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Interpretation of article 24 of the Treaty of Finance and Compensation of 27 November 1961 (between Austria and the Federal Republic of Germany)

15 January 1972

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PART I

Case concerning the interpretation of article 24 of the Treaty of Finance and Compensation of 27 November 1961 (Between Austria and the Federal Republic of Germany)

Decision of 15 January 1972

Affaire concernant l'interprétation de l'article 24 du Traité de finance et d'indemnisation en date du 27 novembre 1961 (entre l'Autriche et la République fédérale d'Allemagne)

Sentence du 15 janvier 1972

CASE CONCERNING THE INTERPRETATION OF ARTICLE 24 OF THE TREATY OF FINANCE AND COMPENSATION OF 27 NOVEMBER 1961

DECISION OF 15 JANUARY 1972

Legal interest—Exhaustion of domestic remedies—Diplomatic protection

Notion d'intérêt juridique — Epuisement des recours internes — Protection diplomatique

ARBITRAL AWARD*

of the Austro-German Arbitral Tribunal on the interpretation of article 24, paragraph 2, of the Treaty between the Federal Republic of Germany and the Republic of Austria concerning settlement in respect of damages sustained by refugees, evacuees and victims of persecution (Treaty of Finance and Compensation) of 27 November 1961

Arbitrators:

Alfred VERDROSS, Hermann MOSLER, Fritz SCHWIND, Joseph H. KAISER in the dispute between the Republic of Austria, Applicant, and the Federal Republic of Germany, Respondent, arising out of differences of opinion concerning the interpretation of article 24, paragraph 2, of the Treaty of Finance and Compensation (TFC).

I. *Decision*

(*a*) Concerning the preliminary objections by the Respondent, ordered and pronounced at Salzburg on 5 October 1971:

1. The Arbitral Tribunal is competent in this dispute to interpret article 24, paragraph 2, of the Treaty of Finance and Compensation.

2. The action is admissible.

(*b*) Concerning the merits, handed down at Vienna on 15 January 1972: In respect of the assertion of diplomatic protection on behalf of those Austrian nationals who as Austria interprets the law have been discriminated against in a manner contrary to general international law by the application of article 60, paragraph 1.2a, of the German Reparations Act, article 24, paragraph 2, of the Treaty of Finance and Compensation is not applicable.

* Translated from German by the Secretariat of the United Nations.

II. *Facts and proceedings*

1. The Parties in the present dispute, "desirous of arriving at a settlement between the two States in a spirit of friendly and good-neighbourly relations, of the financial questions still pending that are connected with the period from 13 March 1938 to 8 May 1945", concluded on 27 November 1961 a Treaty "concerning settlement in respect of damages sustained by refugees, evacuees and victims of persecution and concerning other financial questions including questions in the social field". In addition to the text of the Treaty itself, there are two annexes—not relevant to the present dispute—and a Final Protocol of the same date (*Deutsches Bundesgesetzblatt 1962* II, pp. 1041-1053; *Bundesgesetzblatt für die Republik Osterreich 1962*, No. 283).

In the Treaty, the Federal Republic of Germany undertakes to make financial payments to the Republic of Austria for the benefit of individually identified groups of persons.

Article 24 contains the so-called renunciation clause of the Republic of Austria *vis-à-vis* the Federal Republic of Germany, together with the limitation thereon and exceptions thereto. It reads as follows:

> (1) With the entry into force of this treaty, there shall, subject to the provisions of article 5, exist no financial or property-law questions still to be settled between the Contracting States which stem from factual or legal transactions or events during the period from 13 March 1938 to 8 May 1945 or from subsequent consequences of such transactions or events.
>
> (2) Claims which stem from factual or legal transactions or events during the period referred to in paragraph 1 or from subsequent consequences of such transactions or events, and which have not arisen between the two Contracting States, shall remain unaffected by the provisions of paragraph 1. Neither of the two Contracting States shall support such claims against the other Contracting States, through diplomatic representation or by other means, even if it has a protective right to do so under the general rules of international law, unless the claim or its assertion is based on legislative provisions of the other Contracting State enacted since 8 May 1945 or yet to be enacted, or on an international agreement in force between the two Contracting States.

Paragraph 11 of the Final Protocol contains a reference to article 24, reading:

> It is understood that the claims referred to in article 24, paragraph 2, first sentence, shall also not constitute questions still to be settled between the Contracting States.

The Treaty contains in article 25 an arbitration clause, under which "differences of opinion between the two Contracting States concerning the interpretation or application of this Treaty in respect of which no amicable agreement can be reached" shall be ". . . definitively settled by an arbitral tribunal to be convened in each such instance at the request of one of the two Contracting States". In such cases it is provided that the two Contracting States shall each, within three months following notification of the intention of one Contracting State to bring the disputed issue before the arbitral tribunal, designate

two arbitrators, of the nationality of the Contracting State appointing them, and communicate their names to the other Contracting State (para. 1). If a majority vote is not forthcoming within at most four months from the opening of discussions of the matter by the arbitral tribunal, the Governments of the Contracting States shall within a further three months nominate by mutual agreement an umpire who shall participate in the proceedings as chairman (para. 4).

2. In connection with the draft legislation introduced in the German *Bundestag* concerning the settlement of claims for damages by way of reparation, restitution and compensation (the Reparations Act, hereinafter referred to as RepG, BT-Drs.V/2432), differences of opinion arose between the two Contracting States concerning the scope of TFC article 24.

The Austrian Embassy in Bonn, in a note verbale of 26 May 1964 (Z1.487/64) to the Ministry of Foreign Affairs, stated *inter alia* that:

> Pursuant to articles 12 and 36 in conjunction with article 56 of the government draft of a reparations act, Austrian nationals and German nationals resident in Austria would be excluded from putting forward claims on the basis of the above draft legislation. The Austrian Embassy is of the view that this discrimination against Austrians and persons of equivalent status fulfilling the material requirements for compensation is unjustified.
>
> The Austrian Embassy accordingly has the honour to request that the government draft of the Reparations Act be reviewed in the light of the above considerations, and reserves the right further to enlarge upon its request as necessary.

By a note verbale of 28 August 1964 (V7-80.43/0/5) to the Austrian Embassy, the Ministry of Foreign Affairs responded *inter alia* as follows:

> By the Treaty of Finance and Co-operation of 27 November 1961, the Government of the Federal Republic of Germany committed itself to a high level of financial participation in the disbursements by the Republic of Austria for its settlements in favour of refugees and evacuees, in favour of victims of persecution and in the social field.
>
> In an extremely closely related provision, article 24 of the Treaty establishes that following its entry into force there shall exist no financial or property-law questions still to be settled between the Contracting States which stem from factual or legal transactions or events during the period from 13 March 1938 to 8 May 1945 or from subsequent consequences of such transactions or events.
>
> . . .
>
> In the course of the deliberations on which the government draft of a reparations act is based, the Government of the Federal Republic of Germany came to the conviction that the settlement in respect of damages abroad provided for in article 56 of the government draft of a reparations act is a necessary consequence of the German-Austrian Treaty of Finance and Compensation, since otherwise the Treaty would lose its *raison d'être*.
>
> . . .
>
> In the light of the factual and legal position set forth above, the Government of the Federal Republic of Germany, after further review, still remains of the opinion that articles 12 and 36 in conjunction with article 56 of the government draft of a reparations act are consistent with the agreements reached in the Treaty

of Finance and Compensation of 27 November 1961, and that pursuant to article 24 of that Treaty, the question of the loss of property suffered by specific groups of refugees and evacuees referred to in the note verbale of 26 May 1964 no longer exists.

In the subsequent diplomatic correspondence, the opposition between the legal positions taken by the two Governments became increasingly apparent. The Arbitral Tribunal refers in this connection to the following documents filed by the Parties:

The note verbale from the Austrian Embassy to the Ministry of Foreign Affairs dated 10 March 1965 (Z1.247/65);

The note verbale from the Ministry of Foreign Affairs to the Austrian Embassy dated 9 June 1965 (V7-80.43/0/5);

The communication from the German Ministry of Foreign Affairs to the Federal Ministry of Foreign Affairs of Austria dated 22 February 1967 with annexed memorandum of the same date (V7-82.03/3/94.19);

The communication from the Federal Ministry of Foreign Affairs of Austria to the German Ministry of Foreign Affairs dated 28 February 1967 (Z1.307.440-14/67);

The note verbale from the German Ministry of Foreign Affairs to the Austrian Embassy dated 29 April 1968 (V7-82.03/3-94.19).

The Reparations Act of 12 February 1969 entered into force with effect from 1 January 1969 (*Deutsches Bundesgesetzblatt 1969* I, pp. 105-136). Account was not taken therein of Austria's wishes.

Thereupon, the Austrian Federal Ministry of Foreign Affairs invoked, by a note verbale of 19 May 1969 (Z1.211.803-14/69), the TFC arbitration clause:

In the Reparations Act, which entered into force with effect from 1 January 1969, the arguments put forward by Austria in this connection were not reflected. It is Austria's view that the group of persons referred to in the Austro-German Treaty of Finance and Co-operation should not have been excluded from benefits under the Reparations Act, since the renunciation of the right to intervene expressed by the Contracting Parties in article 24 of the Treaty of Finance and Co-operation expressly excludes those claims in which the claim or its assertion is based on legislative provisions of the other Contracting State enacted since 8 May 1945 or yet to be enacted. There is thus a difference of opinion, within the meaning of article 25 (1), between the two Contracting States parties to the Treaty of Finance and Compensation. From the exchange of notes conducted to date in this connection, it has become apparent that no amicable agreement can be reached between the two Contracting States concerning the interpretation of article 24 of the Treaty of Finance and Compensation.

The Austrian Federal Government accordingly has the honour, in the light also of the outcome of the relevant talks conducted in the context of the State visit by Federal Chancellor Dr. KIESINGER, to make known its intention to bring the issue before an arbitral tribunal to be convened in accordance with article 25 of the Treaty of Finance and Compensation.

For the Arbitral Tribunal to be constituted in accordance with TFC article 25, the Parties appointed as arbitrators:

The Republic of Austria:

University Professor Alfred VERDROSS, D. jur., D. h. c. mult.

University Professor Fritz SCHWIND, D. jur.

The Federal Republic of Germany:

University Professor Hermann MOSLER, D. jur., D. jur. h. c.

University Professor Joseph H. KAISER, D. jur.

The Arbitral Tribunal met in its inaugural meeting in Munich on 7 November 1969. At the meeting, provisional rules of procedure were agreed upon. On 8 November 1969, also in Munich, the Arbitral Tribunal, in agreement with the representatives of the two Parties, established the time-limits for the written proceedings.

On 17 January 1970, the Arbitral Tribunal approved the final version of the rules of procedure. It decided to bear the following title: "Austro-German Arbitral Tribunal on the Interpretation of Article 24, Paragraph 2, of the Treaty of Finance and Compensation of 27 November 1961."

The following persons were designated as Agents:

By the Republic of Austria:

Special Envoy and Minister Plenipotentiary Dr. Erik NETTEL

By the Federal Republic of Germany:

Under-Secretary in the Federal Ministry of the Economy and Finance Dr. Ernst FEAUX DE LA CROIX

And as his Counsel

Vortragende Legationsrat I. Klasse in the Ministry of Foreign Affairs Professor Dr. Helmut RUMPF.

3. The Parties exchanged the following submissions:

(1) The Memorial of the Republic of Austria dated 8 April 1970 in which the Applicant requested the Arbitral Tribunal

> to adjudge that pursuant to TFC article 24, paragraph 2, Austria is entitled to exercise diplomatic protection on behalf of its nationals who have been discriminated against, in a manner contrary to international law, through the application of RepG article 60, paragraph 1.2*a*. The request of the Republic of Austria may also be formulated, using different phraseology, as being that it may please the High Arbitral Tribunal to find that TFC article 24, paragraph 2, does not preclude the exercise by the Republic of Austria of diplomatic protection on behalf of those Austrian nationals who would pursuant to RepG have a claim against the Federal Republic of Germany were it not for their exclusion by RepG article 60, paragraph 1.2*a*, in a manner contrary to international law, from the benefits provided for in RepG.

(2) The Counter-Memorial of the Federal Republic of Germany dated 25 September 1970

in which the Respondent entered preliminary objections to the admissibility of the proceedings and stated its position with regard to the merits. It called for dismissal of the Application:

(*a*) On the ground that the Application is inadmissible or, if not,

(*b*) That it is unfounded.

(3) The Submission of the Republic of Austria dated 7 January 1971

in which the Applicant responded to the preliminary objections and substantive arguments put forward in the Counter-Memorial and requested the Arbitral Tribunal to adjudge that:

1. TFC article 24 does not prevent it from asserting against the Federal Republic of Germany its right under international law to non-discrimination against its nationals as compared with nationals of other States under RepG, and

2. The exclusion of Austrian nationals from the benefits under RepG of the Federal Republic of Germany, to which the Republic of Austria has expressed opposition through the diplomatic channel, cannot be legitimized by means of TFC article 24, paragraph 2.

(4) The Submission of the Federal Republic of Germany dated 16 March 1971

in which the Respondent calls attention to the impermissible amendment of the Application which was in its opinion introduced by the Applicant in the petition contained in its Submission of 7 January 1971 as compared with the petition contained in the Memorial. It refrained from taking a position regarding the material content of the Austrian Submission of 7 January 1971, and requested the Tribunal:

1. Not to admit the amendment of the Application and accordingly

2. To declare the Application withdrawn.

The Respondent reserved its arguments on the merits for the contingency of the Arbitral Tribunal admitting the amendment of the Application.

(5) The Submission of the Republic of Austria dated 1 June 1971 in which the Applicant stated its position regarding the contention that an impermissible amendment had been introduced and the remaining preliminary objections presented by the Respondent, and requested the Tribunal:

1. To reject the arguments and petitions of the Federal Republic of Germany in Tz 61 of its 'Rejoinder' (i.e., the German application of 16 March 1971) and

2. Sought a ruling that its petitions, as summarized and specified in Part V of the 'Reply' of the Republic of Austria, on page 26 (i.e. the petition contained in the Austrian Submission of 7 January 1971 and reproduced above), are legitimate.

(6) The letter of 22 June 1971 from the Agent of the Federal Republic of Germany to the Austrian Agent.

(7) The Submission of the Federal Republic of Germany dated 12 July 1971

in which the Respondent replied to the Austrian position stated in the Submission of 1 June 1971 with respect to the German preliminary objections.

(8) The letter of 19 July 1971 from the Agent of the Republic of Austria to the German Agent.

(9) The Submission of the Republic of Austria dated 26 August 1971

in which the Applicant again stated its position with respect to the preliminary objections and requested the Arbitral Tribunal:

> 1. To reject the arguments and petitions of the Federal Republic of Germany in its 'Rejoinder' and 'Surrejoinder' in reply (i.e. the German Submissions of 16 March and 12 July 1971) and
>
> 2. To adjudge that its petitions, as summarized and specified in Part V of the 'Reply' of the Republic of Austria, on page 26, are legitimate.

(10) The Submission of the Federal Republic of Germany dated 31 August 1971

in which the Respondent summarized its preliminary objections and provisionally stated its arguments on the merits in response to the material comments contained in the Austrian submission of 7 January 1971, and petitioned the Tribunal:

> A. Not to admit the amendment of the Application, and to reject the Application itself as inadmissible or, if not, as unfounded;
>
> B. In the event that the amendment of the Application is admitted, in the first place to reject the petitions in the Reply as inadmissible or, if not, as unfounded; otherwise:
>
> (1) In respect of petition 1 in the Reply:
>
> (*a*) To rule that it is not in dispute that TFC article 24, paragraph 2 is not relevant to the question whether the Republic of Austria is entitled to assert a right possibly conferred on it under international law, namely the presumed right to take measures against the Federal Republic of Germany to remedy an alleged act of discrimination perpetrated, contrary to international law, against its nationals as compared with the nationals of other States by RepG article 60, paragraph 1.2;
>
> (*b*) For the rest, to reject it;
>
> (2) With respect to petition 2 in the Reply, to rule that there is no dispute on that matter between the parties.

Following the filing of the Applicant's Submission of 16 March 1971, the Arbitral Tribunal decided at its meeting in Frankfurt am Main on 24 April 1971, in accordance with rule 11 of its rules of procedure, to decide independently, in a separate procedure, on the preliminary objections of the Federal Republic of Germany. With the agreement of the Parties, it established new time-limits for the filing of submissions and suggested that the Federal Republic of Germany, without prejudice to its procedural position, should proceed to file its provisional arguments on the merits. As is apparent from the foregoing description of the course of the written proceedings, this was done in the German Submission of 31 August 1971.

The Arbitral Tribunal met on 13 and 14 September 1971 in Freiburg im Breisgau. It adopted a decision stipulating that the written proceedings were concluded. The oral proceedings requested by both Parties in accordance with rule 7 of the rules of procedure concerning the procedural objections entered by them in the course of the written proceedings were scheduled for 4 October 1971 in Salzburg. To cover the contingency of the Arbitral Tribunal accepting the admissibility of the proceedings, the oral proceedings on the merits requested by both Parties were provisionally scheduled to be held in Salzburg on 6 October 1971.

4. The closed oral proceedings of the Arbitral Tribunal concerning the preliminary objections entered by the Respondent took place in Salzburg on 4 October 1971.

The Parties were represented by:

For the Applicant, the Agent, assisted by Dr. Peter NEUHOLD and *Amtsrat* Walter ZIDEK as Counsel

For the Respondent, the Agent, assisted by *Vortragende Legationsrat I. Klasse* Prof. Dr. Helmut RUMPF and Vice-President Dr. Karl Heinz SCHAEFER as Counsel.

At the conclusion of the proceedings, the following petitions of the Parties were maintained:

By the Republic of Austria:

> May it please the High Arbitral Tribunal to rule that TFC article 24, paragraph 2, does not preclude the assertion by the Republic of Austria of diplomatic protection on behalf of those Austrian nationals who, by RepG article 60, paragraph 1.2*a*, have been excluded from the benefits provided for under the said Act, in the event that the said exclusion is contrary to international law.

By the Federal Republic of Germany:

> To reject the Application.

In the course of these proceedings, the Agents of the two Parties agreed that the competence of the Arbitral Tribunal extended, and was limited, to the interpretation of TFC article 24, paragraph 2.

The following day, 5 October 1971, the Arbitral Tribunal pronounced in closed session the decision reproduced above in section I, *a*, which ruled that the Arbitral Tribunal in this dispute is competent to interpret TFC article 24, paragraph 2, and that the Application is admissible. The member presiding at the meeting stated the grounds for the decision orally, subject to later amplification.

The closed oral proceedings of the Arbitral Tribunal on the merits took place in Salzburg on 6 October 1971.

The Republic of Austria repeated the petition presented in the oral proceedings on 4 October 1971.

The Federal Republic of Germany requested dismissal of the Application as not conclusive, and hence as unfounded.

At its meeting from 24 to 26 November 1971 in Vienna, the Arbitral Tribunal deliberated on the Arbitral Award on the merits. On 24 November 1971 it adopted a decision stipulating that the opening of discussions on the case, which determines the beginning of the four-month time-limit under article 25, paragraph 4, took place on that date. It further determined that the time-limit would expire at the end of 24 March 1972, unless the Arbitral Award on the merits was delivered before that time.

III. *Legal arguments of the Parties*

A. *Regarding admissibility*

1. The Republic of Austria holds that TFC article 24, paragraph 2, does not preclude the assertion against the Federal Republic of Germany of its right of diplomatic protection on behalf of those Austrian nationals who, by RepG article 60, paragraph 1.2*a*, have been excluded from the benefits provided under the said Act, in the event that the said exclusion is contrary to international law.

This provision of the Reparations Act reads:

> (1) Compensation shall not, in cases where compensation is not already excluded under other rules, be payable in respect of:
>
> 1. . . .
>
> 2. Damages that arose in the German eastern territories then under foreign administration or in territories outside the German Reich:
>
> (*a*) Where the directly injured party, or if he died before 27 November 1961 the person who on that date was his direct or subsequent heir, was on 27 November 1961, or at the time of a transfer of permanent residence to the Republic of Austria before 31 December 1952, an Austrian national without simultaneously holding German nationality, or;
>
> (*b*) . . . or;
>
> (*c*) . . .

2. The Respondent bases its request for rejection of the Application on the following preliminary objections:

(*a*) Lack of jurisdiction of the Arbitral Tribunal:

No ruling can be made on the Application in the absence of a prior decision regarding the "breach of the prohibition of discrimination allegedly contained in general international law" affirmed in the Memorial. The issue involved here is the illegality under international law of RepG article 60, paragraph 1.2*a*. However, the Arbitral Tribunal is not competent to rule on this issue, since under TFC article 25 it is limited to questions of the interpretation and application of that Treaty (Counter-Memorial of 25 September 1970, p. I *et seq.*);

(*b*) Absence of legal interest (*Rechtsschutzinteresse*):

The Application sought a ruling that the renunciation of intervention expressed in TFC article 24, paragraph 2, is not applicable in the present case. The Republic of Austria did indeed "more than once

make representations to the German Federal Government, both before the enactment of the Reparations Act and following its proclamation, for the inclusion of Austrian nationals in the scope of the Reparations Act'' (Counter-Memorial of 25 September 1970, p. 2). The German side voluntarily entered into the substance of the issue. The Republic of Austria thereupon—in the German view, of course, in violation of the Treaty of Finance and Compensation—asserted and exhausted a right of intervention. Accordingly, no legal interest can be taken in a ruling that TFC article 24 does not preclude the assertion of the right of diplomatic protection by the Republic of Austria;

(*c*) Non-exhaustion of domestic remedies by any affected Austrian nationals:

No Austrian national excluded from the benefits of the Reparations Act by article 60, paragraph 1.2*a* has availed himself of German domestic legal remedies against that provision, which, it is contended, is contrary to international law. It is not sufficient to state in general terms that diplomatic protection should come into play ''for persons discriminated against, contrary to international law, under RepG article 60, paragraph 1.2*a*''. The Applicant is not asserting a concrete right of protection but is seeking, in contravention of TFC article 24, to intervene on behalf of an unspecified number of its nationals who moreover are apparently not known to exist. The requirements are thus not met either for the assertion of diplomatic protection or for recourse to the Arbitral Tribunal (Counter-Memorial of 25 September 1970, pp. 2 and 19);

(*d*) Inadmissible amendment of the Application:

In the Application, the Republic of Austria asserted an individual claim of Austrian nationals and claimed its right to exercise diplomatic protection on behalf of those nationals. In the Austrian Submission of 7 January 1971, on the other hand, it is stated that the Republic of Austria is not seeking ''to support individual material claims through the exercise of diplomatic protection'', but is relying rather in that respect on its own right under international law to non-discrimination against its nationals. That constitutes an impermissible amendment of the grounds of the Application and the Application itself (Submission of 16 March 1971, p. 8);

(*e*) Absence of an attempt to arrive at an amicable solution in respect of the amended Application pursuant to TFC article 25, paragraph 1:

Pursuant to TFC article 25, paragraph 1, the new issue in dispute introduced as a result of the amendment of the Application should have been the occasion and subject of efforts to arrive at an amicable solution before the Arbitral Tribunal was convened. However, this procedural requirement has not been met (Submission of 16 March 1971, p. 10, and particularly Submission of 31 August 1971, pp. 10 and 25 *et seq.*).

3. The Republic of Austria countered the Respondent's preliminary objections essentially as follows:

(*a*) The Application does not seek a ruling that the Federal Republic of Germany is in breach of the prohibition against discrimination contained in general international law; rather, the relevant arguments put forward in the Application relate only to the background of the Application and should have been taken to refer only to the argument of the Republic of Austria in the event of further pursuit of its claims before a court of international law. The Arbitral Tribunal, on the other hand, is called upon to interpret TFC article 24, paragraph 2, and is competent to do so (Submission of 7 January 1971, pp. 11-14);

(*b*) Following the negative response by the Federal Republic of Germany to the Austrian interventions, legal interest also exists, and specifically because in the event of an award by the Arbitral Tribunal upholding the Austrian Application, the renunciation of the right to intervene embodied in TFC article 24, paragraph 2, could no longer be held by the Federal Republic of Germany to exclude further pursuit of the Austrian claims (*ibid.*, p. 14);

(*c*) Exhaustion of domestic remedies by injured Austrian nationals does not constitute a requirement in the present dispute, since the Republic of Austria is asserting its own right under international law to equality of treatment for its nationals, a right which is vested directly in it irrespective of actual damages suffered by Austrian nationals (*ibid.*, pp. 5-8);

(*d*) The statements contained in the Submission of 7 January 1971 are intended not as an amendment of the Application but as a clarification of its original wording. Support for individual claims by Austrian nationals and the assertion of Austria's own right to equality of treatment are only two aspects of the same claim (recapitulated in the Submission of 26 August 1971, particularly p. 6). Moreover, the disputed arguments in the Submission of 7 January 1971 are not maintained as part of the Application (oral proceedings on 4 October 1971, transcript of recording, p. 19).

B. *Regarding the merits*

The two Parties are in agreement that the Arbitral Tribunal is limited to deciding on differences of opinion between the two Contracting States concerning the interpretation and application of TFC article 24, paragraph 2.

The Federal Republic of Germany has entered an objection on the basis of TFC article 24, paragraph 1; however, this legal avenue is barred to it by the fact that the Arbitral Tribunal is limited to the interpretation of TFC article 24, paragraph 2.

Since the Parties are in agreement that the competence of the Arbitral Tribunal is limited to the interpretation of the second paragraph of TFC article 24 and the extension of its competence to the

interpretation of the first paragraph is at the discretion of the Governments, it is unnecessary to reproduce here the legal arguments of the Parties based on the interpretation of the first paragraph.

With reference to the content and scope of TFC article 24, paragraph 2, in the current dispute, each Party states the grounds for its position as follows:

1. The Republic of Austria bases its claims on the legal situation created by RepG article 60, paragraph 1.2*a*, contending that the exclusion of Austrian nationals from the benefits conferred under this Act constitutes unjustifiable discrimination, which is contrary to general international law.

The Applicant derives from this position the right to assert diplomatic protection, the dual nature of which is expressed on the one hand in support for individual entitlements to removal of the injustice caused by the discrimination, and on the other hand in the assertion of the Austrian State's own right to equality of treatment with the other State.

(*a*) In support of the individual rights aspect, which in the course of the proceedings became secondary to the State component of the right of diplomatic protection, the Applicant invokes the hypothetical claims that its nationals would be entitled to bring against the Respondent on the basis of the Reparation Damages Act but for the fact that they are excluded by this Act itself from the benefits provided for therein. It argues that these individual claims are excluded pursuant to TFC article 24, paragraph 2, from the renunciation embodied in TFC article 24, paragraph 1, and remain valid as before;

(*b*) The Applicant substantiates its own right in this matter by reference to the fact that a State, in asserting diplomatic protection, is exercising its own right, and by invoking the fundamental right of States to sovereign equality and equal treatment (Submission of 1 June 1971, p. 7);

(*c*) The claims of the State and the parallel claims of individuals could not, it contends, be covered under article 24, particularly paragraph 2 thereof, since they are not claims which stem from legal or factual transactions during the period from 13 March 1938 to 8 May 1945. Since the Reparations Act provides, with effect from 1 January 1969, a basis for claims by the present Administration not based on any legal entitlement, the provisions of article 24, which refer to legal entitlements from the past, are not applicable here (oral proceedings of 4 October 1971, transcript of recording, pp. 2-7).

2. The Federal Republic of Germany states in support of its petition for rejection of the Application that:

(*a*) An individual claim, in support of which TFC article 24, paragraph 2, would permit the exercise of protection as an exception to the renunciation embodied in paragraph 1, could be based on a legislative provision or an agreement only if those instruments them-

selves made provision for it; such claims are, however, expressly excluded under the terms of RepG article 60, paragraph 1.2*a* (Counter-Memorial of 25 September 1970, p. 14 *et seq.*);

(*b*) From the entire complex of regulations governing the settlement of war damages in favour of Austrian nationals contained in the relevant German legislation and in the Treaty of Finance and Compensation, it emerges that RepG article 60, paragraph 1.2*a*, entails no discrimination against Austrian nationals, and consequently that no right of the Republic of Austria itself is violated;

(*c*) The termination clause is very broadly worded. The renunciation by the Republic of Austria it contains is not limited to the real and personal spheres regulated in TFC (oral proceedings on 6 October 1971, transcript of recording, PP. 27-31 and *passim*).

IV. *Grounds for decision*

A. *In respect of the award the Respondent's preliminary objections*

Regarding paragraph 1 of the Arbitral Award, under which the Arbitral Tribunal in this dispute is competent to interpret TFC article 24, paragraph 2:

The Parties concur in interpreting the notes verbales of 29 May 1969 and 18 August 1969 constituting the Arbitral Tribunal as meaning that the Arbitral Tribunal is limited to the interpretation of TFC article 24, paragraph 2, and is required to invoke other provisions or instruments only as necessary for the interpretation of that provision. The Parties also jointly specified that the extension of that competence would require a specific act of their Governments.

Regarding paragraph 2 of the Arbitral Award, whereby the Application is declared admissible:

(*a*) The two Parties are in agreement that the Arbitral Tribunal is not requested to adjudge that RepG article 60, paragraph 1.2*a*, justifies discrimination contrary to international law;

(*b*) The Respondent invoked the absence of legal interest. However, legal interest arises from the fact that RepG article 60, paragraph 1.2*a*, contains an exclusion clause directed against Austrian nationals, and that an intervention by the Republic of Austria seeking the deletion of that clause was rejected by the Respondent on grounds of Austria's renunciation of the right to claim. The Applicant has admittedly not demonstrated the practical significance of the exclusion clause by citing concrete instances, but on the other hand, the assertions of the Respondent do not justify the assumption that the clause must be regarded as devoid of any practical meaning. It is not thereby established beyond doubt that there is no Austrian national who would be entitled to benefit from the application of the general criteria of RepG;

(*c*) The Respondent further pleaded non-exhaustion of domestic remedies by affected Austrian nationals. Exhaustion of domestic remedies is indeed a requirement for the exercise of diplomatic protection even in cases when a State claims to have been damaged or disadvantaged in the person of its nationals, to the extent that effective legal remedies are available to the affected persons. The Arbitral Tribunal is however of the view that in the present dispute this requirement cannot be insisted upon, for the following reasons: the affected Austrian nationals could indeed have lodged in the Federal Constitutional Court a constitutional complaint against RepG article 60, paragraph 1.2*a* (Federal Constitutional Court Act, arts. 90, 93). From the precedent set by this Court in a comparable case, namely that of the exclusion of Austrian nationals under article 166 *c* of the Federal Compensation Act, it may nevertheless be inferred that the lodgement of this appeal would also have offered little prospect of success in the case of article 60, paragraph 1.2*a* (decision of 21 June 1967 *(Bundesausgleichsamt)*—fig. IBvR 237/65—printed in the bulletin of the Federal Board of Equalization, 1967, p. 588; see more recently—on another subject—the decision of 20 October 1971—1BvR 757/66, official reprint, p. 20 *et seq.*). The affected Austrian nationals could therefore not have been reasonably expected to make the attempt;

(*d*) The Respondent's objection that the Applicant had in its Submission of 7 January 1971 amended the Application in an impermissible manner is to some extent undermined by the fact that in the course of the oral proceedings the Applicant specified that the disputed arguments in this Submission did not form part of the Application. The Arbitral Tribunal nevertheless had to ascertain whether the arguments of the Applicant seeking to base a claim of the Republic of Austria itself on non-discrimination against Austrian nationals constitute an amendment of the grounds of the Application. Analysis showed that even in the Memorial itself (pp. 21 and 23), the Applicant had referred to the fact that the principle of non-discrimination against the nationals of a given State as compared with the nationals of a third State can be derived from the principle of "equality of treatment" of all States in the international community; hence it is clear that from the very outset the Applicant was advancing a claim of its own on the basis of non-discrimination against its nationals. Accordingly, no amendment of the grounds of the Application is involved. In its later submissions, the Applicant was merely bringing this argument to the forefront and elucidating it;

(*e*) The complaint that no attempt was made to arrive at an amicable agreement in respect of the allegedly amended Application pursuant to TFC article 25, paragraph 1, is invalidated by the ruling of the Arbitral Tribunal under paragraph (*d*) above.

B. *With regard to the Arbitral Award on the merits*

1. Article 24, paragraph 2, establishes an exception to TFC article 24, paragraph 1. The latter paragraph provides that there exist "no financial or property-law questions still to be settled between the

Contracting States which stem from factual or legal transactions or events during the period from 13 March 1938 to 8 May 1945 or from subsequent consequences of such transactions or events".

The first sentence of paragraph 2 provides that claims which stem from actual or legal transactions or events during the period referred to in paragraph 1 or from subsequent consequences of such transactions or events, and which have not arisen between the two Contracting States, shall remain unaffected by the provisions of paragraph 1. According to paragraph 11 of the Final Protocol to TFC, the claims referred to here shall not constitute questions still to be settled between the Contracting States.

The following, second, sentence of paragraph 2 states the undertaking of each of the two Contracting States not to support such claims against the other Contracting State, through diplomatic representation or by other means, even if it has a protective right to do so under the general rules of international law. The last clause of the sentence excludes from this undertaking claims, or the assertion of claims, under the first sentence of paragraph 2 which are based on legislative provisions of the other State enacted since 8 May 1945 or yet to be enacted, or on an international agreement in force between the two Contracting States.

Application of the second sentence, including the exception provided for in the last half sentence, thus specifies that the claims in question must be claims within the meaning of the first sentence. The provision of the first sentence contains two factual elements, both of which must apply in a specific case in order that a claim shall remain unaffected by the renunciation clause of paragraph 1. According to the second sentence, the renunciation clause shall not affect claims which:

(*a*) Stem from events during the period from 13 March 1938 to 8 May 1945 or from subsequent consequences of such transactions or events; and

(*b*) Have not arisen between the two Contracting States.

If one of these two elements does not apply in the specific case, the claim asserted is not unaffected by the provisions of paragraph 1. In such event, the applicability of the second sentence of paragraph 2, including the exception clause in the last half sentence, does not need to be verified, since the second sentence specifies that conditions of the first sentence shall be fulfilled.

A legal dispute relating to claims between the Contracting States can therefore be analysed only from the standpoint of paragraph 1. In its award on the preliminary objections, the Arbitral Tribunal determined that, on the basis of the notes verbales of 19 May 1969 and 18 August 1969 establishing its competence, it is limited to the interpretation of article 24, paragraph 2, and is authorized to invoke other instruments only in so far as is necessary for the interpretation of that provision. With the announcement of the above award on 5 Oc-

tober 1971, this ruling became binding in law both for the two Parties and for the Arbitral Tribunal. Thus it remains for the Arbitral Tribunal only to rule on the question whether the Republic of Austria will be prevented by the provision of article 24, paragraph 2, from exercising diplomatic protection on behalf of those Austrian nationals who in the view of the Applicant have by virtue of RepG article 60, paragraph 1.2*a*, been discriminated against in a manner contrary to international law. This follows also from the final formulation of the Application in the oral proceedings before the Arbitral Tribunal on 4 and 6 October 1971.

For these reasons, the Arbitral Tribunal was unable to enter into an analysis of the question whether the claim or protection put forward by the Applicant is or is not covered by the renunciation clause of article 24, paragraph 1. As a result, the Arbitral Tribunal also had to refrain from going into the settlement of war damages in respect of Austrian nationals provided for in the German legislation and the Treaty of Finance and Compensation and the arguments put forward by the Parties in that respect.

2. In order to rule on the merits of whether the diplomatic protection claimed by the Applicant is or is not compatible with article 24, paragraph 2, it next had to be ascertained which claims are covered by the renunciation of the exercise of diplomatic protection provided for therein. This question is answered by article 24, paragraph 2, to the effect that these claims must be claims "which have not arisen between the two Contracting States".

According to the arguments of both Parties, the claims involved are claims which individuals maintain that they themselves have directly against the Federal Republic of Germany on the basis of the so-called transition agreement between the Federal Republic of Germany and the Three Powers (France, Great Britain and the United States of America) and any other instruments that may exist (Counter-Memorial, p. 13; oral proceedings of 4 October 1971, transcript of recording, p. 74; oral proceedings of 6 October 1971, transcript of recording, pp. 4 and 5). Such claims are indeed not affected by article 24, paragraph 2; however, they may not be the object of diplomatic protection or representation by either Contracting State *vis-à-vis* the other Contracting State "unless the claim or its assertion is based on legislative provisions of the other Contracting State enacted since 8 May 1945 or yet to be enacted, or on an international agreement in force between the two Contracting States".

However, the Applicant is not in the first place asserting a claim stemming from a direct entitlement of Austrian nationals on the basis of a rule of international law or a domestic rule. It contends, rather, that it has itself been injured by RepG article 60, paragraph 1.2*a*, in the person of its nationals, in that the latter have been discriminated against by the Act in a manner contrary to international law (Memorial, p. 32; Submission of 27 August 1971, p. 6; oral proceedings of 4 Oc-

tober 1971, transcript of recording, p. 23, and of 6 October 1971, transcript of recording, pp. 3 and 8).

These arguments are underscored by the statement that Austrian nationals would be "entitled" to bring such a claim only if "they had not been excluded by RepG article 60, paragraph 1.2*a*, in a manner contrary to international law, from the benefits provided for in the Reparations Act" (Memorial, p. 32; proceedings of 4 October 1971, transcript of recording, pp. 4 and 5).

That the Applicant is asserting a claim of its own against the Respondent, based on general international law, is also made obvious by the fact that, already during the parliamentary debates on the draft of the Reparations Act, the Austrian Federal Government made reference to the exclusion of Austrian nationals provided for therein, and requested a revision of the draft (Austrian note verbale of 26 May 1964). The Applicant thus asserts that Austrian nationals have been placed at a disadvantage by the German Reparations Act in a manner contrary to international law. It does not, however, contend that these persons have acquired an individual entitlement to claim against the Federal Republic, but maintains that it has itself been injured by the Act in question through the violation of its own right, based on general international law, to non-discrimination against its nationals. In referring to the "two-pronged" or "two-tiered" nature of diplomatic protection (Submission of 1 June 1971, pp. 7 and 8; Submission of 26 August 1971, pp. 6 and 7; oral proceedings of 6 October 1971, transcript of recording, p. 8), the Republic of Austria clearly has precisely this situation in mind. Claims by the Republic of Austria against the Federal Republic of Germany stemming from its own right to non-discrimination against Austrian nationals could, however, have arisen only between the two Contracting States.

3. The Arbitral Tribunal could not, however, on the other hand overlook the fact that the claim asserted by the Applicant also has an individual rights component. This involves, according to the Austrian pleadings:

(*a*) The "support of individual claims of Austrian nationals and removal of the injustice which has arisen as a result of the discriminatory provision of a foreign law";

(*b*) The "assertion of the right to equal treatment by the State which violated that right by enacting the discriminatory Act" (Austrian Submission of 26 August 1971, p. 6). What is involved is thus "not the assertion of separate rights, but rather two aspects of the same claim" (*ibid.*).

In the course of the dispute, the justification of the Austrian Application by reference to the right to represent individual claims of Austrian nationals who would have met the requirements of the Reparations Act if they had not been excluded by article 60, paragraph 1.2*a*, became secondary to the justification based on the Austrian State's own right to non-discrimination against Austrian nationals. How-

ever, it was never totally abandoned. In the oral proceedings of 4 October 1971, the Austrian Plenipotentiary stated that the right of protection was a two-track one, with one track taking the injured individual, and the other the injured State, as its starting point (transcript of recording, p. 80).

The Applicant, in response to the Respondent's objection in its Submission of 12 July 1971 that it was asserting only its own claim to equality of treatment and not, as specified in the Memorial, a right exceptionally accorded to it by the last phrase of the second sentence of article 24, paragraph 2, to support individual claims, expressly maintained the individual rights aspect of the claim asserted by it (Austrian Submission of 26 August 1971, *ibid.*; cf. also the arguments put forward by the Austrian Agent in the oral proceedings of 6 October 1971, transcript of recording, p. 6).

Accordingly, the Arbitral Tribunal also had to ascertain whether the Applicant's claim under this aspect is covered by article 24, paragraph 2. Should this be the case, it would further be necessary to investigate whether its assertion by the Applicant is excluded under the first phrase of the second sentence of article 24, paragraph 2, or admissible under the exception provided for in the last phrase.

Application of paragraph 2 requires, pursuant to its first sentence, that a claim should not have "arisen between the two Contracting States". There can be no doubt that this is to be interpreted as meaning claims brought directly by individuals against the Respondent. In order to be able to assert protection under the exception provided for in the last phrase of the second sentence of article 24, paragraph 2, the Applicant would have to demonstrate conclusively the existence of such individual claims by Austrian nationals.

However, it has not done so. The Applicant objects to the exclusion of the Austrian nationals affected by RepG article 60, paragraph 1.2*a*, who meet the general criteria of the Reparations Act, from the benefits provided for under that Act. It bases its position *inter alia* on the fact that the affected Austrian nationals did not themselves have an entitlement under German law because the Reparations Act had excluded them therefrom (oral proceedings of 6 October 1971, transcript of recording, p. 2).

The Applicant has thus not demonstrated that claims within the meaning of article 24, paragraph 2, first sentence, have "arisen" in respect of which it might wish to exercise diplomatic protection. The individual rights aspect of the Application hence does not lead to an examination of the second sentence of paragraph 2 and the exception provided for therein.

4. From the foregoing considerations it emerges that the claim asserted by the Applicant could only have arisen between the two Parties. It is therefore not among the claims which, pursuant to the first sentence of article 24, paragraph 2, remain unaffected by the pro-

visions of paragraph 1. The question whether paragraph 1 would be applicable to this claim *in concreto* is outside the jurisdiction of the Arbitral Tribunal as defined above.

V. *Final provisions*

1. The Arbitral Tribunal will decide as necessary, in accordance with rule 19 of its rules of procedure, on disputes concerning the interpretation of the Arbitral Award submitted within one year from when it was delivered. The time-limit shall begin for each of the two Parties on the day on which the Arbitral Award reaches the Party, and shall end with the expiry of the corresponding day in 1973.

2. Costs shall be apportioned in accordance with TFC article 25, paragraph 7.

DONE at Vienna on 15 January 1972.

A. VERDROSS H. MOSLER F. SCHWIND J. H. KAISER

RULES OF PROCEDURE OF THE ARBITRAL TRIBUNAL

On the interpretation of article 24, paragraph 2, of the Treaty between the Republic of Austria and the Federal Republic of Germany concerning settlement in respect of damages sustained by refugees, evacuees and victims of persecution (Treaty of Finance and Compensation) of 27 November 1961

Rule 1: The Arbitral Tribunal shall be known as the "Austro-German Arbitral Tribunal on the Interpretation of Article 24, Paragraph 2, of the Treaty of Finance and Co-operation of 27 November 1961".

Rule 2: (1) The Registry of the Arbitral Tribunal shall be the Registry of the Arbitral Tribunal of the Austro-German Property Treaty of 15 June 1957 (öBGBl No. 119/1958; No. 73/1960), Vienna I, Minoritenplatz 3.

(2) The Registry shall issue invitations, transmit documentation and perform other duties assigned to it by the presiding member.

Rule 3: The costs of proceedings shall, where such costs are not expressly covered under article 25, paragraph 7 of the Treaty of Finance and Co-operation, be defrayed from a fund to which the parties shall each contribute one half. The fund shall be administered by the secretariat; its utilization shall be at the discretion of the current presiding member of the Arbitral Tribunal.

Rule 4: (1) In principle, meetings shall be convened and conducted alternately by the senior Austrian and the senior German member of the Arbitral Tribunal. The Arbitral Tribunal may make other arrangements in this respect.

(2) When the Arbitral Tribunal is not sitting, the member who is to act as presiding member for the next session shall discharge the

functions assigned to the presiding member by these rules of procedure, and shall take the necessary measures for the further conduct of the proceedings.

(3) The Arbitral Tribunal shall engage verbatim reporters as necessary.

Rule 5: (1) The Arbitral Tribunal shall take its decisions by majority vote.

(2) Within at the latest four months from the conclusion of the first deliberations to take place following the completion of the proceedings, the Arbitral Tribunal shall determine by decision whether or not a majority exists. It shall communicate this decision to the participating Governments.

Rule 6: The exchange of submissions and the time-limits within which they are to be filed shall be determined in agreement with the participating Governments. Submissions shall be filed with the Registry in 12 copies.

Rule 7: (1) Following the conclusion of the written proceedings, the Arbitral Tribunal may decide that oral proceedings are to take place. These shall be scheduled at the request of one of the Parties.

(2) The date of the oral proceedings shall be determined in agreement with the two Parties.

Rule 8: The proceedings shall be public if both Parties so request.

Rule 9: The Parties shall appoint Agents: they may appoint legal counsel.

Rule 10: The Arbitral Tribunal shall decide as necessary on its jurisdiction.

Rule 11: Preliminary objections must be put forward in the first Submission. They shall be decided upon independently in separate proceedings to which all procedural provisions of the Treaty and of these rules of procedure shall apply.

Rule 12: The Arbitral Tribunal may hear all evidence it deems necessary.

Rule 13: The presiding member shall conduct the proceedings. Any arbitrator is empowered to put questions.

Rule 14: (1) Minutes shall be kept of the oral proceedings before the Arbitral Tribunal.

(2) The minutes shall contain: 1. the place and date of the proceedings; 2. an indication of whether the proceedings took place in open or closed session; 3. the names of the arbitrators and the Registrar; 4. the names of the Agents and their legal counsel; 5. the petitions of the Parties; 6. an indication of essential elements in the progress of the proceedings.

(3) The minutes shall be signed by the presiding member and the Registrar.

Rule 15: A verbatim transcript of the oral proceedings shall be prepared on the basis of a tape recording.

Rule 16: The deliberations of the Arbitral Tribunal shall be confidential. The outcome of the vote shall be recorded in special minutes of the deliberations.

Rule 17: The Arbitral Award shall contain: 1. the names of the arbitrators; 2. the names of the Agents and their counsel; 3. the ruling; 4. the grounds for the ruling.

Rule 18: The Arbitral Award shall be signed by all members of the Arbitral Tribunal and transmitted to the two Parties.

Rule 19: Disputes concerning the interpretation of the Arbitral Award submitted within one year from the date on which it is issued shall be decided upon by the Arbitral Tribunal.

Rule 20: Withdrawal of the Application or an accommodation between the Parties shall terminate the proceedings.

Rule 21: Following the conclusion of the proceedings, the documentation shall be deposited with the Registry.

Rule 22: The Arbitral Tribunal may supplement and amend these rules of procedure.