important customers, and also be in a position to conclude with its customers fidelity contracts enabling it to grant a rebate on the tariff charges to those agreeing to entrust all their transport business to it.

The Belgian Government acceded to the Company's request in a letter dated October 24th, 1928, but at the same time pointed out that all shippers of the same category must -be treated on the same footing, adding that the slightest complaint might entail, if justified, the withdrawal of this authorization.

A series of contracts were actually concluded by the Company in 1929 and the following years. These contracts were of two kinds: fidelity contracts properly so-called - most of which have, however, expired - and contracts for the taking over or laying up of shipping.

At the beginning of 1929, Mr.Chinn, a British subject, who had worked in the Congo since 1927, came to Leopoldville and established there a river transport and ship-building and repairing business. According to the information furnished by the Agent for the Government of the United Kingdom - which has not been gainsaid in this respect by the Belgian Government - Mr. Chinn was, apart from Unatra, the only fluvial transporter in the Belgian Congo who did not at the same time carry on business as a merchant or as a producer. The Parties, however, disagree as to the volume of his business and the amount of his profits.

In the course of 1930 and 1931, the severe commercial depression which prevailed throughout the whole world seriously affected trade in the Congo colony. On May nth, 1931, the Chamber of Commerce of Leopoldville is stated to have appealed to the Belgian Government to

lend its assistance by effecting a reduction of 50 % in the cost of all transport, by granting export premiums for the benefit of traders and by establishing government control of production. [72]

On June 20th, 1931, the Belgian Minister for the Colonies sent the following communication to various transport concerns whose tariffs the Government was in a position to control, informing them of the decision which he had taken in order temporarily to relieve the critical state of trade:

[*Translation.*]

"Gentlemen,

The collapse of the prices obtained for colonial produce in the European markets necessitates an immediate reduction in the net price of the following Congo products: timber, cocoa, coffee, rubber, cotton, palm-oil, palm nuts, native rice, sesame, and other native produce with the exception of copal.

After consideration of the question, I have come to the conclusion that this reduction in the cost price must be effected, firstly, by a reduction of the expenses of transportation and handling and, secondly, by a diminution of the overhead charges of colonial producers.

Accordingly, I have decided that the rates at present in force for the transport and handling of the above-mentioned products shall be reduced as follows as from July 1st, 1931:

(a) *Manucongo.*

Reduction of 60 % in the rates at present in force for the carriage of raw cotton of native origin; of 33 % in the rates for the carriage of palm-oil, palm nuts, and empty oil-containers.

(b) *Mayumbe Railway Régie.*

Reduction in the rates for the carriage of palm-oil and of empty oil-containers to 1 franc per ton for any distance.

Reduction of 75 % in the rates at present in force for the carriage of palm nuts.

Reduction of 60 % in the rates at present in force for the carriage of timber, coffee, cocoa, sesame and rubber.

(c) *The "Compagnie du Chemin de fer du Congo".*

Reduction of 60 % in the rates at present in force for the carriage of raw cotton of native origin and of 33 % in the rates at present in force for the carriage of palm-oil and empty oil-containers, and also for the haulage of empty tanks.

(d) *The "Union nationale des Transports fluviaux et Manutention Léo".*

Reduction of the rates for the carriage of coffee, rubber, cocoa, cotton, palm-oil, sesame, native rice and empty oil-containers to 1 franc per ton for any distance.

Reduction of 75 % in the rates for the carriage of palm nuts for any distance. [73]

Reduction of the handling charges at present in force: by 60 % for cotton, 33 % for palm-oil and empty oil-containers and palm nuts.

(e) *Congo Local Railways.*

Reduction of 60 % in the rates at present in force for the carriage of raw cotton of native origin.

(f) *The "Societe des Messageries automobiles du Congo".* Reduction of 60 % in the rates at present in force for the carriage of raw cotton of native origin.

The above reductions will come into force as from July 1st, 1931, for a period of three months, renewable on expiry.

The Colonial Administration requests you to open a special account, showing in particular any costs or losses arising out of the application of the above-mentioned measures. After carefully checking and auditing the figures, the Colonial Administration will reimburse you for any loss appearing in this special account, subject however to the express condition that the whole of your profits and losses, as shown in your annual statement of accounts or in your quarterly balance-sheets, show a deficit; only overhead expenses, normal amortization and interest charges may however appear on the debit side of the said profit and loss account.

Furthermore, it is clearly understood that the charge which the Colony thus agrees to bear shall be recoverable, whenever the economic position allows of the transport tariffs being again raised.

I will be glad if you will inform me that you are in agreement with the above conditions, and if you will send the necessary instructions to your African office to enable the new regulations to come into force as from July 1st next. I have, etc.

(Signed) Paul Crokaert,
Minister.

Letter sent to:

*Manucongo - Régie des Chemins de fer du
Mayumbé - Compagnie de Chemin de fer du
Congo - Union nationale des Transports
fluviaux et Manutention Léo - Chemins de
fer vicinaux du Congo - Société des
Messageries automobiles du Congo."*

As will be seen, the decision, in so far as it applied to the transport of the main products of the colony intended for export, affected downstream' traffic; and in so far as the decision applied to the transport of empty containers, it affected mainly upstream traffic. In both cases the charge, reduced to one franc per ton, was, practically speaking, a purely nominal one.

In consequence of the reduction in rates, the Colony undertook to refund to the companies referred to above any losses incurred by them, provided that the profit and loss account [74] of each concern as a whole showed a deficit. On the other hand, it was understood that any such refunds would be recoverable when the economic situation made it possible to raise transport rates. Under the arrangement, the Belgian State paid to Unatra 2,072,000 fr. in 1931, 12,107,000 fr. in 1932 and 7,456,000 fr. in 1933.

This measure, which was to take effect on July 1st, 1931, and to remain in force for three months subject to renewal, gave rise to discontent in certain circles in the colony.

In a letter dated June 26th, 1931, the "*Société commerciale du Centre africain*", known as "Socca", asked the Minister for the Colonies to state what conditions it must accept in order to obtain compensation for the losses which, it averred, it was bound to suffer as a result of this decision; Socca added that it did not imagine that the Government could have "intended to create - in favour of one company - a preferential régime amounting in fact to a monopoly".

The Chamber of Commerce of Leopoldville also urged in a letter from its President to the Governor-General of the colony dated June 27th, 1931, that, "side by side with the assistance given to trade by the Colony through Unatra, equivalent assistance should be provided for those who prefer to entrust their transport business to other concerns or who transport their own produce".

In the following letter to Socca, dated July 28th, 1931, the Minister for the Colonies expressed his regret that he could not comply with its request:

[*Translation.*]

"Gentlemen,

I have the honour to acknowledge your letter of June 26th, 1931, regarding the reductions granted in respect of the tariffs of Unatra, and in which you ask that governmental aid should be extended to you under the same conditions.

I would observe that the measure with regard to the reduction of transport rates is a measure taken in the general interest and necessitated by the prices prevailing in the European markets for produce of the Congo. These reductions are temporary. They are only valid for periods of three months, at the expiration of which they will be renewed if necessary.

The compensation to be accorded by the Colony to transport undertakings will only be granted in so far as any expenses and losses are incurred resulting from the application of this measure and subject to the express condition that the profit and loss account of an undertaking as a whole shows a deficit, it being understood that on the debit side of this account may only be placed general expenses, normal amortization and interest charges.

The Government of the Colony moreover reserves the right, when a favourable opportunity occurs, to recover by means of increases [75] in the transport rates any sums which may have had to be advanced as a result of these reductions.

It follows that governmental assistance must be confined to transport undertakings over whose rates the Government has a right of supervision. I regret that, in these circumstances, I am unable to comply with your request.

I have, etc."

According to the Government of the United Kingdom, the effect of the decision of June 20th, 1931, was to ruin Mr. Chinn by forcing him entirely to suspend both his transport business and his ship-building and repairing business. According to the Belgian Government, on the contrary, this was not so and Mr. Chinn's last cargo was carried on May 13th, 1931, after which date he carried no further cargo on the river, either upstream or downstream. It is not disputed, moreover, that, on July 1st, 1931, Mr. Chinn's vessels were laid up.

Whatever the facts may be in regard to this point, six concerns interested in river transport, amongst them that of Mr. Chinn, decided to have recourse to the courts. On March 18th, 1932, they brought an action against the Colony before the Court of First Instance at Leopoldville, claiming on the basis of the Convention of Saint-Germain of September 10th, 1919, as approved by the Belgian law of July 5th, 1920, reparation of the damage - provisionally estimated at about twelve million francs - alleged to have been suffered by them as a result of the fact that the Colony "has concluded with the *Société nationale de Transports fluviaux*, known as Unatra, without admitting them to the benefit of similar treatment, an arrangement under which that Company - in consideration of the refund of the amounts involved - has made in its normal rates for the shipment of produce progressive reductions down to a purely nominal

figure, and has thus established in favour of Unatra a virtual monopoly of the river transport business in the most important direction".

Their suit having been dismissed by a judgment given on September 21st, 1932, the claimants lodged an appeal with the Court of Appeal at Leopoldville; the latter, in a judgment given on December 13th, 1932, upheld the decision of the Court below.

Meantime, as the acuteness of the depression did not diminish and as the measure of June 20th, 1931, had only been instituted for three months, the Belgian Government prolonged it for successive periods, after attempting, without result, to revise in respect of certain products the reduction which it had made in Unatra's rates.

In October, 1932, after a visit paid to the Congo by the Minister for the Colonies, a further decision was taken and [76] was promulgated by the Governor-General on October 3rd, 1932. This decision was as follows:

"NOTICE TO THE PUBLIC.

The Minister for the Colonies has decided, as from August 1st, 1932, to grant, as an advance, to all private transporters making application and offering the requisite guarantees, the refund of losses suffered as a result of transporting products the downstream rates for which have been reduced.

This loss will be calculated per ton kilometre on the basis of the loss suffered by Unatra up to December 31st, 1932.

Private transporters must produce the manifest on unloading, and if necessary they must send copies of the bills of lading to support the manifest.

The guarantee must take the form of a guarantee by a bank or other solvent institution or of a mortgage on immovable property."

After the Court of Appeal of Leopoldville had given judgment, the five enterprises which had associated with Mr. Chinn in starting legal proceedings against the Administration of the Colony do not appear to have carried the matter further. Only the latter did not abandon his claim. Before the delivery of the Court of Appeal's judgment, he had already appealed to his Government for protection, and the latter had taken up his claim.

Negotiations ensued between the Government of the United Kingdom and the Belgian Government with a view to a friendly settlement. These negotiations proved fruitless and the two Governments then agreed to submit the case to the Permanent Court of International Justice. The Special Agreement of April 13th, 1934, by virtue of which the Court is called upon to give judgment, was thereupon concluded.

* * *

As the case has been brought before the Court by Special Agreement, it is necessary to be clear as to the positions occupied by the respective Parties, according to the terms of that instrument.

Having regard to the order in which the documents of the written proceedings were alternately filed, in conformity with the method proposed in the Special Agreement, and having regard also to the order in which the Agents were agreed that they should address the Court, and to their attitude during the pleadings, it is evident that, in the opinion of the Parties in the present suit, the British Government is, in fact, in the position of plaintiff, and the Belgian Government in that of defendant. [77]

According to the terms of the Special Agreement, the first question on which the Court has to decide is whether, "having regard to all the circumstances of the case", certain measures taken and applied in the month of June, 1931, and subsequently thereto by the Belgian Government, in connection with the Unatra Company and in relation to fluvial transport on the waterways of the Belgian Congo, are in conflict with the international obligations of that Government towards the Government of the United Kingdom.

It is first necessary to determine the nature of the measures of which the Government of the United Kingdom complains, the "circumstances of the case", that is to say the circumstances which are peculiar to the present suit, and, lastly, the international obligations with which - in the submission of the Government of the United Kingdom - these measures were in conflict.

1. - It is apparent from the history of the case that the measures taken and applied in the month of June 1931, and subsequently thereto, in connection with the Unatra Company and in relation to fluvial transport on the waterways of the Belgian Congo, are primarily the decision of the Minister of the Colonies, dated June 20th, 1931, and the refusal of the Belgian Government, which ensued and which was maintained until October 3rd, 1932, to extend the benefit of these measures to fluvial transport enterprises other than Unatra; the measures also include the payments made by the Exchequer of the Colony to that Company. It is evident that the

fundamental issue in the present suit is the lawfulness or otherwise under international law of the measures taken in 1931.

The action of the Minister appears as a governmental act, applying to several companies engaged in transport and in particular to Unatra; in the case of the latter enterprise, this act constituted a kind of rider to the Company's *cahier des charges*, and is to be accounted for by the right of supervision which the Government retained over that Company; it was also a governmental act, in virtue of the promises held out on behalf of the Colonial Exchequer of reimbursement-possibly only temporary - of any losses that might be incurred. Moreover, it is plain from the Special Agreement itself that the Parties are agreed in regarding the measure as a governmental act, and it is in that character that it has been impugned by the Government of the United Kingdom.

As regards its scope, the Belgian Government's action had in view - as has been shown - a substantial reduction in the transport tariffs on certain native products ; it is not a measure applying especially to the Unatra Company, since it also affects certain land transport concerns under State supervision. On the other hand, to compensate for the expenses and losses which it [78] imposes, it provides for a refund to each of the enterprises concerned, subject however to the condition that the profit and loss account of that particular enterprise, as a whole, reveals a deficit. These reimbursements are, moreover, recoverable by the State, as soon as the economic situation has improved sufficiently to allow the tariffs to be raised again, they constitute a temporary loan, or advance, which has to be refunded to the Colonial Exchequer. The measure itself is of a temporary character ; it may, however, be prolonged.

2. - As regards the "circumstances of the case", which the Parties have expressly asked the Court, in the Special Agreement, to take into account in judging the demand of the Government of the United Kingdom, the information given in the documents filed and in the oral pleadings shows them to be briefly as follows.

In the first place is to be noted the peculiar importance of fluvial transport for the whole economic organization of the colony. The river Congo, owing to the magnitude and extent of its waterways, constitutes the chief highway of the Belgian colony. Penetrating, by means of its numerous tributaries, to the remotest confines of the territory, it makes it possible to exploit and turn to account the local sources of wealth of every part of the colony, so that, from the point of

view of the evacuation of products to be exported, it constitutes an essential factor in the commercial activities of the colony.

A special aspect of the circumstances in which the measure of 1931 was adopted is revealed when one considers the character of the Unatra Company. Having succeeded in 1925 to the Sonatra Company, which was under the direction of the State, the Unatra Company was in form a private company; but it was charged, none the less - owing to the terms of its *cahier des charges* and the supervision therein reserved to the State - with the conduct of an organized public service, involving special obligations and responsibilities, with a view, primarily, to satisfying the general requirements of the colony.

The fact that Unatra was responsible for these services was, it is true, no bar to the enterprises of other concerns who were desirous of engaging in fluvial transport on their own account, or for the account of others. But these concerns, carrying on business freely, and having pecuniary profit as their main and legitimate object, had no claim to any guarantee of their profits from the State. They could only claim the freedom and equality guaranteed by treaty on the Congo, as will presently be shown.

Finally, the circumstance which, according to the Belgian Government, was the determining cause of the measure which [79] it took on June 20th, 1931, was the general economic depression and the necessity of assisting trade, which was suffering grievously from the fall in prices of colonial products, and of warding off the danger which threatened to involve the whole colony in a common disaster.

The Belgian Government was the sole judge of this critical situation and of the remedies that it called for - subject of course to its duty of respecting its international obligations.

3. - As regards the international obligations of the Belgian Government towards the Government of the United Kingdom, these have been clearly indicated by the Parties in their written Memorials and in the course of the pleadings. They are, in the first place, the obligations arising from the international régime of the Congo Basin, under the Convention of Saint-Germain-en-Laye of September 10th, 1919, and in the second place the obligations resulting from the general principles of international law.

According to Article 1 of the Convention of Saint-Germain:

"The signatory Powers undertake to maintain between their respective nationals and those of States, Members of the League of Nations, which may adhere to the present Convention a complete commercial equality in the territories under their authority within the area defined by Article 1 of the General Act of Berlin of February 26th, 1885, set out in the Annex hereto, but subject to the reservation specified in the final paragraph of that Article.

Annex.

Article 1 of the General Act of Berlin of February 26th, 1885.

The trade of all nations shall enjoy complete freedom:

1. In all the regions forming the basin of the Congo and its outlets [according to the geographical boundaries].

2. In the maritime zone extending along the Atlantic Ocean [according to the geographical boundaries].

3. In the zone stretching eastwards from the Congo Basin [according to the geographical boundaries].

It is expressly recognized that in extending the principle of free trade to this eastern zone, the Conference Powers only undertake engagements for themselves, and that in the territories belonging to an independent sovereign State this principle shall only be applicable in so far as it is approved by such State. But the Powers agree to use their good offices with the governments established on the African shore of the Indian Ocean for the purpose of obtaining such approval, and in any case of securing the most favourable conditions to the transit (traffic) of all nations."

Furthermore, according to Article 5: [80]

"Subject to the provisions of the present Chapter, the navigation of the Niger, of its branches and outlets, and of all the rivers, and of their branches and outlets, within the territories specified in Article 1, as well as of the lakes situated within those territories, shall be entirely free for merchant vessels and for the transport of goods and passengers.

Craft of every kind belonging to the nationals of the signatory Powers and of States, Members of the League of Nations, which may adhere to the present Convention, shall be treated in all respects on a footing of perfect equality."

The Convention of Saint-Germain was the successor - so far as the Parties in the case are concerned and as regards the relations between them - of the General Act of Berlin of February 26th, 1885, and of the Act and Declaration of Brussels of July 2nd, 1890 - to which Acts it is linked up by its Preamble; but it should be pointed out that, according to the terms of Article 13 of the Convention signed by the two Governments concerned,

"Except in so far as the stipulations contained in Article 1 of the present Convention are concerned, the General Act of Berlin of February 26th, 1885, and the General Act of Brussels of July 2nd, 1890, with the accompanying Declaration of equal date, shall be considered as abrogated, in so far as they are binding between the Powers which are Parties to the present Convention."

No matter what interest may in other respects, attach to these Acts - the Berlin Act and the Act and Declaration of Brussels - in the present case the Convention of Saint-Germain of 1919, which both Parties have relied on as the immediate source of their respective contractual rights and obligations, must be regarded by the Court as the Act which it is asked to apply; the validity of this Act has not so far, to the knowledge of the Court, been challenged by any government.

The Parties are not agreed as to whether paragraph 1 of Article 1 of the Berlin Act - this Article is reproduced as an Annex to Article 1 of the Convention of Saint-Germain - which proclaims "complete freedom" of trade for all nations, is, or is not, embodied in the last-named Article. In the view of the Government of the United Kingdom, the clause in question constitutes an integral part of that Article. The Court cannot however agree with that opinion, which is inconsistent with the express terms of Article 1 of the Convention of Saint-Germain; for this Article only maintains in force Article 1 of the Berlin Act, which is annexed thereto, in so far as concerns the clauses fixing the limits of the territories to which the Convention applies, and the last paragraph. But that question loses much of its interest in the present case, when it is observed [81] that paragraph i of Article 5 of the Convention applies this principle of freedom of trade in regard to the very question of fluvial navigation with which the Court is now concerned. It is, indeed, hardly open to doubt that the fluvial transport industry is a branch of commerce.

It is true that the Convention of Saint-Germain, by Article 13 referred to above, has abolished the regime of freedom of trade so far as concerns the exemption from customs duties stipulated in Article IV of the Berlin Act. But there is no evidence that it intended to depart, so far as concerns commerce, from the general principle of freedom which was laid down at Berlin in regard to the river system in question. On the contrary, the signatory States of the Convention of Saint-Germain expressly referred to that principle not only - as has already been shown - in Article 5 quoted above, but also in the concluding paragraph of the Annex to Article 1 and in Article 10.

In regard to the general principles of international law, on which the Government of the United Kingdom has alternatively relied, it is apparent from the written Memorials and pleadings of the Parties that the Government of the United Kingdom relies on the obligation incumbent upon all States to respect the vested rights of foreigners in their territories, and that it is this obligation which the Belgian Government is alleged to have infringed in regard to Mr. Chinn.

* * *

In considering, in accordance with the terms of the Special Agreement, whether the impugned measures were or were not in conflict with the international obligations of the Belgian Government, the Court, having regard to the positions occupied by the respective Parties - as indicated above - will examine the arguments advanced by the Government of the United Kingdom against the compatibility of these measures with the obligations in question.

Relying on the international obligations incumbent upon the Belgian Government, the Government of the United Kingdom impugns the measures taken by the Belgian Minister of the Colonies on June 20th, 1931, in the following respects.

In the first place, it is alleged that the Belgian Government, by 'enjoining a reduction of tariffs on the Unatra Company in return for a promise of -temporary pecuniary compensation, made it impossible for the other fluvial transporters, including Mr. Chinn, to retain their customers, and in consequence to carry on their business; in this way, it is argued, it enabled the Unatra Company to exercise a *de facto* monopoly which - in the view of the Government of the United Kingdom - is [82] incompatible with the Belgian Government's obligation to maintain commercial freedom and equality, and also with the obligation arising out of Article 5 of the Convention of Saint-Germain, which applies those principles to fluvial navigation. The Belgian Government is alleged to have acted thus not only with a view to assisting trade in the Colony, but also in order to concentrate fluvial transport in the hands of Unatra.

Alternatively, it is alleged that the Belgian Government, by creating for the advantage of the Belgian Company Unatra a régime in the benefits of which Mr. Chinn, a British subject, was not entitled to share, was practising a discrimination, contrary to the equality of treatment stipulated in the Convention of Saint-Germain.

Lastly, in case the Court should not find that the measures taken in 1931 constituted a breach of the said Convention, the Government of the United Kingdom submits that, by making it commercially impossible for Mr. Chinn, a British subject, to carry on his business, these measures constituted - it is alleged - a violation of vested rights, protected by the general principles of international law.

For its part, the Belgian Government submits the following considerations:

The measures which it adopted became necessary in order to safeguard the interests of the community as a consequence of the position of colonial products in the markets of the world; it never formed part of the intentions of the Belgian Government to create a monopoly of any kind for Unatra in order to drive embarrassing competitors out of business. The measures that it took were lawful from the standpoint of international law, whether conventional or customary.

The Belgian Government further maintains that a distinction must be drawn between the sphere of navigation and that of the management of national shipping. Whereas, in the former sphere, the riparian State is forbidden to encroach on freedom of navigation, its freedom of action in the latter sphere is not subject to restriction.

Lastly, in regard to the British Government's contention based on general international law, the Belgian Government considers that no injury has been caused to already existing vested rights; at the utmost, injury may have been caused to private interests.

* * *

(a) The main argument of the Government of the United Kingdom is the alleged inconsistency between the measures [83] taken by the Belgian Government and the principles of equality and freedom of trade and freedom of navigation.

According to the conception universally accepted, the freedom of navigation referred to by the Convention comprises freedom of movement for vessels, freedom to enter ports, and to make use of plant and docks, to load and unload goods and to transport goods and passengers.

From this point of view, freedom of navigation implies, as far as the business side of maritime or fluvial transport is concerned, freedom of commerce also. But it does not follow that in all other respects freedom of navigation entails and presupposes freedom of commerce.

What the Government of the United Kingdom is concerned with in this case is the principle of freedom of navigation regarded from the special aspect of the commercial operations inherent in the conduct of the transport business ; for that Government has never contended that the impugned measures constituted an obstacle to the movement of vessels.

For this reason the Court - whilst recognizing that freedom of navigation and freedom of commerce are, in principle, separate conceptions - considers that it is not necessary, for the purposes of the present case, to examine them separately.

The Government of the United Kingdom has relied, as regards freedom of commerce, on the first sentence of the Annex to Article 1 of the Convention of Saint-Germain. But, as has been shown above, this argument has not been accepted by the Court, having regard to the wording of Article 1.

The idea of freedom of trade has not, however, disappeared from the Convention of Saint-Germain. Its first Article is devoted to the principle of commercial equality, and the latter in itself presupposes in principle freedom of trade. The last paragraph of Article 1 of the Act of Berlin, which is maintained by the Convention of Saint-Germain, contains, as has been recalled above, the following reservation: "It is expressly recognized that in extending the principle of free trade to this eastern zone, the Powers only undertake engagements for themselves", etc. Commercial freedom is therefore expressly contemplated.

Article 2 of the Convention concerns freedom of trade; it guarantees free access for merchandise, in the same way as it does for vessels flying the flag of any contracting Power, while reserving to the State concerned complete liberty of action as to' the customs and navigation regulations and tariffs to be applied in its territory.

Finally, Article 10 refers to this principle in the following terms: "The signatory Powers recognize the obligation to [84] maintain in the regions subject to their jurisdiction authority and police forces sufficient to ensure protection of persons and of property and, if necessary, freedom of trade and of transit."

Whilst therefore it is certain that the Convention of Saint-Germain is also based on the idea of commercial freedom, it is however to be observed that this idea has not the same import in the Convention as in the Act of Berlin. This Act really meant by free trade the régime of the open door. By abolishing - as has already been stated - the prohibition to levy customs duties found in Article IV of the Act, the Convention has abandoned this régime; in this connection it should also be observed that Article V of the Act, the second paragraph of which corresponds to Article 3 of the Convention, contained a first paragraph which does not reappear in the Convention and which prohibited the granting of a monopoly or privilege in matters of trade.

It cannot be supposed that the contracting Parties adopted new provisions with the idea that they might lend themselves to a broad interpretation going beyond what was expressly laid down.

Freedom of trade, as established by the Convention, consists in the right - in principle unrestricted - to engage in any commercial activity, whether it be concerned with trading properly so-called, that is the purchase and sale of goods, or whether it be concerned with industry, and in particular the transport business; or, finally, whether it is carried on inside the country or, by the exchange of imports and exports, with other countries. Freedom of trade does not mean the abolition of commercial competition ; it presupposes the existence of such competition. Every undertaking freely carrying on its commercial activities may find itself confronted with obstacles placed in its way by rival concerns which are perhaps its superiors in capital or organization. It may also find itself in competition with concerns in which States participate, and which have occupied a special position ever since their formation, as is the case of Unatra. Mr. Chinn, a British subject, when, in 1929, he entered the river transport business, could not have been ignorant of the existence of the competition which he would encounter on the part of Unatra, which had been established since 1925, of the magnitude of the capital invested in that Company, of the connection it had with the Colonial and Belgian Governments, and of the predominant role reserved to the latter with regard to the fixing and application of transport rates.

The Government of the United Kingdom maintains that the reduction in transport rates together with the Belgian [85] Government's promise temporarily to make good losses enabled Unatra to exercise a *de facto* monopoly inconsistent with freedom of trade.

The Court must therefore consider whether the alleged concentration of transport business in the hands of Unatra, of which the Government of the United Kingdom complains, and the fact that, because of this concentration, it was commercially impossible for Mr. Chinn to carry on his business, are inconsistent with the conception of freedom of trade propounded above.

A concentration of business of this kind will only infringe freedom of commerce if commerce is prohibited by the concession of a right precluding the exercise of the same right by others; in other words, if a "monopoly" is established which others are bound to respect.

The Court sees nothing in the measure taken by the Belgian Government indicative of such a prohibition. Moreover, the Government of the United Kingdom does not contend that such a monopoly has been created; but it maintains that the impugned measure had the effect of making it commercially impossible for Mr. Chinn, amongst others, to carry on his business and thus led to what is described as a "*de facto* monopoly". In what the Government of the United Kingdom describes in this case as a "*de facto* monopoly", the Court, however, sees only a natural consequence of the situation of the services under State supervision as compared with private concerns. The Court also sees therein, in some respects, a possible effect of commercial competition; but it cannot be argued from this that the freedom of trade and the freedom of navigation, provided for by the Convention of Saint-Germain, imply an obligation incumbent on the Belgian Government to guarantee the success of each individual concern. If the term "*de facto* monopoly" should be understood, in so far as concerns trade, navigation or the transport business, as covering all measures likely to render it difficult or impossible for others to carry on their businesses at the same prices and under the same commercial conditions, it would follow that all measures affording to customers facilities, reductions "in prices, abatements or other advantageous conditions which other concerns are unwilling or unable to offer and which, after all, are calculated to promote commerce, would be incompatible with freedom of trade. Such a contention would be inconsistent with the very notion of trade; for there is nothing to prevent a merchant, a ship-owner, a manufacturer or a carrier from operating temporarily at a loss if he believes that by so doing he will be able to keep his business going. [86]

To sum up, having regard to the exceptional circumstances in which the measures of June 20th, 1931, were adopted and to the nature of those measures, that is to say, their temporary

character and the fact that they applied to companies entrusted by the State with the conduct of public services, these measures cannot be condemned as having contravened the undertaking given by the Belgian Government in the Convention of Saint-Germain to respect freedom of trade in the Congo.

Even supposing that Unatra took advantage of the temporary lowering of its rates to endeavour to concentrate in its hands the business of its competitors, it cannot be inferred, especially having regard to the circumstances already mentioned, that this was the motive and aim of the action of the Belgian Government.

In these circumstances, it is unnecessary for the Court to consider whether, as alleged by the Government of the United Kingdom, the Belgian Government, in taking the measures which are said to have resulted in this concentration of business, was to a certain extent actuated also by motives other than the desire to assist trade during a period of depression. Moreover, the circumstances in which the impugned measures were taken are such as to preclude any idea that the Belgian Government intended by indirect means to escape the obligations incumbent on it under the Convention of Saint-Germain.

On the other hand, the Court is unable to accept the general proposition of the Belgian Government regarding its conception of "the management of national shipping". However legitimate and unfettered governmental action in connection with the management and subsidizing of national shipping may be, it is clear that this does not authorize a State to evade on this account its international obligations.

(b) With regard to the alternative contention of the Government of the United Kingdom, alleging discrimination inconsistent with the equality of treatment provided for in the Convention of Saint-Germain, it should, in the first place, be remembered that the principle of equal treatment is the characteristic feature of the legal régime established in the Congo Basin. The Convention of Saint-Germain applies this principle in most of its articles, namely in Articles 1, 2, 3, 4, 5, 6, 7, 9 and 11. Moreover, this equality of treatment is only guaranteed by the Convention to the nationals of Powers which are parties to the Convention or of Powers adhering to it.

Thus, Article 1 of the Convention provides that: "The signatory Powers undertake to maintain between their respective nationals a complete commercial equality", etc. Article 3 guarantees to nationals of the same Powers the same treatment and the same rights as those enjoyed by nationals of the Power [87] exercising authority in the territory, and thus provides for assimilation to nationals. The second paragraph of Article ii pro) vides that the signatory Powers will protect and favour, without distinction of nationality or of religion, religious, scientific or charitable institutions.

The form of discrimination which is forbidden is therefore discrimination based upon nationality and involving differential treatment by reason of their nationality as between persons belonging to different national groups.

It should be recalled in this connection that the treatment accorded to Unatra was based on the special position of that Company, as a Company under the supervision of the Belgian Government. The special advantages and conditions resulting from the measures of June 20th, 1931, were bound up with the position of Unatra as a Company under State supervision and not with its character as a Belgian Company. These measures, as decreed, would have been inapplicable to concerns not under government supervision, whether of Belgian or foreign nationality. The inequality of treatment could only have amounted to a discrimination forbidden by the Convention if it had applied to concerns in the same position as Unatra, and this was not the case.

In these circumstances, the Court is unable to attach any legal importance to the argument based by the Government of the United Kingdom on the fact - which is not disputed by the Belgian Government - that Mr. Chinn was the only private transporter who, like Unatra, confined his business to the transport of goods belonging to others.

On the other hand, the Government of the United Kingdom does not maintain, and there is no justification for supposing, that, it was owing to his status as a British national that Mr. Chinn was not given the benefit of the arrangement accorded to the Belgian Company Unatra. In this respect, the position of the British national Mr. Chinn was not, as such, either better or worse than that of the other concerns not under State supervision; these included, according to the evidence produced, Belgian concerns and a French concern.

The Court therefore is equally unable to accept the alternative plea as to an alleged discrimination.

(c) It remains to consider the last alternative plea of the Government of the United Kingdom to the effect that the measure of June 20th, 1931, by depriving indirectly Mr. Chinn of any prospect of carrying on his business profitably, constituted a breach of the general principles of international law, and in particular of respect for vested rights. [88]

The Court, though not failing to recognize the change that had come over Mr. Chinn's financial position, a change which is said to have led him to wind up his transport and ship-building businesses, is unable to see in his original position - which was characterized by the possession of customers and the possibility of making a profit - anything in the nature of a genuine vested right. Favourable business conditions and goodwill are transient circumstances, subject to inevitable changes ; the interests of transport undertakings may well have suffered as a result of the general trade depression and the measures taken to combat it.

No enterprise - least of all a commercial or transport enterprise, the success of which is dependent on the fluctuating level of prices and rates - can escape from the chances and hazards resulting from general economic conditions. Some industries may be able to make large profits during a period of general prosperity, or else by taking advantage of a treaty of commerce or of an alteration in customs duties ; but they are also exposed to the danger of ruin or extinction if circumstances change. Where this is the case, no vested rights are violated by the State.

It is true that in 1932 the Belgian Government decided to grant Belgian or foreign ship-owners, whose business was endangered, advances similar to those allowed to the Unatra Company; the taking of this measure cannot, however, be regarded in itself as an admission by the Belgian Government of a legal obligation to indemnify the transporters for an encroachment on their vested rights; it is rather to be ascribed to the desire of every government to show consideration for different business interests, and to offer them some compensation, when possible. The action of the Government appears to have been rather in the nature of an act of grace.

* * *

For the foregoing reasons, the Court holds that the answer to the first question submitted to it by the Special Agreement must be in the negative.

Accordingly, the point concerning reparation for Mr. Chinn, which forms the subject of the second question in the Special Agreement, does not arise.

In these circumstances, there is no occasion to order the enquiry suggested at the beginning of the hearings by the Agent for the Government of the United Kingdom. [89]

FOR THESE REASONS,

The Court,

by six votes to five,

decides:

that the measures taken and applied in the month of June 1931 and subsequently thereto by the Belgian Government in connection with the limited liability Company *Union nationale des Transports fluviaux* (commonly known as Unatra) and in relation to fluvial transport on the waterways of the Belgian Congo, are not, having regard to all the circumstances of the case, in conflict with the international obligations of the Belgian Government towards the Government of the United Kingdom.

Done in French and English, the French text being authoritative, at the Peace Palace, The Hague, this twelfth day of December, one thousand nine hundred and thirty-four, in three copies, one of which shall be placed in the archives of the Court, and the others forwarded to the Belgian Government and to the Government of the United Kingdom respectively.

(Signed) J. G. Guerrero,

Officiating President.

(Signed) A. Hammarskjöld,
Registrar.

M. De Bustamante, Judge, who sat as a member of the Court during the extraordinary session devoted to the present case until December 10th, 1934, and who took part in the deliberation and in the vote on the judgment, was compelled to leave The Hague before it was delivered. He stated that he concurred both in the operative part of the judgment and in the grounds on which it was based.

Sir Cecil Hurst, President of the Court, Mm. Altamira, Anzilotti and Schücking, and Jonkheer Van Eysinga, Judges, [90] declare that they are unable to concur in the judgment given by the Court and, availing themselves of the right conferred on them by Article 57 of the Statute, have appended to the judgment the separate opinions which follow.

(Initialed) J. G. G.

(Initialed) A. H.

[91] Dissenting Opinion by M. Altamira.

[*Translation.*]

I regret that I cannot concur either in the decision reached in the foregoing judgment or in the grounds on which that decision is based. My main reasons for dissenting are two in number: first, I interpret differently the relevant articles of the Convention of Saint-Germain and, secondly, take a different conception of the question of law which confronts the Court having regard to "all the circumstances of the case". In this opinion I shall confine myself to explaining and justifying these two points of difference.

In point A, 1, of the Special Agreement submitting the "Oscar Chinn" case to the Court, the latter is asked to say whether "the above-mentioned measures complained of by the Government of the United Kingdom were in conflict with the international obligations of the Belgian Government towards the Government of the United Kingdom". The import of the words "the above-mentioned measures" is clearly indicated in the preamble to the Special Agreement. They were "certain measures taken and applied in the month of June 1931 and subsequently thereto by the Belgian Government (which is responsible for the Colonial Administration) in connection with the limited liability Company "*Union nationale des Transports fluviaux* (commonly known as Unatra), and in relation to fluvial transport on the waterways of the Belgian Congo": Furthermore, the Court has received sufficient enlightenment as to the precise nature of these measures in the course of the written and oral proceedings in the case. It appears therefore that this part of the text of point A, 1, requires no further explanation in order to be properly understood.

There might, however, be some doubt whether, by the definition of these measures given in the preamble of the Special Agreement as quoted above, they are restricted to measures directly affecting Unatra to the exclusion of measures affecting any other company or person. An interpretation as narrow as this would leave outside the scope of the question submitted to the Court facts and documents such as, for instance, those relating to the Company known as Socca, which, as I shall explain later, are of great importance for a correct understanding of the present question. It appears evident to me, however, that there can be no doubt of this kind. Not only have the Parties discussed the measures taken by the Belgian Government in regard to Socca and

other commercial enterprises, besides that of Mr. Chinn, as being essential to a full [92] understanding of the facts, but furthermore it is certain that the measures affecting concerns other than Unatra followed directly upon and were closely linked to the measures affecting the latter Company.

The question of law involved in point A, i, of the Special Agreement is to ascertain whether or not the Belgian Government's measures as defined above are inconsistent with any or all of the international obligations of the Belgian Government towards the Government of the United Kingdom. We must, therefore, in the first place, see what these international obligations are.

In so far as treaty law is concerned, the source of these obligations is the Convention of Saint-Germain of September 10th, 1919. Their source might possibly also be traced to the general principles of international law. Let us first of all consider the Convention.

In Article 1 of the Convention, the fundamental words, in my view, are those which describe the international engagement entered into as one to maintain "a complete commercial equality". The signatories of the Convention have therefore under-taken to "maintain" "a complete commercial equality" in the territories indicated thereafter, which include the territory in which the waterways of the Belgian Congo are situated. This equality clearly covers all kinds of trade whether by land, river or otherwise. Accordingly, what we have to examine and define in this case is the general conception of-commercial~ equality._It undoubtedly covers the commercial activities of Mr. Chinn's river transport business.

The idea of equality expressed in Article 1 of the Convention is certainly tantamount to a prohibition of any discrimination between the respective nationals of signatory Powers and of States, Members of the League of Nations, acceding to the Convention. It follows from the fact that the Article says: "a complete equality", that the discrimination prohibited by it embraces in principle any kind of discrimination which would involve a transgression of this very widely conceived principle of equality. It is however true that the word "complete" cannot have so absolute a meaning as to render it impossible for the governments bound by the Convention to carry out any act or measure of a commercial nature in their own territory and within the sphere of their own sovereignty. A large proportion of such acts and measures they are certainly free to carry out, even in relation to the commercial activities of foreign nationals. Nevertheless, this

freedom, though very wide, cannot be exercised beyond the point where it would entail infringement of the equality accorded to such nationals in their commercial activities. This point would be reached as [93] soon as the measure taken by the Belgian Government affected fundamentally the commercial activities which foreigners are entitled to engage in the Congo under the same basic conditions as Belgian nationals. It is clear that this does not imply the slightest encroachment on the sovereignty of Belgium, since it was in the exercise of this sovereignty that the Belgian Government accepted the obligations contained in the Convention of Saint-Germain. The Court has expressly enunciated this principle in its Judgment No. 1 (p. 25), and has referred to and confirmed it in Advisory Opinions Nos. 10 and 14.

I think that a more precise definition of what is covered by the equality mentioned in Article 1 is to be found in the other articles of the Convention. At all events, this definition must be sought within the four corners of the Convention and not elsewhere. The idea of equality in fact dominates the whole of the Convention to such an extent that it constitutes the common denominator of the articles following Article 1. We already begin to find evidence of what I have just said in Article 2, which prescribes "free access" for the merchandise of every signatory State to the interior of the regions specified in Article 1, as well as access to all the coast and to all maritime ports. And, in order to determine the precise import of this "free access" in the intention of the Convention, the term is immediately followed in the same Article by a clause to the effect that "no differential treatment shall be imposed upon the said merchandise on importation or exportation". The same prohibition is repeated in connection with the access of vessels to the coast and ports ; this means that equality is also prescribed in this respect, and thus concrete shape is given to one aspect of the idea of "complete commercial equality" enunciated in Article 1, an idea which is different' from the mere "access" prescribed in the previous sentence of Article 2. The last paragraph of the same Article further confirms this general aim of the Convention, since, in reserving to the States concerned "complete liberty of action as to the customs and navigation regulations and tariffs to be applied in their territories", it makes this liberty of action subject to the preceding provisions in the same Article ("subject to these provisions").

Article 3 of the Convention, like Article 2, adds something further to the definition of what is meant by complete commercial equality : it lays down that foreign nationals shall enjoy

in the territories specified in Article 1 "the same treatment and the same rights as the nationals of the Power exercising authority in the territory". This applies as regards "the protection of their persons and effects" "the acquisition and transmission of their movable and real property", and "the exercise of their professions"; here, again, we have [94] different aspects of equality which cover a wider legal sphere than that of commerce, but nevertheless include the latter by the reference to the exercise of professions. The provision concerning the "exercise of their professions" should be especially noted here, since a part of the business carried on by Mr. Chinn in the Congo was a profession which in the codes of all countries, as well as in common parlance, is described as commercial, a point which moreover is well brought out in the judgment.

The same prohibition of differential treatment is to be found in Article 4, though it does not relate to matters relevant to the present case. On the other hand, Article 5, paragraph 1, prescribes a special right which directly concerns the fluvial traffic in issue, the right of free navigation "for merchant vessels and for the transport of goods and passengers".

The interpretation of the word "navigation" would seem to present no difficulty, since it expresses a common conception and one understood by all in the two senses which are well explained in the judgment. This conception is fully confirmed, as regards the kind of navigation with which we are concerned, by the phrase above quoted which specifies the economic activities which the Convention meant the term "navigation" to cover, by reference to the different functions served by navigation: commerce proper, the transport of goods and that of passengers. But the difficulty begins when we have to interpret the word "navigation" in conjunction with "freedom", since the latter may apply equally well to the ship itself as to the economic function which it serves and which is the chief reason why freedom of movement is essential to it. Accordingly, whereas if one were to consider "freedom" as applying only to the movement of ships in the direction, in the regions and at the times demanded by the object in view, any impediment of another character would be consistent with the rule laid down in Article 5, if, on the other hand, one considers "freedom" from the standpoint of the ultimate economic aim of navigation (trade, the transport of goods or passengers), the term would also cover freedom from impediments likely to render economically impossible the attainment of this aim. The consequences of these two interpretations differ of course considerably, and, in the present case, they would lead to entirely contrary conclusions. The first would render the first paragraph

of Article 5 applicable to the present case only if Mr. Chinn's vessels had been actually prevented from proceeding on their voyages; the second would make that paragraph applicable even if there were no actual impediment to navigation, provided that some other cause resulting from a measure taken by the Belgian [95] Government in regard to fluvial traffic on the Congo rendered the carrying on of the transport enterprise in question economically or otherwise impossible. Upon reflection, it does not appear to me that the second interpretation is possible, because paragraph 1 of Article 5 does not cover the exercise of the calling with which the economic purpose served by the vessels is connected. An economic impediment may convert a favourable venture into a ruinous one which it is impossible to proceed with, since the aim of business life is to reap profits and not incur loss; but such an impediment would not prevent the movement of ships for any other purpose served by navigation. Economic or, in other words, professional aims have been dealt with in Article 3, and there is nothing to indicate that they are again contemplated here.

On the other hand, paragraph 2 of Article 5 contains a phrase similar to that occurring in Article 1: "a footing of perfect equality", a footing on which "craft of every kind belonging to the nationals of the signatory Powers" are to be treated "in all respects". This can only be regarded as another concrete aspect of what is meant by commercial equality which, to be "complete", must necessarily cover not only the persons of foreign nationals and their commercial activities, but also their merchandise and vessels. As regards the latter, it is clear that the Convention covers them in the widest possible manner, since Article 5 contains the phrase already quoted: "in all respects", which may well cover all respects in connection with and necessary to, not merely actual navigation, but also the fulfilment of its various possible and lawful objects. The phrase "in all respects", in fact, will easily bear this interpretation, since access of vessels and merchandise and customs regulations and tariffs have already been dealt with in Article 2, since Article 6 deals with other charges, duties and obligations, and paragraph 1 of Article 5 which we are now considering covers the other movements of vessels, which leads naturally to the supposition that the phrase "all respects" in the second paragraph of the same Article may well possess an import much wider than the simple movement of vessels.

Article 6, as already stated, also concerns navigation; it exempts shipping from dues and taxes with the exception of certain charges duly specified in regard to which the Article repeats

that they shall "not admit of any differential treatment". Article 7 extends the provisions of Article 5 to the tributaries of the rivers and lakes specified in the latter, as well as to roads, railways or lateral canals, and, in authorizing the collection of certain tolls, it says that, "as regards the [96] tariff of these tolls, the nationals of the signatory Powers shall be treated on a footing of perfect equality". Finally, Article 9, though it permits the governments exercising authority to establish such systems "as may be required" for the maintenance of public safety and order and other general necessities, on certain rivers and their tributaries and on certain lakes, stipulated that such regulations "shall not admit of any differential treatment".

After this analysis of the various articles relevant to the present case, I can once more affirm that the idea dominating the Convention with regard to the international obligations contracted therein is clearly the idea of equality of treatment in every matter dealt with.

Before turning to another point, we must now consider Article 10 of the Convention, although it does not belong to the group of articles which concern the matter before us. The fact that the words "freedom of trade" do not occur in these articles may have been noticed; instead of them we find "commercial equality" in Article 1, and "freedom of navigation" in Article 5. Only in Article 10, which is practically copied from Article 35, Chapter IV, of the Act of Berlin, do we find a reference to "freedom of trade" in conjunction with freedom of transit; but this reference serves rather to emphasize that the Convention is governed by a conception somewhat different to that represented by the phrase "freedom of trade" in the sense in which it was understood in 1885. The full text of this Article demonstrates this sufficiently clearly:

"The signatory Powers recognize the obligation to maintain in the regions subject to their jurisdiction an authority and police forces sufficient to ensure protection of persons and of property and, if necessary, freedom of trade and of transit."

As regards the last paragraph of Article 1 of the Act of Berlin - which is annexed to Article 1 of the Convention of Saint-Germain but for the purpose indicated therein only - the phrase "free trade" also occurs in that paragraph, but, in my opinion, the only purpose which it serves in the Convention is to explain the scope of the obligations embodied therein in relation to international life as a whole.

As regards the source of any international obligations which might be deduced from the general principles of international law, I have nothing to say, being in agreement with the Court's judgment on this point.

Having thus analysed the sources of law, we must now consider the measures taken and applied in June 1931 and subsequently [97] by the Belgian Government, in order to see whether they are consistent with the international obligations noted above.

In examining these measures, I shall take account of the "circumstances of the case" referred to in point A, 1, of the Special Agreement, in so far as relevant to the question put therein. To my mind there is no doubt that these "circumstances" include the facts for which the Belgian Government is responsible (and accordingly the "measures" referred to in Article 1 of the Special Agreement) as well as those in connection with Mr. Chinn's activities in the river transport business. Since the Special Agreement is an agreement between the two Governments who were parties to the present dispute, the words "having regard to all the circumstances of the case" can only be meant to cover both the opposing standpoints, that is to say both that of the Belgian Government and that of the Government of the United Kingdom, and likewise the circumstances in connection with the person whose case the latter Government has taken up. Accordingly, we must "have regard" on the one hand to "circumstances" in connection with the Belgian Government's measures, their explanation and justification, and, on the other hand, to "circumstances" in connection with the effects of these measures as regards Mr. Chinn and the latter's reaction to them.

The first of the Belgian Government's measures contemplated by the Special Agreement is the decision of June 20th, 1931. This decision was taken by the Belgian Minister for the Colonies. Practically speaking, it consists, on the one hand, of a reduction in the rates applying at that date to the transport and handling of certain colonial products of the Congo, the reason for the reduction being "the collapse of the prices obtainable for colonial products in the European markets", and, on the other hand, a promise to refund any losses occasioned by this reduction to certain companies, which refunds would be recoverable by the Colony "when the economic situation made it possible again to raise the rates above mentioned".

The decision states that the reductions in rates are to be applied in so far as concerns Unatra "for all voyages". A differentiation between upstream traffic and downstream traffic, as regards the application of the new rates, is not expressly mentioned but seems to be implied in so far as concerns colonial products properly so-called which, as a rule, will be intended for export

to Europe, thus involving transport downstream only. These products being the most plentiful and important in the colony, must in reason constitute a vast preponderance of the traffic, certainly of downstream traffic. In reality, however, and for the purposes of this case, this distinction between the two streams of traffic on the river is not very important. [98] It may be of importance in connection with the appraisal of the economic effects (larger or smaller losses; greater or less degree of the financial impossibility of carrying on transport business), since an impediment affecting navigation traffic in one direction only (upstream or downstream) will certainly be a factor exercising great influence on shipping engaged in the transport of merchandise. For transporters are most careful to secure cargoes for the voyage in both directions, since otherwise the venture might be so financially unprofitable to them that they might be impelled to lay up their vessels, as experience shows to be sometimes the case. On the other hand, it in no way affects the commercial inequality resulting from the decision of June 20th, 1931, which I shall demonstrate later. Nor does the inconsistency of this measure with the international obligations of the Belgian Government towards the Government of the United Kingdom depend on what was the economic aim pursued by the former Government in the decision of 1931, or on the question whether it had more than one intention in taking that decision. In any case, the relation in which the decision stands to certain articles of the Convention of Saint-Germain will remain the same. That is why I see no use in discussing the British and Belgian standpoints in regard to this question.

The companies affected by the decision and enumerated therein were four land transport concerns, one river transport concern (Unatra), and another the nature of which is not specified. These six companies did not constitute all the concerns at that time engaged in the transportation business in the Congo; over and above the companies to which the decision of June 20th, 1931, applied were other concerns, both Belgian and foreign, which are grouped together under the heading of "private transporters". It is difficult to understand the reasons which led to this exclusion, seeing that the crisis was at that time a general phenomenon which affected every branch of economic activity in the Congo, and that one of the enterprises excluded (that of Mr. Chinn) was at that moment the only one besides Unatra (a fact which is hot disputed) engaged in fluvial transportation proper - the other enterprises being in reality producers who transported their own produce. The only reason for this exclusion which would, appear at all

comprehensible, is that it was impossible for the Belgian Government to compel companies, other than those mentioned in the decision, to reduce their transport tariffs. But, even disregarding a point which is not without importance, namely the actual wording of the decision, that calls on the enterprises in question to "consent" to these reductions being imposed on them (the Government's only right, so far as we know, in this respect was that of [99] approving Unatra's transport tariffs, but that did not include the imposing of any freight rates, even upon that Company), it is clear that there was nothing to prevent the Government from making a similar proposal to the so-called "private" enterprises, and in case of their acceptance, from offering them the above-mentioned repayment - as it actually did, as we shall see later, in 1932. That shows that there was no fundamental impossibility in this respect. It might even be added that the Belgian Government ought to have taken this - step in 1931, seeing that, although the depression was primarily affecting trade in products of the Congo, it could, not fail, by an inevitable reaction, to affect the carriers of -those products, that is to say, not only those referred to in the decision of June 20th, 1931, but also those who were excluded from the benefits of that decision, though they constituted an integral part of the economic life of the Congo, in the same way as the others. There is nothing in the text of the decision of June 20th which gives even an indication of such an elementary consideration. It is interesting to observe that, a few years before that date, namely in 1928, when the Belgian Government was authorizing this very Unatra Company, which is the chief subject of the decision, to introduce certain reductions which it had asked leave to make in its transport tariffs in order to meet the competition of other carriers, it added some reservations which revealed its solicitude for the rights of other enterprises. Thus, the letter written by the Minister of the Colonies on October 24th, 1928, contains the following passage:

[*Translation.*] "I should see no objection to the tariffs that are submitted for my approval being regarded as maximum rates; in these circumstances you would be able to conclude special transport contracts; but I draw your attention to the need of treating all the carriers of the same category on a footing of equality. I do not wish to receive any justifiable complaints; the smallest such complaint would lead me to contemplate the withdrawal of the approval which I convey to you in the present despatch."

In view of the different circumstances surrounding the decision of June 20th, 1931, the legal description which best fits it is, in truth, that it constituted a privilege. It does not, of course, acquire that character simply because it affirms the necessity and the intention of

reducing tariffs, as was done, with the consequence, so far as the transport enterprises were concerned, of costly sacrifices, attended by grave financial consequences. We might even agree that it did not become a privilege because, at the outset, it applied the tariff reductions to some only of the transporters operating on the Congo. But it undoubtedly became a privilege when it confined to one group only of the transporters its offer of enabling them to offset the losses which must necessarily [100] follow the lowering of tariffs, and when it failed to extend this favour to the other enterprises. And yet the "private transporters" were inevitably placed by the Belgian Government's decision in a manifestly weaker position for resisting the crisis which must immediately overtake the transport business ; in other words, they were faced with the certainty of loss without being offered the hope of compensation. And the privilege thus conferred solely upon one group of transporters is nothing else than an inequality of treatment affecting a particular branch of commerce.

It is true that this inequality would not, in principle, be regarded as an injustice in the normal life of a State. It might arise, without giving any ground for justified complaint on the part of enterprises not admitted to participate in advantages such as those which were offered, in a period of general commercial depression, by the decision of June 20th. But, in the case of the Congo, where the special Statute created by the Convention of Saint-Germain is in force, the question presents itself in a very different light. Having regard to the international obligations which that Convention imposes on the riparian States, and in particular upon the Belgian State, in the matter of commerce, the above-mentioned decision undoubtedly constitutes one of those cases of inequality that is prohibited by the Convention. That inequality is not dispelled owing to the difference that exists between the special position of Unatra in the economic life of the Congo, and in its relations with the Belgian Government, and the position of the other companies. Even if that difference were, as profound as has been alleged, that would be no ground for concluding that Unatra's affairs - however closely that Company may be controlled by the Belgian Government - are outside the boundary of the international obligations arising from the Convention of Saint-Germain. It appears to me that, from the point of view of that Convention, Unatra can only be regarded in the light of its commercial character and of its Belgian nationality, and not in its capacity as a controlled or an uncontrolled Company - a point which is immaterial for the legal issue in the present case. The same reasoning should apply, in good logic and in good law, to the theory that the decision of June 20th, 1931, may be considered

as a kind of *novatio* of the contract between Unatra and the Belgian Government. No modification of that kind could go so far as to override the obligations undertaken in the Convention.

Also, owing to the fact that, as already mentioned, one of the enterprises excluded by the decision was that of Mr. Chinn, a British subject, and, still more, owing to the circumstance that Mr. Chinn was, apart from Unatra, as has been pointed out, [101] the only carrier, in the strict sense of the term, the conflict which results with the rules of the Convention of Saint-Germain is a "conflict with the international obligations of the Belgian Government towards the Government of the United Kingdom", in regard, in particular, to Articles 1, 3 and 5 of that Convention.

The following objection may be made against this conclusion. Even if one admits, as a consequence of the foregoing arguments, that the decision of June 20th, 1931, produced a commercial inequality of treatment, did that inequality fulfil the condition, said to be required by the Convention, of being based on the ground of nationality ? Or does the fact that the group of enterprises excluded by the decision (the "private transporters") comprised both Belgian and foreign nationals show that the above-mentioned condition was not fulfilled, and that, consequently, there was no inequality of treatment in the sense of the Convention ?

I do not think so. First, because the idea of nationality appears to me to mean something quite different in the Convention of Saint-Germain from what it means in the treaties in which the ground of nationality is the characteristic feature, namely, the treaties relating to Minorities properly so-called. The standpoint of those treaties is indeed very different from that which the Convention of Saint-Germain may have had-and, in my opinion, really had. Moreover, there is nothing to show that a conception of nationality such as might justify the objection we are now considering, played any part in the negotiations which led to the framing of that Convention. It would indeed be difficult to regard the presence of a certain number of foreigners of different nationalities in the Congo as evidence of the existence of minorities who would have need of rules for their protection similiar to those provided for minorities in the treaties referred to above.

The signatory Powers of the Convention of Saint-Germain and the signatories of the Berlin Act were not moved to give contractual form to the freedom, equality, and guarantees, which are stipulated in those two treaties, by any need of affording protection in the Congo to

some minority of nationality, language, or religion present therein, and attached to the respective Powers by -political or other ties. Their aim-apart from matters relating to the natives and from some words in Article 11 - was the economic object of ensuring for the citizens of certain States in these African territories freedom to engage in all economic activities, and protection for their civil rights against the system of monopolies which had long characterized the financial policy of the colonizing countries. Thus, when the Convention refers to "nationals", it is [102] because that word is best suited to designate the link that unites the persons referred to therein to the contracting States. But these persons are not considered in the Convention with reference to their nationality, or with a view to safeguarding anything inherent in their status as nationals, but with reference to their commercial, shipping or other associations which, it must be repeated, are the special concern of this Convention. It is in order to safeguard them in the exercise of those avocations that the Treaty was concluded, and it follows that it is the inequality of treatment to which they might be subjected in that respect which is for-bidden in the Treaty, irrespective of the grounds on which it is based.

In view of the above considerations, it appears to me impossible to agree that acts of discrimination can only be regarded as infractions of the international obligations arising out of the Convention of Saint-Germain if the discrimination affects foreign nationals as compared to Belgian nationals. To demonstrate the fallacy of this view, one needs only to observe that, if that theory were adopted, the result would be to abolish international obligations in a number of cases. It would suffice that, as a result of an error or oversight, a measure which was discriminatory in itself, happened to apply both to nationals and to foreigners, for the said measure to be regarded as compatible with the international obligation of equality of treatment. The earnest solicitude for "complete commercial equality" - which is shown by the Convention of Saint-Germain could not be reconciled with an interpretation which would presume an oversight on the part of the signatory Powers, fraught with consequences inimical to their essential purpose.

One must also consider the fact (a very important "circumstance of the case") that, in the present instance and because in 1931 there were no fluvial transporters, properly so-called, other than Unatra and Mr. Chinn - the inequality suffered by the latter really results from a difference of treatment as between a Belgian national (Unatra) and a foreign national (Mr. Chinn); for the

other transporters on the Congo were not - as has been already shown - working under the same conditions that characterized the position of Unatra and Mr. Chinn. Accordingly, even if the hypothesis which I am now considering were correct, it could not, in my view, cover the present case.

The conclusion that there was inequality of treatment is based solely - as has been seen - on the decision of June 20th, 1931. The subsequent facts are recited in the judgment. I will only select from among them the fresh decision of July 28th, [103] 1931» which most signally endows the decision of June 20th with the character of a privilege, inconsistent with the terms of the Convention.

For, although the decision of June 20th, 1931, confined itself to offering repayment of future losses to a particular group of companies, there was nothing in the text of that decision which prevented a similar favour from being conceded to the other companies, if they also reduced their tariffs to the same scale as that laid down by the Belgian Government. As a fact, this possibility at once occurred to some of the private transporters; it was raised in particular by Socca in its letter of June 26th, 1931, to which I shall return. One finds other evidence of the same fact in the letter dated June 27th, 1931, from the President of the Leopoldville Chamber of Commerce, in the representations made by the *Association des intérêts coloniaux belges* in August of the same year, and in the recommendations made by the Council of the Colonial Government at Leopoldville on July nth, 1931, and also at its meeting on October 14th. Evidence to the same effect is to be found in recitals of the judgment of the Court of first instance at Leopoldville (Sept. 21st, 1932), which show that other private transporters, in addition to Socca, had perceived the perfectly justifiable possibility of the advantages offered by the decision of June 20th being further extended. The judgment in question says: "Whereas the associated plaintiffs have brought an action against the Colonial Government for damages on account of the prejudice they claim to have suffered owing to the fact that the Colonial Government concluded an arrangement with the *Société nationale des Transports fluviaux* known as "Unatra" without admitting them to the benefits of similar treatment...."

The Socca Company, as has already been said, had made formal application to that effect to the Belgian Minister of the Colonies in a letter dated July 26th. It is noteworthy that Socca does not ask, in that letter, for any special favour, but that it assumes from the outset - as something too self-evident to require proof - that the repayments promised in the decision of

June 20th are naturally applicable to companies other than those enumerated in that decision. Accordingly, Socca confines itself to asking for the necessary information as to the conditions with which it must comply in order to qualify for the said repayments, that is to say, in order to come under the régime of June 20th. Thus, paragraph 2 of Socca's letter reads : "As our Company maintains a regular transport service, carried on by several vessels, we should be glad if you would inform us as to the conditions with which we must comply in order to be compensated by the Government for the losses we are incurring, as a direct consequence of your [104] recent decision in regard to transport." Socca was right, in my opinion, in believing that there could be no logical obstacle to its participation in the new régime.

The reply from the Minister of the Colonies to the letter of June 26th is dated July 28th. It consists of five paragraphs. The first states clearly the request made by Socca; the second gives a description of the decision of June 20th, saying that "the measure in regard to the lowering of trans-port tariffs was taken in the general interest and was made necessary by the conditions in regard to prices of Congo products in the European markets". This statement is of great importance for the present question, as it offers a confirmation of the chief reason which is given for the necessity of the decision of June 20th; but whereas one would expect this statement to be followed by the natural conclusion ensuing from the *general character* thus attributed to the measure taken in June, one finds on the contrary that, in its last paragraph, the Minister's letter abandons the position taken up in the second paragraph and refuses Socca's request for reasons of a totally different kind. This fifth and last paragraph says: "It follows that the Government's intervention must be confined to those transport enterprises whose tariffs it has the right to control. I regret that I am not therefore able to comply with the request you have submitted." To show even more clearly the lack of continuity between the reasoning in this fifth paragraph and that of the earlier paragraphs of the same letter, it should be mentioned that the remainder of paragraph 2 and paragraphs 3 and 4 merely give explanations regarding the text of the concluding paragraphs of the decision of June, and point out that those paragraphs are only concerned with fixing the character of the reimbursements promised, and the conditions upon which they will be paid and, in due course, refunded, to the Colonial Exchequer. They contain no argument which would enable the conclusion in paragraph 5 to follow from what is stated in paragraph 2.

Omitting all other possible comments - which would be superfluous at this time - on this letter of July 28th, the fact which results from the refusal it conveys is that it definitely confirms the differential treatment which was already so clearly indicated by the decision of June 20th. The reply of the Minister of the Colonies of July 28th, 1931, is there-fore in obvious conflict with the Convention of Saint-Germain and especially with its Articles 1 and 3.

On the other hand, I have not been led to the same conclusion, that there was a conflict with the international [105] obligations arising from the Convention -in regard to the thesis based on the allegation that it became absolutely impossible for the "private transporters" to continue their business, as a consequence of the Minister's refusal of July 28th, taken in conjunction with the decision of June 20th; and that Mr. Chinn not being a merchant, was therefore not able to protect himself by trading from the consequences of the injury done to his transport enterprise. Apart from the uncertainty as to whether his business was in fact rendered impossible - a point which is disputed by the Belgian Government, but which is not in my view an essential issue - there is also the uncontested fact that Mr. Chinn did abandon his business (on July 1st) a few days after the publication of the decision of June 20th, and that he does not seem to have taken the same steps as Socca to seek a natural solution of the situation created by the decision of June 20th, before he had recourse to the courts in 1932. In these circum-stances, it would be rash to conclude that - in addition to the inequality prohibited by the Convention of Saint-Germain - he suffered prejudice on the ground that it was made impossible for him to continue his business. I think that the prejudice would be found to consist - if it had been possible now to make a thorough investigation - not in the fact referred to above, but perhaps in the inevitable losses resulting from the position of inequality in which the so-called "private" transporters were placed by the decision of June 20th. But all those points are now immaterial to the issue, and I think there is no need for me to dwell upon them.

I have still a few words to say regarding certain facts subsequent to July 28th, 1931.

Fifteen months after that date, a "Public Notice", issued by the Governor-General of the Congo in pursuance of a decision by the Minister of the Colonies, modified the policy expressed in the decision of June 20th, 1931, and in the letter of July 28th of the same year, and declared that "private transporters who ask for it will be granted, as an advance and subject to the

requisite guarantees, repayment of the losses suffered as a result of the transport of produce downstream at the reduced tariffs. This loss to be calculated on the basis of the loss sanctioned by Unatra on December 31st, 1932"; that is to say, it would not be calculated upon the basis of the losses suffered by the private transporters.

I will not examine the substantial value of this new offer, having regard to the conditions attached to it and to the terms of the fresh Notice of November 5th, 1932, as these facts are irrelevant, from my point of view, to the legal [106] issue stated in A, 1, of the Special Agreement. I will content myself with pointing out that this rectification of the policy which the Belgian Government had declared in June 1931, and which it reaffirmed on July 28th, confirms my reasoning. Moreover, the fresh decision of October 3rd, 1932, could not obliterate the effects of the former policy which had been felt by the private transporters (including Mr. Chinn) during the past fifteen months; or the fact that discriminatory treatment had continued throughout that period, not to mention the disastrous consequences to business which naturally ensued from it. That, in my opinion, suffices to cause an affirmative answer to be given to point A, 1, of the Special Agreement.

(Signed) Rafael Altamira.

[107] Separate Opinion of M. Anzilotti.

[*Translation.*]

I regret that I am unable to concur either in the decision reached in the judgment rendered by the Court or in the grounds on which that decision is based.

In my opinion, this judgment fails to appreciate the true import of the main plea of the Government of the United Kingdom and does not satisfactorily deal with the question of law raised by that plea. Furthermore, and in consequence of my attitude in regard to the point above mentioned, I think that the Court, before deciding the case on the merits, should have ordered the production of further evidence, as the Agent for the Government of the United Kingdom requested it to do without any objection on the part of the Agent for the Belgian Government.

1. - As I understand it, the main plea of the Government of the United Kingdom may be summarized as follows:

By compelling Unatra to reduce to one franc per ton its charge for the carriage of the chief products of the Congo colony, and by giving an undertaking to that Company temporarily to bear the losses resulting from the reduction imposed, the Belgian Government was wittingly rendering it commercially impossible for other transporters to carry on their businesses, was concentrating the transport business in the hands of Unatra and was thus creating in favour of that Company what the Government of the United Kingdom calls a *de facto* monopoly.

These measures, regarded from this point of view, that is to say, in so far as they were bound to bring about and did in fact bring about the situation described, are alleged to be in conflict with the provisions of the Convention signed at Saint-Germainen-Laye on September 10th, 1919, concerning freedom of navigation and trade, and equality of treatment in connection with these matters.

The Government of the United Kingdom does not contend that the measures adopted by the Belgian Government are in themselves and in all circumstances inconsistent with that Convention. It disputes neither the State's right to control shipping companies or itself to engage in the transport business, nor its right to regulate transport changes or to grant subsidies; its Agent has even made an express statement to the contrary.

It contends, however, that in this particular case these measures were bound to create and did in fact create a privileged position for Unatra, by making it practically impossible for [108] other concerns to engage in the river transport business. It is on this ground, and this ground only, that the Government of the United Kingdom alleges that the measures in question are in conflict with the obligations resulting from the Convention of Saint-Germain.

2. - The first question raised by this plea is whether the facts advanced to support it have been established, that is to say, whether one can regard it as adequately proved that the measures taken by the Belgian Government were bound to result and did in fact result in concentrating the river transport business in the hands of Unatra, by making it commercially impossible for other transporters to engage in that business.

I have no hesitation in answering this question in the negative.

Of course, the Government of the United Kingdom has presented to the Court a considerable quantity of information and statistics regarding the transport of goods before and after the measure of June 20th, 1931, and regarding the distribution of vessels amongst the various concerns; it would appear from this evidence that, after the adoption of the measure in question, Unatra did in fact attain a privileged position and did in fact replace the other transporters.

The Belgian Government, however, for its part, has produced an equally large quantity of information and statistics, from which it would appear that the river transport business was still carried on or even improved after the decision of 1931. With the evidence at present available, it was certainly impossible for the Court to say that the information and statistics produced by the Government of the United Kingdom were correct and that those produced by the Belgian Government were incorrect.

Again, it is to be observed that, in order actually to establish the contention of the Government of the United Kingdom, it will not suffice to prove that private river transport concerns in the Congo ceased to operate after the measures adopted in 1931; it must also be proved that these measures and the cessation of business stand in the relation of cause and effect. Since the decision of June 20th, 1931, only affects the carriage of certain products of the colony between certain points on the river, this necessitates the appraisal of a number of technical

considerations which only experts in fluvial navigation and in the economic conditions of the Congo could adequately present to the Court.

3. - In these circumstances and at the very beginning of the oral proceedings, the Agent for the Government of the [109] United Kingdom made the request to the Court to which I have referred at the outset of this opinion.

After remarking that serious discrepancies still existed between the Parties in regard to important matters of fact, and after pointing out the difficulty of producing complete proofs, when the facts to be established had transpired in the territory of another State, the Agent for the Government of the United Kingdom suggested that the Court should order an enquiry, but only, of course, if it considered that the evidence already produced was insufficient to establish that the effect of the Belgian Government's measures had been to create a *de facto* monopoly, and that such a monopoly, if proved to exist, would be inconsistent with Belgium's international obligations.

The Agent for the Belgian Government raised no objection: whilst observing that the facts established - which however were quite other than the facts to which the Agent for the Government of the United Kingdom referred - sufficed in his view for the settlement of the dispute, he said that he left the matter to the Court, which possessed all the requisite powers under Article 50 of its Statute.

This being the position and seeing that the case depended mainly on the appraisal of the facts, as the Special Agreement expressly says in the very terms of the question to be answered, the Court, in my opinion, ought not to have hesitated. Being confronted with the alternative of rejecting the main plea of the Government of the United Kingdom, for lack of evidence, or of exercising the powers conferred on it by the Statute and ordering the production of the necessary evidence, it should have taken the latter course.

To do so however would have hardly been possible without first of all establishing that the evidence to be called for was material to the issue. As the facts to be established related to the creation of a *de facto* monopoly in favour of Unatra, it was necessary to prove that such a monopoly, if its existence was established, would be inconsistent with the obligations laid on Belgium by the Convention of Saint-Germain.

It was from this aspect that the question of law raised by the main plea of the Government of the United Kingdom should have been considered by the Court at the very outset of its deliberation. I think that I may formulate the problem as follows:

Assuming to have been duly established the facts alleged by the Government of the United Kingdom and tending to prove that the decision of June 20th, 1931, and the application of that decision were bound to result and did in fact result in concentrating the river transport business in the hands [110] of Unatra by making it commercially impossible for other transporters to engage in that business, are these measures in conflict with the international obligations incumbent on Belgium under the Convention of Saint-Germain ?

4. - Before taking up this question, which is undoubtedly the most important and the most delicate of the questions of law raised by the present case, it will, not be out of place to define its essential features.

In the first place, it is certain that Unatra's privileged position is not the result of any legal prohibition applied to other river transport concerns. The latter are in law free to navigate their vessels and to carry passengers and cargo, just as before the decision of June 20th, 1931; what prevents them doing so is simply a commercial obstacle, namely the impossibility of obtaining customers unless they adopt Unatra's rates and, as a result, face very considerable losses.

On the other hand, Unatra's privileged position is not the result of the natural operation of economic laws, and in particular of competition. Unatra did not enter into competition with other transport concerns in the way that any other transporter might have done: it was solely owing to the financial assistance of the Government that it was able to lower its rates to such an extent as to drive other transporters out of the market. Its monopoly - if it is a monopoly - is the result of the decision of June 20th, 1931, that is to say of an act of the Government.

There is no doubt that, if this decision had taken the form of a prohibition to transport certain ' goods and to reserve their carriage to Unatra, it would have been contrary to the Convention.

Nor is there any doubt that, if the fact that it became impossible to carry on the transport business had been the result of the natural operation of economic laws, for instance a reduction in rates made by one of the river transport concerns or by Unatra itself, without any intervention

on the part of the Government, that fact would have been of no importance as regards the obligations arising out of the Convention.

What is the law when it is in fact impossible, though a legal right remains, for others to engage in the business in question, and this impossibility is the necessary and direct consequence of an act of the Government ?

This, in my view, is the real question of law raised by the main plea of the Government of the United Kingdom.

5. - In order to answer this question, I do not think it necessary to ascertain how far the principle of freedom of trade which is so fully stipulated for in Article 1 of the Act of [111] Berlin of February 26th, 1885, has been accepted by the Convention of Saint-Germain. It will suffice for my purposes to refer to Article 5 of that Convention, which is the real *sedes materia*.

The Article is worded as follows:

"Subject to the provisions of the present Chapter, the navigation of the Niger, of its branches and outlets, and of all the rivers, and of their branches and outlets, within the territories specified in Article 1, as well as of the lakes situated within those territories, shall be entirely free for merchant vessels and for the transport of goods and passengers.

Craft of every kind belonging to the nationals of the signatory Powers and of States, Members of the League of Nations, which may adhere to the present Convention shall be treated in all respects on a footing of perfect equality."

It is clear, to begin with, that this Article lays down that navigation is to be free, both as regards movements of shipping, or navigation in the strict sense of the word, and as regards the carriage of passengers and cargo. It is, indeed, in that sense that freedom of fluvial navigation has always been understood in international treaties concerned with the question.

It follows that an encroachment on the freedom to carry goods is a contravention of this Article, for the same reason and in the same way that an encroachment on the freedom of movement of shipping would contravene it. It is therefore quite possible, from this standpoint, for the Belgian Government's measures to be in conflict with Article 5, although they only affect the carriage of goods and in no way restrict the passage of vessels.

The most delicate point of the problem is, however, the question whether the provisions of Article 5 merely require the signatory Powers to refrain from any measure restricting either

the free movement of shipping, or the freedom to carry passengers and cargo - provided of course that such measure is not legally justified by some other article relating to navigation in the Convention - or whether the Article goes further and requires the signatory Powers to refrain from any measure which, though not interfering with the free movement of shipping or cargoes, is of such a nature as to render this freedom economically valueless.'

The question amounts to this: what is it that Article 5 sets out to protect? The Article is, indeed, drawn in such wide and general terms that any injury done to that which it seeks to protect is undoubtedly covered by its terms; there is nothing in the text to justify a belief that it is only aimed at legal prohibitions of navigating or of carrying cargoes. [112]

In my view, it is beyond doubt that, in the Convention of Saint-Germain - as in all the other conventions relating to this subject, to which the present Convention is merely a sequel - navigation is regarded, and is protected, as a branch of economic activity, as a business. The purpose of Article 5 is to open the commercial exploitation of the waterways of the Congo Basin to everybody, so that everyone may reap the financial profits to be derived from it.

The freedom of navigation which Article 5 seeks to protect is not an abstract and academic freedom, but a tangible and effective freedom: the freedom to engage in a business in order to reap its profits. The purpose of this Article would be entirely stultified if the State were entitled to make it impossible for the shipping business to earn any profits, so long as every one was left free to engage in it: the idea of freedom of navigation which underlies Article 5 is something altogether different.

It would, of course, be absurd to maintain that the State was bound to make it possible for the shipping business to be carried on by guaranteeing custom and profits to those who engage in it; freedom of navigation can only signify freedom to engage in the shipping business, without hindrance, and subject to the risks to which that business is liable.

But the position is quite different if the State itself takes measures which* render it impossible to obtain custom or to earn profits: in that case it is restricting that very freedom which it was bound to respect; measures of that kind are just as repugnant to Article 5 of the Convention of Saint-Germain as would be a law prohibiting navigation or the carriage of passengers and cargo. I find it impossible to believe that this Article prohibits the Belgian Government from reserving to the Unatra Company by legal enactment the carriage of goods

referred to in the decision of June 20th, 1931, and yet left that Government free to adopt measures as a consequence of which no one else but Unatra could carry such goods without the certainty of incurring heavy losses.

6. - If, assuming the facts alleged, by the Government of the United Kingdom to have been duly established, the measures adopted by the Belgian Government were contrary to the Convention of Saint-Germain, the circumstance that these measures were taken to meet the dangers of the economic depression cannot be admitted to consideration. It is clear that international law would be merely an empty phrase if it sufficed for a State to invoke the public interest in order to evade the fulfilment of its engagements.

I hasten to add, to prevent any misunderstanding, that it is quite possible, on the other hand, when one comes to examine [113] the facts, that the economic depression was an important or even a decisive factor, accounting for the Belgian Government's measures in a manner calculated to refute the allegations of the Government of the United Kingdom. That is however, a question of fact. And it is for that reason that the Court, unless it rejected the submissions of the last-named Government for lack of proof, could not adopt that course except as the result of an enquiry which would elucidate all the questions of fact, both those relied on by the Belgian Government - including therefore, and primarily, the economic depression - and those relied on by the Government of the United Kingdom, which relate to the creation of a monopoly in favour of Unatra by the measures referred to.

Again, the position of Unatra, as a Company which has been under governmental control from the time of its foundation in 1925, and which is responsible for certain public services, has no bearing on the issue: that position in no way precluded competition by other enterprises. It is true that it was owing to the control which the Belgian Government exercised over Unatra - as over the other transport enterprises covered by the decision of June 20th, 1931 - that that Government was able to take the impugned measures; but it is equally true that the Belgian Government should have abstained from taking those measures if they had been inconsistent with its international obligations. The situation occupied by the State-controlled companies, on the one hand, and by the uncontrolled companies, on the other hand, is therefore entirely immaterial to the issue which the Court had to decide.

7. - The situation would have been entirely different if the Belgian Government had been acting under the law of necessity, since necessity may excuse the non-observance of international obligations.

The question whether the Belgian Government was acting, as the saying is, under the law of necessity is an issue of fact which would have had to be raised, if need be, and proved by the Belgian Government. I do not believe that that Government meant to raise the plea of necessity, if the Court had found that the measures were unlawful; it merely represented that the measures were taken for grave reasons of public interest in order to save the colony from the disastrous consequences of the collapse in prices.

It may be observed, moreover, that there are certain undisputed facts which appear inconsistent with a plea of necessity.

To begin with, there is the fact that, when the Belgian Government took the decision of June 20th, 1931, it chose, from among several possible measures - and, it may be added, in a manner contrary to the views of the Leopoldville Chamber of [114] Commerce - that which it regarded as the most appropriate in the circumstances. No one can, or does, dispute that it rested with the Belgian Government to say what were the measures best adapted to overcome the crisis.: provided always that the measures selected were not inconsistent with its international obligations, for the Government's freedom of choice was indisputably limited by the duty of observing those obligations. On the other hand, the existence of that freedom is incompatible with the plea of necessity which, by definition, implies the impossibility of proceeding by any other method than the one contrary to law.

Another undisputed fact which seems irreconcilable with the plea of necessity is the offer made by the Government to trans-ports other than Unatra on October 3rd, 1932. Whatever its practical value, that offer showed that it was possible to concede advantages to all enterprises, similar to those granted to Unatra, and hence to avoid creating that *de facto* monopoly which, in the submission of the Government of the United Kingdom, was the necessary consequence of the decision of June 20th, 1931.

8. - For the foregoing reasons, I have reached the conclusion that the facts alleged by the Government of the United Kingdom are not sufficiently established ; but that if they were proved, that is to say, if it were established that the decision of June 20th, 1931, and the

application of that decision, were bound to result and did in fact result in concentrating all fluvial transport business in the hands of Unatra by rendering it commercially impossible for other transporters to engage in that business, those measures would be in conflict with Belgium's international obligations under the Convention of Saint-Germain towards the United Kingdom.

Seeing then that further evidence was material to the issue, it was the duty of the Court, in my opinion, having regard to the terms of the Special Agreement and to the attitude of the Parties, to suspend its decision on the merits and to proceed, under Articles 48 and 50 of the Statute, to order the necessary enquiries, to establish the truth impartially in regard to the disputed facts, and to obtain the requisite technical information to enable it correctly to appraise them.

It is only with the result of these enquiries before it that the Court could fulfil the mission confided to it by the Special Agreement which was to deliver judgment "having regard to all the circumstances of the case".

(Signed) D. Anzilotti.

[115] Dissenting Opinion of Sir Cecil Hurst.

Being unable to concur in the answer which the judgment gives to the first question put to the Court in this case, I feel it necessary to avail myself of my right under the Statute of the Court and to indicate my standpoint in regard to the dispute.

It is a case where the decision must so largely depend on a correct appreciation of the facts and circumstances that I shall frequently find it necessary to state my view of the facts.

The dispute submitted to the Court has arisen with regard to the consequences which certain measures taken by the Belgian Government in connection with Unatra had upon the enterprises carried on by a British subject, Oscar Chinn, in the Belgian Congo.

Unatra is a Congolese Company: therefore the treatment which it receives at the hands of the Belgian Government is no concern of the Government of the United Kingdom, but the allegation is that Chinn's losses were due to the measures taken with regard to Unatra.

As it is not legally possible in this case that the Belgian Government should be liable to make reparation to the Government of the United Kingdom on behalf of Chinn if the measures taken involved no violation of the international obligations of Belgium, the basis of the British case must be that the measures taken by the Belgian Government were in themselves unlawful, either by reason of the intention with which they were taken, or by reason of the consequences which they were bound to entail and which should have been foreseen by the Belgian Government. In this latter, the element of intention would be immaterial.

It is not easy to tell from the Memorial and the Reply and from the oral arguments of Counsel for the United Kingdom which of the above alternatives is adopted as the foundation of the British case. It is therefore necessary to examine them both.

The first alternative involves a demonstration either by direct proof or by necessary deduction from proved or admitted facts that the Belgian Government intended to achieve a situation inconsistent with its international obligations, i.e. that in this particular case it intended to drive out Chinn from the transport business on the Congo either by concentrating the whole of the transport business in Unatra's hands or by rendering it [116] impossible for him to carry on. Nothing in the case suggests that the contention put forward on behalf of the United Kingdom is that the Belgian intention was to drive out Chinn alone. No evidence of any such intention is

produced, and the story of the facts as detailed in the Memorial shows that up to the moment when the Government of the United Kingdom took up Chinn's case, Chinn was associating himself with other private transporters (mostly of Belgian nationality) who" were equally aggrieved by the Belgian measures.

The relative smallness of Chinn's business as compared with the aggregate volume of river transport on the Congo makes it inherently improbable that the Belgian Government would conceive measures directed against him alone.

It may therefore be assumed that, when it is alleged that the Belgian measures rendered it impossible or commercially impossible for Chinn to carry on business, reference is made to Chinn merely because he was the only British subject involved, not because he was singled out for special treatment, and that the contention is that the position was made impossible not only for Chinn but for all private transporters.

As between the two alternatives indicated above - illegality of the Belgian measures because of their intention and illegality because of their necessary consequence - it seems on the whole more probable that the case of the United Kingdom is that they were illegal by reason of their consequences.

No attempt is made in the documents of the written proceedings to adduce the evidence required to establish the illegality of the Belgian measures on account of the intention with which they were taken, i.e. to show that it was the *intention* of the Belgian Government in adopting the measures of 1931 to concentrate the river transport in the hands of Unatra. Intention is a question of fact - as to which proof is necessary - and the burden of proof lies on the party making the allegation. It is true that direct proof of intention is not usually forthcoming: the proof must in most cases consist of deductions from admitted or established facts, but where that is the case the intention must be clearly deducible from the facts. Here such facts as are admitted or established are insufficient to render any such intention clearly deducible. In his reply the Agent for the United Kingdom, it is true, suggested that there [117] was this second motive for the particular action taken by the Belgian Government, viz. that it

would benefit Unatra and put an end to competition, but the statement is one which must be read in the light of the rest of his speech.

If the intention to establish a monopoly for Unatra was the essence of the case put forward by the United Kingdom against the Belgian Government, it is incredible that the Memorial should not treat a document such as that referred to in the third footnote on page 10 of the Memorial as a "document in support" which should under Rule 40 be annexed to the Memorial (i.e. in full).

The fair conclusion would seem to be that the case put forward on behalf of the United Kingdom is not that the Belgian measures were inconsistent with the international obligations of that Government because they were *intended* to confer upon Unatra a monopoly, but because their necessary consequence and one which must have been foreseen was to create such a monopoly.

If this conclusion is erroneous, and the case on behalf of the United Kingdom is based upon the contention that the Belgian measures were inconsistent with the international obligations of that Government because they were *intended* to concentrate the whole of the river transport in Unatra's hands, the case with regard to the alleged *de facto* monopoly fails for want of proof of the intention on which it is founded.

For these reasons I conclude that the contention of the United Kingdom is that the Belgian measures were inconsistent with the international obligations of that Government, because of the consequences which they involved and which the Belgian Government should have foreseen that they involved.

The measures themselves have already been explained in the judgment of the Court. To appreciate the effect of them, however, it is desirable to add a few words as to the industry of the colony.

The Belgian Congo is an area producing in great quantities commodities which find their market in Europe. The exporter depends for the prosperity of his business upon the price which the goods realize on the European market. Out of this price has to be paid the cost of transport to Europe; the higher the cost of transport, the smaller the net price realized by the exporter. It stands to reason in these circumstances that the exporter in the Congo will patronize the business which will transport his goods at the lowest rate.

If of two competing businesses one can say that he is now able to transport goods at one franc per ton and the other that he cannot do so, and must continue to charge the previous [118] rates, it is obvious that the former will get the business. The general conditions to which both are subject will be identical; they will be subject to the same laws, the same regulations, the same conditions or liability as regards insurance and carriage, the same rights to the use of ports, wharves, pilots and stevedores, the same dues, etc.: all will be identical, but the one will get the cargoes to carry and the other will not.

All this is so obvious that the Court is entitled to assume that the Belgian Government must have realized what the consequences would be of the sweeping reductions in Unatra's transport rates which they effected by the decision of June 20th, 1931.

It is true that most upstream and some downstream traffic was not affected by the reductions, but if this traffic had been sufficient wherewith to carry on a business, Unatra would not have incurred the losses it did in 1931 and 1932.

It follows therefore that the Belgian Government must have realized that the effect of the June measure would be that Unatra, carrying at one franc a ton, would get all the business and a private transporter, such as Chinn, carrying at the old rates, would get none. Even if the Belgian Government did not realize this at first, it was within a few days made clear to them by the Socca Company at Antwerp and by the Chamber of Commerce at Leopoldville.

Before turning to the questions whether the Belgian measures were or were not inconsistent with the international obligations of that Government, it is necessary to examine these measures a little more clearly.

The decision of June 20th, 1931, embodied two elements: the direction that the tariffs were to be reduced, as therein stated, and the arrangement for the repayment of the losses which each of the six companies concerned suffered as a result of the reductions.

The so-called *de facto* monopoly of transport on the river which Unatra are said to have secured as the consequence of this measure would result from the first element - the reduction of the tariffs. Exporters would entrust their goods to Unatra for carriage, because they would by this means get them carried most cheaply.

If Chinn had been able to reduce his charges to the same extent, he could have protected himself by carrying goods at the same rate as Unatra and keeping his clientèle, but that he could not do. To carry goods at one franc per ton would [119] have been ruin to him, just as it would have been to Unatra if the Belgian Government had not reimbursed their losses.

The decision of June 20th, 1931, being addressed to the six companies concerned, was silent on the subject of extending the same favourable treatment to private transporters if they made corresponding reductions in their charges. Judging by the terms of the letter of the Leopoldville Chamber of Commerce of June 27th, 1931, commercial circles in the Congo must have had a shrewd suspicion that the Government did not intend to accord the same treatment to the private transporters, but the position was not certain. This is shown by the letter referred to above which Socca (one of the Belgian exporting firms which had organized its own transport fleet) wrote to the Belgian Minister on June 26th, 1931, asking how they could qualify for repayment of the losses they would suffer, as they could not believe that the Belgian Government intended to create a preferential régime for Unatra.

It was not until July 28th, 1931, that the Belgian Government by letters addressed to Socca (Series C, No. 75) and to the Chamber of Commerce at Leopoldville (Memorial, par. 24; *ibid.*) refused to accord similar treatment to private transporters.

It follows that the concentration in the hands of Unatra of the whole of the river transport trade resulted (if at all) from the reduction of tariffs by the decision of June 20th, 1931. The injury to Chinn resulted (if at all) from the failure to make any provision for repaying their losses to private transporters who made similar reductions, and this omission only became definitive as from July 28th, 1931.

There are certain subsidiary questions of fact which it is desirable to dispose of in order to keep the legal issues clear.

The first is that the arrangement introduced by the decision of June 20th, 1931, was temporary in character: it was open to review at the end of three months. This circumstance cannot affect the question whether the measures were inconsistent with Belgium's international

obligations. The duration of the arrangement would certainly affect the amount of the reparation, if the measure were illegal, but if a State is subject to engagement to do or not to do a certain thing, there cannot be read into it a provision that for short periods there shall be liberty to violate the engagement. [120]

The second is that the decision of June 20th provided that the sums paid by the State to reimburse the losses suffered by the six Belgian companies concerned should be repayable to the State when the economic situation allowed. Clearly this is not a circumstance which could affect Chinn or the Government of the United Kingdom.

The third is that several of the Belgian companies at work in the colony had previous to 1931 organized their own fleets so as to be able to do their own transport work. It seems that when they could, their fleets transported goods for other people as well. The Belgian measures of 1931 affected these companies in a way which differed slightly from the way in which they affected Chinn or any other person who was not an exporter and who devoted himself entirely to transport work.

A company which had sunk capital in organizing its own fleet and had collected a personnel to man and run that fleet would hesitate to abandon its fleet merely because temporarily it could get its transport work done for it more cheaply by Unatra under the decision of June 20th, 1931, than it could do it for itself. It might feel that in the long run it would be more advantageous to maintain its fleet and run it at a loss than to get its merchandise carried gratuitously for a short time by another concern.

If the companies which had organized their own fleets had been British nationals, it would be necessary for the Court to enquire as to how the Belgian measures affected each one of them, but being Belgian, the effect of the measures upon them is not a matter with which the Court need deal.

The difficulty which the position of these companies creates is that both sides have endeavoured to establish their contentions before the Court by the production of statistics as to the volume of merchandise which private transporters carried on the river after the measures of 1931 came into force. These statistics include the goods transported by companies which for a

time at least kept their fleets going. Neither side accepts the statistics put forward by the other, and so great is the discrepancy between them that the Agent for the United Kingdom asked for the appointment of an "expertise" to investigate the questions to which these statistics related.

The Court has declined to appoint such an expertise. [121]

In the view which I take of the case, such an appointment would have been useless, as the results of the enquiry could not affect the ultimate decision. What the United Kingdom has to show is that Chinn was injured by measures which were inconsistent with Belgium's international obligations: such proof would not be assisted by an enquiry as to the effect which the measures had on the transport business of Belgian companies which tried to keep their fleets going. It would only result in an enquiry as to how much of its financial reserves each company was able and willing to devote to keeping its fleet in being

I return to the question whether the Belgian measures of 1931 were or were not inconsistent with the international obligations of that country. It is maintained by the Government of the United Kingdom that they were so; that they constituted a violation of the Convention of Saint-Germain of 1919, which regulated relations between the United Kingdom and Belgium in the Conventional Basin of the Congo, and that they ran counter also to Belgium's obligations under general international law.

The latter contention is a short one which can be disposed of rapidly.

It is maintained on behalf of the United Kingdom that, as Chinn went to the Congo relying on the position assured to him by treaty and set up a business there, and as the Belgian measures destroyed his business and rendered it impossible for him to carry on, his acquired rights were interfered with to an extent and in a manner which is inconsistent with the admitted principles of international law.

This contention is not in my opinion well founded.

Following the line of argument which Counsel for the United Kingdom have put forward, it may be correct to say that Chinn possessed under treaty a right to carry on in the Congo a ship-owning and ship-building business, but this right cannot be put higher than that of a right to make contracts for the transport of goods on the river, or for the repairing or building

of ships, with any person in the Congo who desired to make a contract with him. Chinn possessed no right, either under the Treaty of Saint-Germain or under general international law, which entitled him to find customers in the Congo, i.e. people who were desirous of contracting with him. If the individuals with whom Chinn would have liked to make contracts found that they could get better terms elsewhere for the transport of their merchandise or the repairing of their ships, they had just as much right to contract with persons other than Chinn, as Chinn had [122] to make contracts with them. Consequently, the fact that these other individuals found it to their advantage not to contract with Chinn, involved no violation by them of a right belonging to him. Similarly, the decision of the Belgian Government which rendered it more profitable for these persons to make contracts elsewhere and not with Chinn interfered with no acquired right of his.

If it could be shown on behalf of Chinn that some right which he had already obtained to carry the goods of a particular merchant or to repair the ships of some particular merchant had been infringed by the Belgian Government, as, for instance, if he had had in existence a contract to carry all the goods of such and such a person and the Belgian Government had stepped in and prevented that person, no matter how much he wished to do so, handing over his goods to Chinn to transport, it would be right to say that an acquired right of Chinn had been interfered with, but the facts do not show any such position. Chinn's right to fulfil existing contracts for the transport of goods or the repair of ships, or to secure new contracts to that effect if he could, was never interfered with.

The more important argument advanced by the United Kingdom is that the Belgian measures ran counter to the Convention of Saint-Germain. This Treaty was concluded in 1919 as part of the peace settlement of that year. Its purpose appears to have been to replace the Berlin and Brussels Acts by something more suitable to the conditions of the moment, while maintaining the general principles which those instruments embodied. By Article 13 the earlier Acts are abrogated as between the Powers which are parties to the new Convention. Both the United Kingdom and Belgium are parties to the Convention and have in this case treated it as the operative instrument.

In these circumstances I do not propose to express any opinion as to a question which, it is true, was not raised by the Parties in this case, but which must strike any one who studies the published *procès-verbaux* of the Berlin Conference of 1885. That question is whether both Belgium and the United Kingdom had not already pledged themselves by the terms of the Berlin Act not to terminate or to modify, even as between themselves, the provisions of that instrument except in agreement with all the other States which were parties to it. Nor do I propose to express any opinion as to what would be the [123] effect of such a pledge, if it had been given, that is to say, whether a new treaty made in violation of such a pledge would be devoid of juridical effect, or whether it would merely be a wrongful act entitling a State which was not a party to the Convention of Saint-Germain, but was a party to the Berlin Act, to demand reparation.

The stipulations of the Convention of Saint-Germain which the Government of the United Kingdom alleges that the Belgian Government violated by what it did in connection with Unatra are those which obliged it to maintain in the Congo commercial freedom and commercial equality, and also the provisions of Article 5 relating to liberty of navigation and equality of treatment for craft.

If I appreciate correctly the Belgian arguments, that Government does not dispute its obligations to apply in the Congo the principles of liberty and equality of commerce and of liberty of navigation ; its contention is that the measures taken in 1931 infringed none of these principles nor any of the stipulations of the Convention of Saint-Germain, because they fell within the "*domaine de la gestion de la flotte nationale*" and that this domain lies outside the scope of the Treaty provisions.

On this latter point I agree with what is said in the judgment of the Court. The Belgian arguments constitute an inadequate answer to the British contentions, if these contentions are made out. In my view the more difficult question is whether the June measure rendering transport by Unatra practically gratuitous can be said, even if it did establish a monopoly in fact for Unatra, to be inconsistent with "liberty of commerce" or "liberty of navigation" or with "complete commercial equality".

Liberty of commerce, freedom of commerce, liberty of trade and freedom of trade are phrases which are used in the English texts of the Berlin Act and the Convention of Saint-Germain almost indiscriminately. I can see no practical difference between them.

In the Convention of Saint-Germain there is no specific provision in favour of freedom of trade. In this respect it differs from the Berlin Act, Article 1 of which provides that in the Congo the trade of all nations shall enjoy complete freedom. All that the Convention of Saint-Germain provides for in Article 1 is "complete commercial equality", and yet there is a provision in this same Article which looks as if it must have been intended by the new Convention to keep alive the [124] principle of freedom of trade laid down in the first Article of the Berlin Act. This provision consists of the words at the end of the Article, "but subject to the reservation specified in the final paragraph of that Article". The final paragraph of Article 1 of the Berlin Act is that, "in extending the principle of free trade to the eastern zone, the Conference Powers only undertake engagement for themselves", etc. If the authors of the Convention of Saint-Germain deliberately kept alive that reservation in the Berlin Act as to freedom of trade instead of making a corresponding reservation as to the application of the principle of complete commercial equality to the eastern zone, it seems difficult to escape the conclusion that they intended to maintain, after the Convention of Saint-Germain came into force, this principle of liberty of trade. It is equally difficult to believe that they intended the principle to apply only in the eastern zone and not throughout the Conventional Basin. I conclude, therefore, that this principle operates in the Belgian part of the Congo, and that the Belgian Government is still under obligation to the Government of the United Kingdom to see that the trade of all nations enjoys complete freedom.

The next question is whether a Government measure which enables one transporter to carry goods on the Congo so cheaply that he will attract all the business, violates the liberty of commerce to which other transporters are entitled. What exactly is meant by maintaining liberty of commerce?

The conclusion to which I am led is that this stipulation was intended to prevent the imposition by a government of obstacles or prohibitions - whatever their nature - to which a

trader must perforce submit, and that it is not contravened by measures which leave him free to carry on his trade if he can. The important word in this connection is the word "liberty" or "freedom".

The Belgian measure of June 20th, 1931, reducing Unatra's transport charges, left the other transporters free to carry on their business if they so wished and if they could. The question whether they could depended on the extent of their financial resources - not upon any matter for which the Government was responsible. The Government measure imposed no obstacle to the carrying on of the business; at most it made it unprofitable. [125]

The argument advanced on behalf of the United Kingdom is that the Belgian measures of 1931 made it *commercially impossible* for Chinn to carry on his business ; when analyzed this only means that these measures prevented him from earning any profit, because the cargoes available for transport out of the carriage of which the profits would have been earned all went to a competitor with whom he could not compete. They did not place Chinn in such a position that he was not *at liberty* to carry on his business if he so desired.

Inability to make a profit is a circumstance which may equally well arise from the superior activities of a commercial competitor. It certainly cannot have been the intention of the Berlin Act to eliminate trade competition in the Congo, but if the freedom of trade assured by the Berlin Act could be interpreted as entailing an obligation on the Government not to take a particular measure on the sole ground that it would prevent the earning of a profit by a particular business carried on in the Congo, it would have to be interpreted as obliging the territorial Government to exclude trade competition.

For these reasons the reduction of Unatra's tariff to one franc a ton, even if it did result in that Company getting all the business, did not infringe the liberty of commerce to which Chinn was entitled.

The Belgian measures are also alleged to infringe the principle of liberty of navigation.

In this case there is no doubt as to the particular treaty stipulation applicable: liberty of navigation is provided for in Article 5 of the Treaty of Saint-Germain.

The difficulty in accepting this argument arises from the fact that, as in the case of liberty of commerce, what a stipulation in favour of *liberty* of navigation seems to exclude is the imposition by the Government of some direct obstacle in the way of the use of the ship or of the business on which the ship was employed, something to which the ship-owner must submit, whether he likes it or not, something which interferes with his *liberty*. Nothing of the kind is to be found in the Belgian measures. Chinn was as much at liberty to send his ships up and down the Congo after July, 1931, as he was before.

A separate argument can be founded on the second paragraph of Article 5, which says that craft belonging to nationals of the signatory Powers shall be treated in all respects on a footing [126] of perfect equality; but here again it is difficult to see how the Belgian measures infringed this provision. Even after July 1st, when the reduced tariffs on Unatra came into operation, there was nothing in the evidence submitted by the United Kingdom to show that any difference was made between the treatment meted out to the ships of the Unatra fleet and those of private transporters.

The Memorial also maintains that the Belgian measures infringed the "complete commercial equality" between the respective nationals of the signatory Powers enjoined by Article 1 of the Treaty of Saint-Germain.

This argument is used in paragraphs 40 and 44 to attack the Belgian measures so far as they resulted in the *de facto* monopoly for Unatra and in paragraph 45 as an alternative argument based on the discrimination involved in "granting a subsidy to Unatra alone", i.e. in the refusal to undertake to repay to Chinn as a private transporter the losses which were to be repaid to Unatra if goods were carried at one franc a ton. With this second contention I deal later on.

As regard the first contention, that advanced in paragraphs 40 and 44, the argument differs but little from that based on the right to liberty of commerce. So long as the Government measures left all transporters (including both Chinn and Unatra) free to carry on their business, the reduction of tariffs imposed upon Unatra did not infringe the commercial equality prescribed by the Treaty of Saint-Germain.

The general conclusion is therefore that the reduction of Una-tra's transport rate by the Belgian decision of June 20th, 1931, was not inconsistent with the liberty of commerce, the liberty of navigation or the commercial equality which Belgium was obliged to maintain in the Congo, even though the effect of the reduction was bound to be that exporters would give their cargoes to Unatra and not to a private transporter like Chinn.

That disposes of the argument founded on the so-called *de facto* monopoly.

There remains the alternative contention that the Belgian measures amounted to discrimination in favour of Unatra and against Chinn, i.e. that by refusing to extend to the private transporters, including Chinn, the arrangement for the [127] repayment of losses promised to Unatra in the June 20th decision, the Belgian Government failed to maintain that complete commercial equality between the nationals of the signatory Powers which they were bound by Article 1 of the Convention of Saint-Germain to do.

The June 20th, 1931, decision of the Belgian Colonial Minister said nothing about the question of extending a similar arrangement to other transporters. It was not until July 28th that the Government's refusal to do so was published. The discrimination, therefore, if any, did not result from the decision of June 20th, but from the action taken on July 28th. The latter measure, however, is equally included in the reference to the Court.

The question is whether the Government's refusal to extend the arrangements for the repayment of losses to Chinn as a private transporter was a violation of Article 1 of the Convention.

It has not been disputed by the Belgian Counsel that one franc a ton was not an economic transport rate. It is obvious that a rate which entailed on Unatra in 1932 losses of over 12,000,000 francs was not a charge high enough to enable a private transporter to make his business pay, even allowing for the up and downstream business not touched by the decision.

It is equally obvious that a private transporter who, like Chinn, was not an exporter on his own account, would get no cargoes to transport unless he carried them at the same rate as

Unatra. Indeed it is admitted by the Belgian Government that these sweeping reductions were only made in order to save the industry of the colony, that is to say that it must have been assumed either that exporters generally would patronize Unatra and so get the benefit of Unatra's reduction, or that the private transporters would make corresponding reductions - otherwise the industry of the colony would not be saved.

For the Government to oblige one transport concern by a direct order to reduce its transport charges and to agree to reimburse the resulting losses, and to oblige another transport concern indirectly to make similar reductions in order to save its business and to refuse to reimburse the resulting losses, cannot be said to amount to maintaining between the two a complete commercial equality. [128]

That alone, however, is not sufficient to constitute a violation of the Convention of Saint-Germain. What Article 1 obliges the signatory Powers to maintain is complete commercial equality "between their respective nationals and those of States Members of the League....".

Chinn's nationality was British, and Unatra's was Belgian. Is this discrimination between an individual British subject and the group of Belgian companies to whom the decision of June 20th was addressed, sufficient to fulfil the requirements of Article 1 ? Or must the discrimination be shown to be based on nationality?

The judgment adopts the latter interpretation. I am not able to share this view. In my opinion it is not necessary to show that the discrimination was based on nationality, in the sense that the differentiation was made because the persons possessed a particular nationality.

Such a requirement would material reduce the scope of the application of Article 1.

The wording of the Article supports the larger interpretation. The equality is to be maintained "between their respective nationals and those of States...." (*entre leurs ressortissants respectifs et ceux des États...*). If any conclusion can be drawn from the use of the phrase "respective nationals" instead of saying "undertake to maintain between their nationals respectively and those of States....", it is that the parties to the Treaty intended to ensure the position of their nationals individually.

The wording of other articles in the Treaty prohibiting differentiation supports the view that what Article 1 is aimed at is the protection of individual equality.

Article 3 provides that nationals of the territorial Power and of other Powers shall enjoy *without distinction* equal treatment and the same rights as regards protection of persons and effects and as regards property and professions. Clearly this is an Article which guarantees individual equality: so does Article 2 which excludes differentiation as regards merchandise and vessels. When Article 2, paragraph 2, and Article 5, paragraph 2, are read together, one sees that the equality of treatment guaranteed to craft by Article 5 must be individual equality. This is a conclusion of some interest, because the wording of this paragraph of Article 5 is much the same as that of Article 1.

An additional argument is to be found in the fact that the liberty of commerce stipulated in the Berlin Act must have ensured *individual* liberty. Complete commercial equality under the Berlin Act followed from the liberty of commerce so promised, and therefore must have been individual liberty. The words [129] in the fourth paragraph of the Preamble of the Treaty of Saint-Germain as to the application of the principles of the Berlin Act render it unlikely that the Powers intended by Article i to admit a sweeping change in the basis of the commercial equality which their nationals had enjoyed under the Berlin Act.

Another reason is to be found in the fact that, as between Belgium and some of the European Powers, it is the Berlin Act which still governs matters in the Congo. The nationals of these Powers enjoy complete commercial equality in the Congo thereunder. It seems improbable that the Powers who became parties to the later Treaty can have intended that their nationals should enjoy a régime of commercial liberty and equality less favourable than that enjoyed by those who remained bound by the Berlin Act.

A still further reason is to be found in the fact that, if Article 1 excludes only commercial differentiation based on nationality, it must be taken to admit commercial differentiation based on race, colour, or religion.

These reasons justify the view that what Article 1 of the Convention of Saint-Germain ensures is an individual commercial equality.

As above said, the refusal to extend the repayment of losses to private transporters was inconsistent with such individual commercial equality. Therefore, so far as the Belgian measure embodied in the decision of July 28th, 1931, applied to Chinn, it was inconsistent with the international obligations of Belgium to the United Kingdom.

To this extent the answer to the first question put to the Court should in my view be in the affirmative.

In the above statement of my views, no reference has been made to Chinn's ship-building yard.

The shipyard part of the case of the United Kingdom fails in my opinion for the reason that the damage is too remote. Assuming that the Belgian Government acted in contravention of Article 1 of the Convention of Saint-Germain in that they failed to accord equal treatment to Chinn in the matter of repaying the losses entailed upon him by his being obliged to transport cargoes at one franc a ton in order to save his business, that Government would not be liable to make reparation for such breach of treaty beyond the loss which could reasonably be [130] foreseen as the direct or necessary consequence of the violation of the Convention. The injury to Chinn's ship-building business falls outside the scope of this principle.

(Signed) C J. B. Hurst.

[131] Separate Opinion of Jonkheer Van Eysinga.

[*Translation.*]

The undersigned is unable to concur in the judgment of the Court and submits the following observations.

* * *

Article 1 of the Special Agreement of April 13th, 1934, requests the Permanent Court of International Justice to give judgment, in the first place, on the following question:

"Having regard to all the circumstances of the case, were the above-mentioned measures complained of by the Government of the United Kingdom in conflict with the international obligations of the Belgian Government towards the Government of the United Kingdom?"

The Special Agreement does not state what is the source of the international obligations of the Belgian Government towards the Government of the United Kingdom, with which the impugned Belgian measures are alleged to conflict. But it is shown by the written and oral proceedings that the two Governments are agreed that, apart from unwritten customary international law (with which the present dissenting opinion does not deal), the only source in question is the Convention signed at Saint-Germain on September 10th, 1919, by the United States of America, Belgium, the British Empire, France, Italy, Japan and Portugal. The instruments of ratification of that Convention by those States were deposited in the archives of the French Government, that of the United States quite recently on October 29th, 1934.

The first question that arises is whether the signatory States of the Convention of Saint-Germain were really entitled to consider the General Act of Berlin of February 26th, 1885 (except for the stipulations of its first Article, which are embodied in Article 1 of the Convention of Saint-Germain), and the Declaration of Brussels of July 2nd, 1890, as abolished *inter se*, and to replace these instruments *inter se* by the articles of the Convention of Saint-Germain (Art. 13).

In regard to this question, the following points should be noted.

The General Act of Berlin of February 26th, 1885, came into force as between thirteen contracting Powers; it was drawn up at a time when several of them were engaged in the colonization of Central Africa - which at that period was still, in part, [132] *terra nullius* - a situation that might lead to unfortunate international complications. It was mainly with the intention of regulating these colonizing efforts that Prince von Bismarck, in close cooperation with the French Government, convened the Berlin Conference. The result of the Conference was to invest the Central African region, defined in Article 1 of the General Act, with an international statute which greatly diminished the danger of international disputes. This eminently pacific object was attained by instituting for Central Africa a highly internationalized régime, which diminished the importance of the question whether a given part of the continent belonged to this or that country. Thus, Chapter I of the General Act definitely lays down the principle of the "open door": The freedom of trade which it establishes does not only cover what commercial treaties of that period understood by that term - namely the forbidding of import and export prohibitions - but also forbids the imposition of any import or transit duties; moreover, it provides an extremely liberal régime for all foreigners, no matter of what nationality. As regards the exercise of fluvial navigation, the General Act contains - in addition to Article 2 comprising general provisions - a special act, constituting its fourth Chapter, concerning the navigation of the Congo; this Navigation Act provides a more internationalized régime than any others that exist; the signatory Powers considered that the provisions of its 13th Article were so important that they recognized them as henceforward a part of public international law. The Niger, though situated outside the part of Central Africa defined in Article 1, was endowed with a similar Navigation Act (Chapter V). The VIth Chapter of the General Act attempts to bring order into the efforts at colonization by prescribing rules for the occupation of territories lying outside the possessions of a contracting Power, even where such territories are situated in parts of Africa other than the Congo Basin. As regards Chapter II, it contains the germ of the General Act of the Brussels Conference of 1890 concerning the African slave trade, and recognizes the duty of protecting the natives in the whole Congo Basin. Chapter III is in some respects the most interesting, since it pushes the idea of internationalization as far as neutralization: for it is provided that the highly internationalized and eminently pacific régime of the Congo Basin may continue, even in time of war, whereas this is imperatively enjoined in the Navigation Acts both of the Niger and the Congo (Art. 25 and 33).

It will be seen from this survey that the Berlin Act presents a case in which a large number of States, which were territorially [133] or otherwise interested in a vast region, endowed it with a highly internationalized statute, or rather a constitution established by treaty, by means of which the interests of peace, those of "all nations" as well as those of the natives, appeared to be most satisfactorily guaranteed. Similar internationalized régimes have been established also in other parts of the world.

The General Act of Berlin contains no clause providing for its denunciation; nor does it contain any provision authorizing the contracting States to conclude private arrangements separately among themselves, even supposing that such arrangements were not repugnant to the provisions of the General Act -a provision which is often found in collective conventions, for instance in Article 15 of the International Convention for the Protection of Industrial Property, signed at Paris on May 3rd, 1883.

On the other hand, the Powers assembled at Berlin considered that the treaty régime of the Congo Basin would have to be revised from time to time. In regard to that point, the report signed by Baron de Courcel, the French Plenipotentiary, and Baron Lambert, the Belgian Plenipotentiary, contains the following observation (de Martens, *N. R. G.*, 2nd Series, p. 401):

"The situation being as it is in the regions of the Congo, it seems difficult and perhaps premature to make provision for everything and to regulate everything in advance.

By making any amendment of the acts of the Conference dependent upon an agreement between the Powers arrived at in the light of experience, due regard will be paid to the requirements of the future and to the permanence of your decisions."

In this connection, the following provision (Art. 36) was inserted in Chapter VII of the Act:

"The signatory Powers of the present General Act reserve to themselves to introduce into it subsequently, and by common accord, such modifications and improvements as experience may show to be expedient."

The legislative significance of the Article therefore resides in the fact that the States which together had established the international statute of Central Africa had made provision, as an integral part of their union, for periodical revision thereof. By doing this, the Article however expressly provides at the same time that the Act of Berlin may only be modified with the consent of all contracting Parties. This precludes any modification by some only of the contracting Parties, and moreover such modification would not be appropriate in the case of a convention bestowing an international statute upon a vast area. The General Act of Berlin does not create a [134] number of contractual relations between a number of States, relations which may be replaced as regards some of these States by other contractual relations; it does not constitute a *jus dispositivum*, but it provides the Congo Basin with a régime, a statute, a constitution. This régime, which forms an indivisible whole, may be modified, but for this the agreement of all contracting Powers is required. An inextricable legal tangle would result if, for instance, it were held that the régime of neutralization provided for in Article 11 of the General Act of Berlin might be in force for some contracting Powers while it had ceased to operate for certain others.

It must not be forgotten that Article 36 of the Act of Berlin merely repeats, superfluously, the "essential principle of international law" formulated - not for the first time - by the Protocol of London of 1871. It is by agreement, that is to say upon the consent of all Powers parties to the General Act of Berlin, that that instrument may be modified. But this would have been the case even if Article 36 had not existed.

It is interesting to observe with what constitutional nicety the General Act of Berlin was modified at the Brussels Slavery Conference (1890). One State which was not a party to the General Act of Berlin was present at this Conference, namely Persia. That country could take part in the General Act upon the slave trade, but not in the revision of the General Act of Berlin, to which it had not adhered. For this reason, the Declaration of Brussels modifying the General Act of Berlin runs as follows:

"The Powers assembled in Conference at Brussels, who have ratified the General Act of Berlin of February 26th, 1885, or who have acceded thereto,

.....
Have agreed to make the following Declaration:
.....

The ratifications of the present Declaration shall be exchanged at the same time as those of the General Act of this day."

In 1919, some of the Powers parties to the General Act of Berlin, including the two States which have submitted the present case to the Court, acted in an entirely different manner. Without inviting the other contracting Parties to take part in the Conference which they held, they thought themselves entitled at that Conference to modify the General Act of Berlin *inter se*. It seems clear that in proceeding thus they acted contrary not only to an essential principle of international law, but also [135] to Article 36 of the General Act of Berlin, which expressly provides that modifications may only be made in the General Act by agreement. This is a legal situation of such importance that a tribunal should reckon with it *ex officio*. The only convention which the Court could apply is the Act of Berlin. If the Court had done so, it would have applied the Act of Berlin alone. It should be observed here that the validity of the Convention of Saint-Germain cannot, as the Court seems to hold, be dependent on the question whether or not any government has disputed its validity; moreover, the Court has not gone into this question. In applying the Act of Berlin, the Court's task would have been singularly facilitated by the fact that, with regard to the legal relations in issue in the Chinn case, Articles 3 and 5 of the Convention of Saint-Germain simply reaffirm Articles 5 and 13 of the Act of Berlin.

In making the foregoing observations, the undersigned has not lost sight of the fact that, up to a certain point, the parties to a case may specify in the Special Agreement the rules of law which the Court to which they have recourse is to apply. Article 38 of the Court's Statute provides for this amongst other things when it says: "The Court shall apply international conventions, whether general or particular, establishing rules expressly recognized by the contesting States." Although the Special Agreement in the present case is silent on the question what rules of law the Court is to apply, and although consequently it does not constitute a special convention specifying rules expressly accepted by Great Britain and Belgium, the question might perhaps be raised whether, since the two Parties clearly indicated both in the written and oral proceedings that they considered themselves bound by the Convention of Saint-Germain, it would not follow that this Convention constitutes for them an immediate source of special treaty law applicable in this case.

Even adopting this line of reasoning, it seems difficult to hold that the two Parties could adduce the Convention of Saint-Germain.

If, in a given case, no international law exists or if the law is uncertain, it is comprehensible that the parties, in resorting to an international tribunal, should at the same time determine the law to be applied. The classic example of this is the *Alabama* case between the United States of America and Great Britain; at the time, i.e. after the civil war, the law of neutrality which, in the contention of the United States, had been violated by Great Britain, was very uncertain. In a Special Agreement, signed on May 8th, 1871, the two Parties therefore drew up the three famous Washington rules which were to be applied by the tribunal of arbitration provided for in the same [136] Special Agreement. These are the rules which subsequently were codified by the thirteenth Convention of the Second Peace Conference in 1907 concerning the rights and duties of neutral Powers in maritime war.

The case before the Court presents an entirely different aspect. In this case - apart from the arguments which the United Kingdom seeks to draw from customary unwritten law, with which arguments the present opinion, as already stated, does not deal - the international obligations of Belgium which the Court has to determine are to be found in a collective treaty, the Treaty of Berlin, modified in 1890 at Brussels, which Treaty can only be modified by common accord. It seems clear that the two Parties have no right to change this Treaty basis by means of statements made in the course of legal proceedings. For it is impossible to admit that what a portion of the group of States which were parties to the General Act of Berlin could not lawfully do, namely modify that Act, two only of these States could do and not even by means of a convention (the Special Agreement), but simply by means of statements made in the written memorials and oral pleadings of an action at law.

The undersigned cannot refrain in this connection from expressing his regret that the Court should frequently be called upon to give decisions in regard to collective conventions concluded after the Great War, without having at its disposal the records of the meetings at which these conventions were elaborated, these records being kept secret. The resulting lack of information has once more made itself felt in the present case.

* * *

The British subject, Mr. Chinn, carried on with his own ships in the Congo the business of transporting goods, and he also had a shipyard at Leopoldville. At the time of the economic crisis which also made itself felt in the Congo Basin, the Belgian Government, by a decision taken on June 20th, 1931, and several times extended, reduced to one franc per ton the downstream transport tariff for nearly all products of the *Union nationale des Transports fluviaux* (Unatra), a Company under the effective control of the Government. The British Government contends that, as a result of this drastic reduction which practically brought to zero Unatra's charge for the transport of goods downstream, traffic became concentrated in the hands of Unatra to such an extent that that Company found itself in possession of a virtual monopoly which rendered it commercially impossible for Mr. Chinn to carry on his business ; in addition to Unatra, a few concerns [137] were able to carry on, that is due to the fact that they transported their own produce, whereas, apart from Unatra, Mr. Chinn's concern was the only one which exclusively carried goods of others.

The Government of the United Kingdom considers that it follows from these facts that the measure taken by the Belgian Government is inconsistent with the freedom of navigation and commercial equality to which Mr. Chinn was entitled under the Convention of Saint-Germain. Alternatively, the Government of the United Kingdom maintains that the Belgian Government has by this measure, which confers a virtual monopoly upon the Belgian Company, been guilty, contrary to the terms of the same Convention, of discrimination to the detriment of the only concern which, like Unatra, exclusively carried goods of others.

The Belgian Government's answer is that, in taking the measure drastically reducing transport rates in regard to Unatra, a Company under its effective control, it was keeping strictly within the sphere of the *management of the national fluvial shipping industry*, and contends that this is something quite distinct from the sphere of the *régime of navigation* within which the exercise of navigation falls. As regards the management of the national fluvial shipping industry, the sovereignty of riparian States remains intact and cannot be affected either by the freedom of navigation prescribed by the Convention of Saint-Germain - which belongs to quite a different sphere of action - or by the equality of treatment in commercial or other matters laid down by the

same Convention. The latter standpoint emerges from the reply made by the Belgian Agent to the question put to him at the beginning of the hearing on October 26th, 1934.

The present dissenting opinion will deal in the first place with the question of equality of treatment.

* * *

At the first meeting (Nov. 15th, 1884) of the Conference of Berlin, Sir Edward Malet, the British Plenipotentiary, after observing that in using the term "free trade" in the Basin of the Congo, the intention was to provide traders of all countries with a guarantee that no import duties or transit dues would be levied and that the goods would only be subject to reasonable taxes designed solely to cover administrative requirements, went on to say :

[*Translation.*] "But I think that the Conference after mature reflection upon the question will recognize the necessity of making more detailed provision for the absolute equality of treatment of the [138] subjects of all the Powers, with regard to direct and indirect duties, and taxes, residence, freedom to engage in trade and to travel, the use of roads and railways, coasting traffic, and religious freedom." (De Martens, p. 205.)

These words expressed the desire for absolute equality of treatment for the subjects of all nations, whether nationals or foreigners, in the Congo Basin. Moreover, this equality had already been provided for in the second sentence of paragraph 5 of the draft declaration concerning free trade, submitted to the Conference by the German Government and on which the first part of the Act of Berlin was based; this sentence ran as follows: "Foreigners shall enjoy the same treatment and rights as nationals without any differentiation." (De Martens, p. 208.) The British Plenipotentiary meant to suggest that the short sentence in the German draft should be expanded and defined.

That is indeed what was done by the Committee instructed to examine the declaration on freedom of trade; the Chairman of that Committee was Baron de Courcel, and the Rapporteur was Baron Lambermont. In regard to the matter in question, the report speaks as follows:

"Paragraph 2 of the same Article [Article 5 of the General Act] relates to the rights of foreigners. In order to develop trade, it does not suffice to open the ports or to lower customs barriers. There can be no trade without traders. If one desires to attract trade to distant and little-known countries, one must give the traders guarantees for the things that most vitally interest them - their persons, their goods, the acquisition of property, inheritances, the exercise of professions. That is the aim of Article V. It does not only protect traders; it covers all foreigners and the pioneers both of civilization and of commerce. It has met with the unanimous approval of the Committee." (De Martens, p. 254.)

The result of this unanimous support was paragraph 2 of Article V of the Berlin Act, which provides that:

"Foreigners, without distinction, shall enjoy protection of their persons and property, as well as the right of acquiring and transferring movable and immovable possessions; and national rights and treatment in the exercise of their professions."

It appears clear that the stipulation that "foreigners, without distinction, shall enjoy ... national rights and treatment" and "the absolute equality of treatment of the subjects of all the Powers" desired by the British Plenipotentiary are one and the same thing. In fact, the General Act of Berlin prescribes complete equality of individual treatment for all persons in the Congo [139] Basin, and any inequality of treatment is a contravention of the Berlin Act.

Did the authors of Article 3 of the Convention of Saint-Germain desire to modify that situation ? Certainly they desired to limit the category of persons who were to benefit by equality of treatment; whereas the General Act of Berlin covers the nationals of any country whatever, Article 3 of the Convention of Saint-Germain only applies to the nationals of certain States. But there is nothing to show that, within this restricted group, individual equality does not continue to be the law. This individual equality, which is such a characteristic feature of the work accomplished at Berlin - the result of which was to internationalize the legal régime of the Congo Basin in so many respects - was not modified by the Convention of Saint-Germain. That is shown by several articles of the latter instrument. Thus, for example, while Article 1 *maintains* complete commercial equality between the nationals of all the contracting States, it provides equality of treatment as between all these individuals regarded as a group. The same observation applies to paragraph 2 of Article 5, which provides that craft belonging to the nationals of any of

the contracting States shall be treated, in all respects, on a footing of complete equality. Could it be otherwise, in the case of Article 3, the history of which at Berlin - as has just been recalled - shows so manifestly the intention of according absolute equality of treatment to all persons engaged in professions in the Congo Basin?

It results from the foregoing that the inequality of treatment created by the Belgian Government's measure of June 20th, 1931, in favour of Unatra and to the detriment of the only other enterprise in the Congo which exclusively transported the goods of others, namely, Mr. Chinn's business, is in conflict with the international obligations of the Belgian Government towards the United Kingdom.

* * *

As regards the relation between the Belgian Government's measure of June 20th, 1931, and the freedom of fluvial navigation prescribed by Article 5 of the Convention of Saint-Germain, the Belgian Government contends, as has been observed, that this measure, operating within the sphere of the management of the national fluvial industry - a field in which the sovereignty of the riparian State remains intact - could never be in conflict with freedom of navigation, a thing which belongs to a totally different sphere.

The question arises whether this distinction between the two separate spheres is not rather arbitrary; it certainly has no foundation in fluvial international law, as it has evolved since [140] the Congress of Vienna in 1815. It will be remembered that Articles 108 to 116 of the Final Act of Vienna constitute the basis of the General Act of Berlin of 1885 (see the Preamble to that Act, Nos. 4 and 5), and that the Belgian Government has repeatedly alluded to those Articles of the Vienna Congress during the present case.

In 1814, when Talleyrand, for it was probably he, proposed the clause which became Article V of the first Peace Treaties of Paris - those of May 30th, 1814 - an Article which thus inaugurated the general international regulation of navigation on international rivers - he was regarding fluvial navigation, not as "an object in itself", or as a "self-sufficing principle", as the Belgian Government contends (pleadings of Oct. 24th, afternoon), but as an element of international trade. It suffices to read Article V of the Treaties of Peace of 1814, which is worded as follows:

"The navigation of the Rhine, from the point where it becomes navigable unto the sea, and *vice versa*, shall be free, so that it can be interdicted to no one: - and at the future Congress, attention shall be paid to the establishment of the principles according to which the Duties to be raised by the States bordering on the Rhine may be regulated, in the mode the most impartial, and the most favourable to the commerce of all Nations.

The future Congress, with a view to facilitate the communication between Nations, and continually to render them less strangers to each other, shall likewise examine and determine in what manner the above provisions can be extended to other Rivers which, in their navigable course, separate or traverse different States."

Indeed, from the very outset, freedom of fluvial navigation has included both the nautical aspect, in the sense of freedom of movement and the commercial aspect; it is seen from the text quoted above that Article V of the Treaties of Peace of 1814 intends that the *free navigation of the Rhine* and of other international rivers should be regulated by the Congress that was to meet at Vienna in such a way that navigation duties-which would primarily consist of *duties on goods* carried on the waterway, as laid down at that time, by Article 99 of the Convention concerning the Rhine Tolls of 1804 - should be fixed in the manner most favourable to the *trade* of all nations. It is clear, therefore, that from the very beginning, freedom of fluvial navigation has been understood as an element of international trade, and that it was never complete in itself in the sense of freedom of movement. This close, one might almost say, indissoluble link between navigation and trade appears again in Article 109 of the Final Act of Vienna: "Navigation shall be entirely free and shall not in respect to commerce [141] be prohibited to anyone ; it being understood that the regulations established with regard to the police of this navigation shall be respected, as they will be framed alike for all, and as favourable as possible to the commerce of all nations." And the three articles which follow deal with navigation duties levied upon the *goods*. It is this freedom of *commercial* navigation which the General Act of Berlin of 1885, as stated in its Preamble, provided also for the Congo and its tributaries; and there is nothing to show that the authors of Article 5 of the Convention of Saint-Germain intended to alter that situation.

What are now the obligations of the riparian States of an international river with regard to freedom of navigation? The Belgian Agent stated them very clearly at one moment during the proceedings, when he said that: "Freedom of navigation implies the taking of all action - for instance repairs and maintenance works - and abstention from any action - for instance the

creation of difficulties or obstacles - in so far as this is necessary to render this freedom effective." (Belgian Rejoinder, para. 32.) In the present case we are only concerned with the second aspect of these obligations: the abstention from any action which might impede the effective freedom of navigation.

Some of the acts impeding the freedom of commercial navigation are expressly named in Article 109, and the following articles, of the Final Act of Vienna, and in the subsequent fluvial conventions. They are, in part, acts which are perfectly lawful in themselves, but would become unlawful if applied in such a way as to cause impediments to free navigation. Thus Article 115 of the Final Act of Vienna lays down that: "Regulations shall be established to prevent officers of the customs, in the exercise of their functions, throwing obstacles in the way of navigation." And these prohibited impediments to navigation are not solely acts calculated to destroy a shipping business-which would mean that a State might lawfully do anything to the detriment of such a business so long as it allowed it to exist; for it is, on the contrary, the duty of the riparian States of an international river to encourage and promote navigation. Thus, according to Article 109, the regulations for the policing of navigation must be "as favourable as possible" to the trade of all nations ; and according to Article 111 the tariffs for navigation duties levied on cargoes must be prepared in such a manner as "to encourage commerce by facilitating navigation". In fact, it is not sufficient that the riparian States of an international river should abstain from acts which impede the free movement of shipping to such an extent that the shipping firm has to abandon its fluvial transport business. The impediment comes under the prohibition at an earlier [142] stage, namely as soon as freedom of navigation ceases to be effective. It is purely a question of fact whether, in a given case, the effective freedom of navigation has, or has not, been annihilated ; it may not always be easy to decide, but a Court must expect to find itself often confronted with difficult questions of fact.

If all acts of a riparian State which result, in a given case, in putting an end to effective freedom of navigation, are prohibited, why should it be more lawful for a riparian government to take measures which favour one of the two purely shipping enterprises operating on an international river, to such a degree that the other enterprise, not only suffers, but is driven out of business ? That is the action which the British Government accuses Belgium of having taken, describing it, very justly, as a virtual monopoly, and it seems clear that, if it were proved that the freedom of commercial navigation to which Mr. Chinn is entitled has ceased to be effective in

consequence of the Belgian Government's measure of June 20th, 1931, the reply to the first point in Article 1 of the Special Agreement should also be in the affirmative, having regard to Article 13 of the General Act of Berlin, which, as regards legal situations such as that existing in the present case, is reaffirmed by Article 5 of the Convention of Saint-Germain. While it is beyond doubt that a riparian government is under no obligation to obtain customers for a foreign shipping enterprise, it is also true that it is not entitled to deprive the foreign enterprise of its customers by conferring a virtual monopoly on another fluvial transport concern. "

The foregoing observations suffice to show that the Belgian contention to the effect that the measure of June 20th, 1931, could in no case be in conflict with freedom of navigation is arbitrary. When paragraph 30 of the Belgian Rejoinder declares that the two separate spheres of the management of the national fluvial shipping industry and of the régime of navigation have always been recognized as distinct in practice and jurisprudence, one is constrained to ask if that statement is really in line with the facts.

In any case, it is necessary to look again closely into this doctrine of the two separate spheres.

Are they, even according to the Belgian Agent's own explanations, as distinct as he affirms? We learn from the pleadings on the afternoon of October 24th, 1934, that fiscal laws may put obstacles in the way of navigation, and therefore those laws belong to the sphere of navigation ("a fiscal régime incompatible with the idea of freedom would also be contrary to this freedom"). Again, we are told in these pleadings that fiscal laws belong definitely to the other sphere, that of the management of the national fluvial shipping industry. ("In [143] this sphere of management, there is a large number of measures which it" - i.e. the State - "may take. Its fiscal legislation may be more or less burdensome.") It follows that the important subject of fiscal legislation belongs to both of these spheres, which Belgium seeks to separate from one another. This being so, the separation seems to lose much of its distinctness, and the question again arises: Why should a measure taken by a riparian government, as a consequence of which measure a fluvial shipping business is annihilated, not belong, also, to the regime of navigation ?

But there is more. In order to construct a sphere of the management of the national fluvial shipping industry, distinct from the sphere of navigation, it was necessary to keep the latter sphere as small as possible. The Belgian argument seeks to arrive at this result by relying on the conception of navigation which it alleges that the Court laid down in its Advisory Opinion

on the jurisdiction of the European Danube Commission between Galatz and Braila. But in doing so, the Belgian argument seems to lose sight of the fact that the Opinion - which related, *inter alia*, to the limits of the Commission's competence - turned chiefly on the question how far navigation extends, and it held, in this respect, that navigation is practised not only on the river itself, but also in ports. It was solely the territorial aspect of navigation which it was desired to bring out in the Opinion, and the other aspects could be neglected. The British Reply points this out, quite correctly, in paragraph 45, and the Belgian Rejoinder seems to admit it, by its opening sentence in paragraph 33. However, in his pleadings, the Belgian Agent again recurred to the Advisory Opinion in the Danube case.

While the Belgian arguments seek to restrict the conception of navigation by adducing this Advisory Opinion, which is not relevant, they endeavour to restrict the conception of freedom of navigation by adducing Article 109 of the Final Act of Vienna of 1815. According to paragraph 39 of the Belgian Counter-Memorial, the above-mentioned Article has already indicated "the scope of the freedom of navigation recognized on the waterways to which the Act relates: it is the freedom which consists in immunity from exclusion by a sovereign prohibition". However, in paragraph 32 of the Belgian Rejoinder, which has already been referred to, the sphere of navigation is singularly enlarged. The above-mentioned statement in the Counter-Memorial is relegated to the plane of "reflections offered by way of illustration" and needing to be supplemented by stating that navigation comprises "the taking of all action, for instance repairs and maintenance works, and abstention from any action, for instance the creation of difficulties or obstacles, in so far as this is [144] necessary to render this freedom effective". As has already been said, this supplementary explanation is correct. However, when it is kept in mind that the Final Act of Vienna does not speak of navigation in its purely nautical aspect, as an "object in itself", but of navigation in its commercial aspect, the supplementary explanation in the Belgian Rejoinder necessarily implies that the régime of navigation comprises the act of the riparian government by which the fluvial shipping industry of a private individual is extinguished, as, in the British Government's submission, happened in the case of Mr. Chinn.

The judgment recognizes that "freedom of navigation and freedom of commerce are, in principle, two different things". Nevertheless the judgment holds that, in the present case, there is no need to consider freedom of navigation and freedom of trade separately. The undersigned cannot agree with this view, and sees no reason in the present case for departing from the general

rule which is recognized, quite correctly, in the judgment. If the Belgian Government's argument is that freedom of fluvial navigation merely signifies freedom of movement for ships, leaving the commercial aspect out of account, the judgment, in the present case, adopts a diametrically opposite standpoint, and interprets freedom of fluvial navigation by the provisions relating to the liberty of commerce. The truth lies mid-way between the two standpoints : freedom of navigation certainly possesses a commercial aspect; but it is an independent notion, and is not determined by the provisions relating to freedom of trade.

If, in a given case, in order to appraise the commercial aspect of the principle of freedom of fluvial navigation, reliance is placed on other treaty clauses concerning freedom of trade, it must be admitted that, if there exist no clauses of that nature - that is to say, if freedom of trade is not provided for in a treaty stipulation - the commercial aspect of freedom of fluvial navigation is reduced to nothing at all. Such a consequence should alone be sufficient to counsel the greatest prudence in this question.

The contemplated hypothesis is moreover by no means a *casus non dabilis*. It would be easy to mention international rivers whose navigation act prescribes freedom of navigation without there being, either in the act itself or in any other convention, any clause regarding freedom of trade. If the reasoning of the judgment were correct, freedom of navigation would thus be reduced to freedom of movement. The reasoning amounts to the interpretation of an article concerning freedom of navigation - a conception well known in international fluvial law - in the light of other factors belonging to the domain of freedom of trade which may enter into account to an extent [145] varying from insignificance to decisive importance. The principle of freedom of navigation on international rivers, which was laid down at Vienna, reasserted at Berlin and not abandoned at Saint-Germain, would thus become a very uncertain conception.

An interpretation leading to such consequences cannot be sound.

It would, in fact, be more correct to regard freedom of navigation on international rivers as a principle having an existence of its own independently of what may or may not be said regarding freedom of trade by other treaty provisions binding the riparian States. The idea of the law of international rivers, as developed in a large number of conventions, is that, on certain waterways of importance for international trade, there should be freedom of navigation from the commercial stand-point also ; one characteristic feature of this freedom of navigation is precisely

that it is independent of what may be the law in other parts of the territory of States through which the international river passes.

This is also the case as regards the Congo. When the Conference of Berlin elaborated an international statute for the Congo Basin, it dealt with the matter from different aspects : freedom of trade, régime for native races, neutralization, a navigation act for the Congo, its tributaries, etc. As a result there has been some overlapping. Thus navigation on the Congo and its tributaries is already mentioned in Article 2 of Chapter I of the General Act. But the freedom of navigation prescribed in Article 13 retains precisely the same independent value as it possesses in many other conventions concerning navigation on international rivers. And there is nothing to indicate that the same does not hold good as regards Articles 5 to 9 of the Convention of Saint-Germain.

From the foregoing it follows that, if it were established that the measure taken by the Belgian Government on June 20th, 1931, had the effect of concentrating in the hands of Unatra the fluvial transport business by rendering it commercially impossible for Mr. Chinn - the only ship-owner on the river who, apart from Unatra, only carried goods belonging to others - to engage therein, that measure would be inconsistent with the right of entirely free navigation conferred on Mr. Chinn by Article 13 of the General Act of Berlin, which is reaffirmed as regards legal situations such as that existing in the present case by Article 5 of the Convention of Saint-Germain. The measure would even constitute a characteristic case of infringement of the freedom of fluvial navigation.

Nevertheless, the allegations of the Government of the United Kingdom - that it was commercially impossible for Mr. Chinn to carry on his transport business and that this [146] was a consequence of the measure taken by the Belgian Government on June 20th, 1931 - have not been established. The Government of the United Kingdom has certainly submitted a considerable number of figures and statistics concerning on the one hand the quantities of goods carried on the Congo before and after the coming into force of the measure of June 20th, 1931, on July 1st, 1931, and, on the other hand, the distribution of shipping on the Congo amongst the various transporters before and after July 1st, 1931, etc. These figures and statistics tend to show that the measure taken by the Belgian Government gave Unatra a virtual monopoly preventing Mr. Chinn from carrying on his river transport business.

On the other hand, the Belgian Government has not confined itself to maintaining that the measure of June 20th, 1931, fell within the sphere of the management of the national fluvial shipping industry and was not therefore inconsistent with the conventional freedom of navigation, which appertains to the quite distinct sphere of the régime of navigation; it has also produced a considerable quantity of figures and statistics tending to show that Mr. Chinn might well have carried on his river transport business after the coming into force of the measure of June 20th, 1931, on July 1st, 1931.

It is clear that the course of events subsequent to this measure cannot be consistent with the assertions of both Parties which contradict each other practically on every point.

In these circumstances, the Agent for the United Kingdom, at the hearing on October 23rd, 1934, suggested that the Court should exercise the powers possessed by it, and order an enquiry into the facts. The Belgian Agent, at the same hearing, observed that the Court could under its Statute comply with the wish of the Agent for the United Kingdom, and he left the matter to the Court.

It is to be noted that Article 50 of the Statute does in fact confer on the Court power at any time to entrust any individual, body, bureau, commission or other organization that it may select with the task of carrying out an enquiry or giving an expert opinion. In the present case, it would seem that there were several reasons in favour of such an enquiry. According to the terms of the first question in Article 1 of the Special Agreement, the Court is asked to have "regard to all the circumstances of the case". These words are very rightly inserted in a case which, like the present, depends to such an extent upon an appraisal of the facts; indeed, there has never been a case before the Court in which the facts have been disputed to the same extent.

Furthermore, the Court is not tied to any system of taking evidence, whether proceedings are begun by Special Agreement or by Application. Its task is to cooperate in the objective [147] ascertainment of the truth. Of course, it behoves the parties to a Special Agreement as far as possible to produce proof in support of their statements - if for no other reason than because it is to their interest - and the Governments concerned have not omitted to do this. But when one party has done its best to produce proof of its assertions and admits that perhaps it has not succeeded, and suggests that the Court should apply Article 50 of the Statute, the Court must have very strong reasons for not adopting this course, more especially if, as in the

present case, the facts to be established all transpired outside the territory of the Party adducing them. The Court cannot omit to use any means which may enable it to ascertain the objective truth; as regards the obtaining of evidence, the Statute provides that the Court shall take active steps and not adopt a passive attitude.

* * *

For the foregoing reasons, the undersigned cannot concur in the judgment of the Court.

(Signed) V. Eysinga.

[148] Separate Opinion of M. Schücking.

[*Translation.*]

I do not concur in the opinion expressed by the Court in its judgment; on the other hand, I find myself entirely in agreement with the dissenting opinion of Jonkheer van Eysinga, and with the arguments employed therein. The importance of one of those arguments is, however, so great that I am led to add a few observations upon it.

M. van Eysinga's dissenting opinion appears to me to show that the Congo Act intended to prohibit a limited group of its authors from making any changes in the Act ; if that is so, a tribunal cannot refrain from considering what are the ensuing consequences as regards the validity of a convention concluded in violation of that prohibition by some of the authors of the Congo Act.

The doctrine of international law in regard to questions of this kind is not very highly developed. There is no clear and generally recognized doctrine regarding "acts which are automatically null and void", and acts of which the nullity is only relative, that is to say that they are valid in relations between their signatories, but are open to be impugned by other parties. The Court seems to have proceeded on the assumption that, even if there was a prohibition which debarred a limited group of the signatories of the Congo Act from modifying its terms - a question which the Court has not gone into - the new Convention continues nevertheless to be legal and valid, until such time as the Powers which were not invited to participate in it take steps to assert, their rights.

In my opinion, this view is not in conformity with the will of the States which drew up the Congo Act. Once it is recognized that the intention was to create a Statute of the Congo which should not be liable to be altered by some only of its authors, the will of the Powers must be interpreted as being that no convention can acquire valid existence that is contracted in disregard of the rule forbidding a limited group of signatories of the Act to modify its terms. The antecedents of the Berlin Conference show that the intention was to set aside all treaties concluded between certain Powers only in regard to their interests in the Congo Basin: indeed, two States (the United Kingdom of Great Britain and Portugal) had to discard a commercial treaty concluded prior to the Berlin Act (Feb. 26th, 1884), and that particular treaty was the real cause of the Berlin Act. It is beyond doubt that the signatory States of the Congo Act desired to

make it absolutely impossible, in the future, [149] for some of their number only to amend the Congo Act, seeing that any modifications thus introduced would have been a danger to their vested rights in that vast region. Accordingly, in my view, the nullity contemplated by the Congo Act is an absolute nullity, that is to say, a nullity *ex tunc*, which the signatory States may invoke at any moment, and the convention concluded in violation of the prohibition is automatically null and void. The fact that, up to the present time, those signatories of the Berlin Act who did not participate in the Convention of Saint-Germain have not impugned the latter instrument, cannot, therefore, in any way remedy the absolute illegality of its conclusion. It remains null and void, because it transgresses the bounds which the authors of the Berlin Act established for themselves when they subscribed to that Act.

I think that the case in which a convention has to be regarded as automatically null and void is not an entirely isolated case in international law. The Covenant of the League of Nations, as a whole, and more particularly its Article 20, in which the Members undertake not to enter into obligations or understandings inter se inconsistent with its provisions, would possess little value unless treaties concluded in violation of that undertaking were to be regarded as absolutely null and void, that is to say, as being automatically void. And I can hardly believe that the League of Nations would have already embarked on the codification of international law if it were not possible, even to-day, to create a *jus cogens*, the effect of which would be that, once States have agreed on certain rules of law, and have also given an undertaking that these rules may not be altered by some only of their number, any act adopted in contravention of that undertaking would be automatically void. If that is the situation, and if the Convention of Saint-Germain is not merely an act which the signatory States of the Congo Act are entitled to impugn, but one which is, in itself, invalid, then, as M. van Eysinga has already pointed out, the Court ought not to apply the Convention. Our Court has been set up by the Covenant as the custodian of international law. It is an essential principle of any court, whether national or international, that the judges may only recognize legal rules which they hold to be valid. There is nothing to show that it was intended to disregard that legal principle when this Court was instituted, or that it was to be obliged to found its decisions on the ideas of the parties - which may be entirely wrong - as to the law to be applied in a given case. The terms of Article 38 of the Statute - which indicates, in the first place, as the source of law for the Court's decisions "international conventions, whether general or particular, establishing rules expressly recognized by the

contesting States" - cannot be intended to mean that [150] the Court is bound to apply conventions which it knows to be invalid. The Court would never, for instance, apply a convention the terms of which were contrary to public morality. But, in my view, a tribunal finds itself in the same position if a convention adduced by the parties is in reality null and void, owing to a flaw in its origin. The attitude of the tribunal should, in my opinion, be governed in such a case by considerations of international public policy, even when jurisdiction is conferred on the Court by virtue of a Special Agreement.

(Signed) W. Schücking.

[151] Annex.

Documents Submitted to the Court.

I. - Documents Filed in the Course of the Written Proceedings.

A. - *On behalf of the Belgian Government:*

1. Extract from "*Renseignements de l'Office colonial*" published by the Belgian Ministry for the Colonies. Year 1914, pp. 36-37: "The Rubber Markets of Antwerp, 1913."
2. *Cahier des charges* Agreement, concluded on April 16th, 1925, between the Colony of the Belgian Congo, the *Union nationale des Transports fluviaux* (Unatra), and the Company known as the "*Compagnie industrielle et de Transports au Stanley-Pool*" (Citas).
3. Comparative table of prices obtained for colonial produce.
4. Table of reductions granted on September 1st, 1930.
5. Table showing the rate of the abatements granted as from July 1st, 1931
6. Correspondence from the Belgian Minister for the Colonies to the President of the Permanent Committee for the coordination of transport services in the Congo, indicating the intention to modify the rate of reductions and abatements in accordance with requirements.
7. Note concerning fidelity contracts and contracts for the taking over of fleets.
8. Form of fidelity contract.
9. Correspondence exchanged showing the origin of the fidelity contracts.
10. Table of tonnage transported up and down stream from 1929 to 1933.
11. Extract from the statutes of Unatra in 1925.
12. General summary of contracts concluded by Unatra.
13. Ordinance of the Governor-General. - River police. - Loading of ships and other craft. (*Bulletin administratif et commercial*, 1920, p. 667.)

14. Summary of bordereaux and manifests, relating to incoming and outgoing traffic, from 1930 to 1932, in connection with cargoes carried by Mr. Chinn's vessels.
15. Note for the Chief Engineer of the Navigable Waterways Service respecting Mr. Chinn's vessels.

B.- On behalf of the Government of the United Kingdom:

1. Graphs showing financial results of Mr. Chinn's business from July 1930 to the end of 1933.
2. Graphs showing:
 - (a) expenses in connection with the Unatra fleet, 1927 to 1931;
 - (b) tonnage carried down stream by Unatra and by private transporters, 1929 to end of 1933.
3. Decision of June 20th, 1931.
4. Unatra charges before July 1931.
5. Form of fidelity contract and list of concerns with which fidelity contracts were made by Unatra subsequently to July 1931.
6. Graph showing prices of produce and proportion represented by the subsidy, from April 1931 to March 1934.
7. Correspondence with Socca and the Belgian Government regarding the offer made in October 1932, and letter showing that Unatra allowed special rebates.
[152]
8. Convention of Saint-Germain-en-Laye of September 10th, 1919 (*Treaty Series*, 1919, No. 18) (*in English and French*).
9. Correspondence between the Belgian Minister for the Colonies, Socca, Unatra and M. Crokaert:
 - (a) Letter from Socca to the Minister for the Colonies (June 3rd, 1932).

- (b) From the same to the same (June 21st, 1932).
 - (c) Letter from the Minister for the Colonies to Socca (June 23rd, 1932).
 - (d) Letter from Socca to the Minister for the Colonies (July 2nd, 1932).
 - (e) Letter from Unatra to M. Crokaert (May 22nd, 1933).
 - (f) Letter from M. Crokaert to Socca (June 7th, 1933).
 - (g) Letter from the Ministry for the Colonies to M. Crokaert (June 26th, 1933).
 - (h) Letter from Unatra to M. Crokaert (July 13th, 1933).
10. Letter from the Agent of the United Kingdom to the Registrar (May 17th, 1934).
 11. Letter from Socca to the Belgian Minister for the Colonies (June 26th, 1930).
 12. Letter from the Belgian Minister for the Colonies to Socca (July 28th, 1931).
 13. Judgment of the Court of First Instance at Leopoldville (Sept. 21st, 1932).
 14. Judgment of the Court of Appeal at Leopoldville (Dec. 13th, 1932).
 15. Proclamations issued by the Governor-General of the Congo (Oct. 3rd and Nov. 5th, 1932).
 16. Letters exchanged between Unatra and Socca, etc.:
 - (a) Unatra to Socca (Nov. 6th, 1931).
 - (b) Socca to Unatra (, 17th, ,).
 - (c) Unatra to Socca (, 21st, ,).
 - (d) Socca to Unatra (, 27th, ,).
 - (e) Unatra to Socca (Dec. 2nd, ,).
 - (f) Agreement between Unatra and Socca (Nov. 3rd, 1933).

II. - Documents Filed in the Course of the Oral Proceedings.

A. - On behalf of the Belgian Government :

Map of the Belgian Congo (means of communication).

B. - On behalf of the Government of the United Kingdom:

1. Letter sent on September 30th, 1931, to Mr. Oscar Chinn by the Inspector of Navigation on the Belgian Congo.
2. *Bulletin de la Chambre de commerce de Léopoldville*, 9th year, No. 8.
3. The *Echo de la Bourse*, an industrial and financial paper, ed. of Sept. 21st, 1933.

III. - Documents Consulted by the Court.

1. General Act of the Conference of Berlin of February 26th, 1885 (*Nouveau Recueil général de Martens*, 2nd Series, Vol. 10, pp. 414-427).
2. Maps of the Belgian Congo.