S.S. "WIMBLEDON"

Judgment of 17 August 1923
(Series A, No. 1)

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(*Admissibility of the suit.—Regime of the Kiel Canal; inland waterways and maritime canals; time of peace and of war; belligerents and neutrals.—Restrictive interpretation.—Neutrality and sovereignty.—The right of intervention under Article 63 of the Court Statute is dependent only on a point of fact.*)

History of the case.

An English steamship, the "Wimbledon", time-chartered by the French Company *Les Affréteurs réunis*, had been loaded at Salonica, in March 1921, with a cargo of munitions and artillery stores consigned to the Polish Naval Base at Danzig. When the vessel arrived in the course of its voyage at the entrance to the Kiel Canal, it was refused permission to pass through by the Director of Canal Traffic, who based his action on the German neutrality orders issued in connection with the Russo-Polish war and on instructions received by him.

The French Ambassador at Berlin requested the German Government to withdraw this prohibition and to allow the S.S. "Wimbledon" to pass through the Canal, in conformity with Article 380 of the Treaty of Versailles. In reply, he was informed that the German Government was unable to allow a vessel loaded with munitions and artillery stores consigned to the Polish Military Mission at Danzig, to pass through the Canal, because the German neutrality orders of July 25th and 30th, 1920, prohibited the transit of cargoes of this kind destined for Poland or Russia, and Article 380 of the Treaty of Versailles was not an obstacle to the application of these orders to the Kiel Canal.

Without waiting any longer, the *Société des Affréteurs réunis* telegraphed to the captain of the "Wimbledon" ordering him to continue his voyage by the Danish Straits. The vessel weighed anchor on April 1st and, proceeding by Skagen, reached Danzig, its port of destination, on April 6th; it had thus been detained for eleven days, to which must be added two days for deviation.

Application instituting proceedings.

In the meantime, the incident had given rise to negotiations between the Conference of Ambassadors and the Berlin Government; but these negotiations, in the course of which the contrast between the opposing standpoints had become apparent and the Allied Powers' protest had been met by a statement of Germany's alleged rights and obligations as a neutral in the war between Russia and Poland, led to no result; whereupon the British, French, Italian and Japanese Governments—thereby adopting a course suggested by the German Government itself—decided to bring the matter which had given rise to the negotiations before the jurisdiction instituted by the League of Nations to deal, amongst other matters, with any violation of Articles 380 to 386 of the Treaty of Versailles or any dispute as to their interpretation, *viz.* the Permanent Court of International Justice.

By the application of these Powers, dated January 16th, 1923, it was submitted that the German authorities were wrong in refusing to the S.S. "Wimbledon" free access to the Kiel Canal, and that the German Government was under an obligation to make good the prejudice sustained as a result of this action by the said vessel, *viz.*: 174,084 francs 86 centimes, with interest at 6 per cent. per annum from

March 20th, 1921; in the event of payment not being effected within the period fixed, interim interest was claimed.

Application for permission to intervene.

The application was communicated to the German Government, to the Members of the League of Nations and to signatories of the Treaty of Versailles, the interpretation of which was involved.[1] The four applicant Governments filed, within the times fixed by the Court, a case and a reply, which were respectively answered by a counter-case and rejoinder filed by the respondent. Furthermore, the Polish Government, basing its claim in the last resort on Article 63 of the Statute, which provides that whenever the construction of a convention to which States other than those concerned in the case are Parties is in question, such States have the right to intervene in the proceedings, filed in May an application for permission to intervene.

The "Wimbledon" case was placed on the list for the third (ordinary) Session of the Court, which opened on June 15th and terminated on September 15th, 1923. The following judges were present:

MM. Loder, *President,*
Weiss, *Vice-President,*
Lord Finlay,
MM. Nyholm,
Moore,
de Bustamante,
Altamira,
Oda,
Anzilotti,
Huber,
Wang.

With the members of the Court sat Professor Schücking, whom Germany, being a Party to the suit and making use of her right to choose a judge of her nationality,[2] had appointed for this purpose.

Interlocutory judgment on the application for permission to intervene.

The Court first of all had to consider Poland's application to intervene. On June 28th, 1923, after hearing the observations and conclusions of the applicants, respondent and intervener, and having affirmed that the interpretation of certain clauses of the Treaty of Versailles was in fact involved in the suit and that Poland was one of the States which were Parties to that Treaty, the Court allowed the application. Passing next to the suit itself, it heard the statements of the Agents of the Governments concerned and, on August 17th, 1923, delivered judgment.

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The Court's judgment (analysis).

In the judgment, the Court states, in the first place, that it can take cognizance of the suit in spite of the fact that the applicants cannot all adduce a prejudice to some pecuniary interest; for they have a clear interest in the execution of the provisions of the Treaty of Versailles relating to the Kiel Canal.

[1] Article 63 of the Statute.
[2] Article 31 of the Statute.

Turning next to the merits of the case, the Court, after analysing these provisions, arrives at the conclusion that the terms of Article 380 give rise to no doubt. It follows that the Canal has ceased to be an internal navigable waterway the use of which by the vessels of States other than the riparian State is left entirely to the discretion of that State. This rule also holds good in the event of Germany's neutrality. For the reservation made in Article 380 to the effect that a vessel must, in order to benefit by the rights of access, fly the flag of a nation at peace with Germany, shows that the authors of the Treaty contemplated the contingency of Germany being in the position of a belligerent. If the conditions of access to the Canal were also to be modified in the event of a conflict between two Powers remaining at peace with Germany, the Treaty would not have failed to say so. But it has not said so and this omission was no doubt intentional. It follows therefore that the general rule establishing free passage is also applicable in the case of Germany's neutrality. Again, the fact that a special section of the Treaty is devoted to the Kiel Canal, and that in this section certain clauses which concern the inland navigable waterways of Germany are repeated, shows that the provisions relating to this Canal are self-contained, and that principles drawn from other articles of the Treaty, relating for instance to the conditions governing inland waterways in the case of the neutrality of the riparian State, are not intended to be applied to it.

There is no doubt that the clause under consideration places an important limitation on the exercise by Germany of sovereign rights over the Canal, in particular as regards the rights of a neutral power in time of war. The Court acknowledges that this fact constitutes a sufficient reason for the restrictive interpretation of the clause, in case of doubt. But this restrictive interpretation cannot be carried so far as to contradict the plain terms of the article.

Furthermore, the abandonment of the rights in question cannot be regarded as inadmissible for reasons connected with Germany's sovereignty; for the Court declines to see in the conclusion of any treaty by which a State undertakes to perform or refrain from performing a particular act, an abandonment of its sovereignty; on the contrary, the right of entering into international engagements is an attribute of State sovereignty. Again, the Court sees in the analogy which it establishes between the new regime of the Kiel Canal and those applicable to artificial waterways joining two open seas which are assimilated to natural straits, proof that even the passage of war vessels of belligerents does not compromise the neutrality of the sovereign State under whose jurisdiction the Kiel Canal lies. Moreover, the President of the German Delegation expressly admitted this, when he stated in a note to the President of the Conference of Ambassadors that the German Government claimed to apply its neutrality orders only to vessels of commerce and not to war vessels; it follows *a fortiori* that the passage of neutral vessels carrying contraband of war cannot constitute a failure on the part of Germany to fulfil her duties as a neutral.

The Court holds that Germany was perfectly free to regulate her neutrality in the Russo-Polish war, but subject to the condition that she respected and maintained intact her contractual obligations, *viz*., in this case, those entered into by her at Versailles on June 28th, 1919. These obligations involved the definite duty of allowing the passage of the "Wimbledon" through the Kiel Canal, and her duties as a neutral did not oblige her to prohibit it.

As regards the obligation to pay compensation resulting from the conclusion thus reached, the Court gives judgment in favour of the applicants, except as regards certain points. In the first place, the claim for the share of the vessel in the general expenses of the Company which had chartered it, is disallowed. Secondly, the Court considers that interest should run, not from the time of the arrival of the "Wimbledon" at the entrance of the Kiel Canal, but from the date of the judgment establishing Germany's obligation to pay. Lastly, the Court does not award interim interest at a higher rate in the event of the judgment remaining uncomplied with: it neither can nor should contemplate such a contingency.

Dissenting opinions.

Two of the judges, MM. Anzilotti and Huber, were unable to concur in the judgment of the Court and delivered a dissenting opinion. Professor Schücking, the national judge, was in the same position and also delivered a separate opinion.

Dissenting Opinion by MM. Anzilotti and Huber[(*)]

MM. Anzilotti and Huber explain that the essential difference between their standpoint and that of the majority concerns a point which affects the interpretation of international conventions in general. According to them, the question to be decided is: Do the clauses of the Treaty of Versailles relating to the Kiel Canal also apply in the event of Germany's neutrality, or do they only contemplate normal circumstances, that is to say, a state of peace, without affecting the rights and duties of neutrality?

MM. Anzilotti and Huber observe that, for the purposes of the interpretation of international conventions, account must be taken of the complexity of interstate relations and of the fact that the contracting parties are independent political entities. Though it is true that when the wording of a treaty is clear its literal meaning must be accepted as it stands, without limitation or extension, it must not be presumed that the intention was to express an idea which leads to contradictory or impossible consequences or which, in the circumstances, must be regarded as going beyond the intention of the parties.

MM. Anzilotti and Huber recall that international conventions and more particularly those relating to commerce and communications are generally concluded having regard to normal peace conditions. If, as the result of a war, a neutral or belligerent State is faced with the necessity of taking extraordinary measures temporarily affecting the application of such conventions in order to protect its neutrality or for the purposes of national defense, it is entitled to do so even if no express reservations are made in the convention.

The authors of the joint dissenting opinion recognize that a State may enter into engagements affecting its freedom of action as regards wars between third States. But engagements of this kind, having regard to the gravity of the consequences which may ensue, can never be assumed. The right of a State to adopt the course which it considers best suited to the exigencies of its security and to the maintenance of its integrity, is so essential a right that, in case of doubt, treaty stipulations cannot be interpreted as limiting it, even though these stipulations do not conflict with such an interpretation. While this consideration would not be effective against a definite provision expressly referring to the circumstances arising out of a war, no such provision is to be found in the Treaty of Versailles.

MM. Anzilotti and Huber assert that the words "nations at peace with Germany" do not necessarily mean that States which are not at war with her are entitled to avail themselves in all possible circumstances of the provisions of Article 380 and the following Articles; they rather mean that a state of peace is the condition upon which the application of these provisions is dependent. Having considered Article 380 in connection with the other provisions of the same section, MM. Anzilotti and Huber reach the conclusion that the obligations undertaken by Germany to maintain the Kiel Canal free and open to vessels of nations at peace with her does not exclude her right to take the measures necessary to protect her interests as a belligerent or neutral power. This does not mean that the Canal is not also free in time of war, but this freedom will then necessarily be limited either by the exigencies of national defence, if Germany is a belligerent, or, if she is neutral, by the measures which she may take. The legal status of the Kiel Canal, therefore, resembles that of the internal navigable waterways of international concern.

According to the authors of the joint dissenting opinion, the only question to be decided is whether the application to the Kiel Canal of the neutrality regulations adopted by Germany was an

[(*)] Summary prepared by the Codification Division of the United Nations Office of Legal Affairs.

arbitrary act calculated unnecessarily to impede traffic. They conclude that such a contention appears impossible, having regard to the gravity of the international and internal political situation at that time.

Finally, MM. Anzilotti and Huber state that if the view be adopted that the passage through the Kiel Canal of any ship could not infringe the neutrality of Germany, they feel called upon to make a reservation with regard to the recognition of a right to international protection for the transport of contraband. It is not disputed that present international law allows neutrals the option of suppressing or tolerating in their territory commerce in and transport of contraband, and more especially of arms and munitions. For this reason it seems difficult to admit a right, as between neutral States, enforceable at law to trade in and to transport contraband, whereas the same interests are unprotected as against a belligerent.

Dissenting Opinion by M. Schücking[*]

M. Schücking states that the right to free passage through the Kiel Canal undoubtedly assumes the form of a *servitus juris publici voluntuaria* or servitude. He points out that treaties concerning servitudes must be interpreted restrictively in the sense that the servitude, being an exceptional right resting upon the territory of a foreign State, should limit as little as possible the sovereignty of that State, and expresses serious doubts as to whether Germany, in order to safeguard her interests, when placed in the position of a belligerent or neutral, should in fact, under Article 380, lose the right to take special measures as regards the canal, not provided for under Article 381, paragraph 2, also as against ships belonging to States other than her enemies. The Canal is under the jurisdiction of Germany and it has not been neutralised; its use has rather been internationalised, like that of the great inland waterways, and the right to take special measures in times of war or neutrality has not been expressly renounced.

M. Schücking observes that the States benefiting by the servitude are under the obligation *civiliter uti* as regards the State under servitude. The vital interests of the State under servitude must in all circumstances be respected. At the moment the vital interests of Germany made it necessary for her to observe a strict and absolute neutrality. In acting as it did, Germany did not allow a special right of necessity to prevail over her contractual obligations; she merely made use of the natural limitations to which every servitude is subjected.

M. Schücking also observes that one of the two belligerent States - Russia - did not participate in the Versailles Treaty and that Germany therefore remained under an obligation to fulfil her duties as a neutral towards her.

On the basis of Articles 2 and 7 of the fifth Hague Convention of 1907 concerning the rights and duties of Neutral Powers and persons in land warfare, M. Schücking concludes that the passage of the "Wimbledon" was not compatible with Germany's duties as a neutral towards Russia. He further notes that it cannot be the intention of the victorious States to bind Germany, by means of the Versailles Treaty, to commit offences against third States and that a legally binding contractual obligation cannot be undertaken to perform acts which would violate the rights of third parties.

[*] Summary prepared by the Codification Division of the United Nations Office of Legal Affairs.

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Effects of the judgment.

Following upon the judgment given by the Court on August 17th, 1923, in the case of the "Wimbledon", the German Government asked the Guarantee Committee of the Reparation Commission, through the *Kriegslastenkommission* (note dated October 5th, 1923), for its consent to the payment of the damages fixed by the Court.

On November 10th, 1923, a reply in the negative was received, which the German Minister at The Hague communicated to the Registrar of the Court on December 6th, 1923.