Document:-
A/CN.4/151

Digest of the decisions of International Tribunals relating to State Succession - study prepared by the Secretariat

Topic:
Succession of States and Governments

Extract from the Yearbook of the International Law Commission:-
1962 , **vol. II**

Short title	*Full title and citation*
1953 Opium Protocol	Protocol for Limiting and Regulating the Cultivation of the Poppy Plant, the Production of, international and Wholesale Trade in, and Use of Opium, opened for signature at New York on 23 June 1953. Doc. E/NT/8 (Sales No.: 53.XI.6).
1953 Protocol on Slavery	Protocol, opened for signature and acceptance at the Headquarters of the United Nations on 7 December 1953, amending the Slavery Convention signed at Geneva on 25 September 1926. U.N.T.S., vol. 182, p. 51.
1954 Additional Protocol on Tourist Publicity Documents	Additional Protocol to the Convention concerning Customs Facilities for Touring, relating to the Importation of Tourist Publicity Documents and Material, done at New York on 4 June 1954. U.N.T.S., vol. 276, p. 191.
1954 Convention on Customs Facilities for Touring	Convention concerning Customs Facilities for Touring, done at New York on 4 June 1954. U.N.T.S., vol. 276, p. 191.
1954 Customs Convention on Private Road Vehicles	Customs Convention on the Temporary Importation of Private Road Vehicles, done at New York on 4 June 1954. U.N.T.S., vol. 282, p. 249.
1956 Customs Convention on Aircraft and Pleasure Boats	Customs Convention on the Temporary Importation for Private Use of Aircraft and Pleasure Boats, done at Geneva on 18 May 1956. U.N.T.S., vol. 319, p. 21.
1956 Customs Convention on Commercial Road Vehicles	Customs Convention on the Temporary Importation of Commercial Road Vehicles, done at Geneva on 18 May 1956. U.N.T.S., vol. 327, p. 123.
1956 Customs Convention on Containers	Customs Convention on Containers, done at Geneva on 18 May 1956. U.N.T.S., vol. 338, p. 103.
1956 Supplementary Convention on Slavery	Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, done at Geneva on 7 September 1956. U.N.T.S., vol. 266, p. 3.
1957 Convention on Nationality of Married Women	Convention on the Nationality of Married Women, done at New York on 20 February 1957. U.N.T.S., vol. 309, p. 65.
1958 Convention on Fishing	Convention on Fishing and Conservation of the Living Resources of the High Seas, done at Geneva on 29 April 1958. A/CONF.13/38.
1958 Convention on Foreign Arbitral Awards	Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958. U.N.T.S., vol. 330, p. 3.
1958 Convention on the High Seas	Convention on the High Seas, done at Geneva on 29 April 1958. A/CONF.13/38.
1958 Convention on the Territorial Sea and Contiguous Zone	Convention on the Territorial Sea and the Contiguous Zone, done at Geneva on 29 April 1958. A/CONF. 13/38.

DOCUMENT A/CN.4/151

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[Original text: English]
[3 December 1962]

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Introduction

1. At its 668th meeting on 26 June 1962 the International Law Commission took note of the undertaking of the Secretariat to prepare a digest of the decisions of international tribunals in the matter of State succession (A/5209, para. 72). In pursuance of that undertaking, the following Digest has been prepared to cover the pertinent decisions of the International Court of Justice, the Permanent Court of International Justice, the Permanent Court of Arbitration and of other international tribunals whose awards are contained in the *Reports of International Arbitral Awards*, vols. I-X.[1] In view of the fact that many of the cases were only concerned incidentally with questions of State succession or were largely determined in the light of particular treaty provisions, attention has been concentrated on those parts of the decisions which have most relevance as indications of the general principles involved.

2. The decisions have been arranged under topic headings, with cross-references to decisions under other headings where appropriate. The heading of each case lists the title, date, parties, arbitrator or tribunal, and source reference.

I. General

(A) MODE OF TRANSFER OF SOVEREIGNTY

COLOMBIA-VENEZUELA BOUNDARY CASE (1922)

Colombia v. *Venezuela*

Arbitrator (Swiss Federal Council) appointed under a Special Agreement of 3 November 1916

Reports of International Arbitral Awards, vol. I, p. 229

3. A dispute arose between Colombia and Venezuela regarding the execution of an arbitral award given in 1891, under which certain boundary territories occupied by Venezuela were awarded to Colombia. After Colombia had attempted to execute the award in part, the two States agreed to request the Swiss Federal Council to decide whether or not any further formalities were required before the award could be put into effect.

4. In the course of its award the Swiss Federal Council stated that there was no binding rule of international law requiring the formal transfer of territory, although numerous examples existed where such a transfer had been required under treaty. Such examples, however, related to real cessions of territory, transferred by one State which renounced sovereignty to another which acquired it. Even if there was a rule requiring the formal transfer of territory—which was not the case—this could not operate as regards the boundary between Colombia and Venezuela since both States were deemed to have had sovereignty over their respective territories since 1810 under the principle *uti possidetis juris*. This principle, which was agreed to by both Colombia and Venezuela and formed part of their respective constitutions, provided that their boundaries should follow those laid down by the Spanish authorities in respect of the different territorial units existing prior to the establishment of the independent Latin American republics. In these circumstances, stated the Tribunal, *"il n'y a ni cédant, ni cessionnaire"*. The Tribunal added:

> *"L'Etat qui occupait un territoire dont la souveraineté a été reconnue à l'autre Etat n'a aucun titre pour opérer la remise d'un territoire qu'il détient sans droit; sa possession a cessé d'être légitime le jour de l'entrée en vigueur de la sentence. L'Etat dont l'occupation est contraire à la sentence n'a d'autre devoir que d'évacuer le territoire dont il s'agit, et l'autre Etat*

[1] *Reports of International Arbitral Awards* (R.I.A.A.), published by the United Nations under the following sales numbers: vol. I, Sales No.: 48.V.2; vol. II, Sales No.: 49.V.1; vol. III, Sales No.: 49.V.2; vol. IV, Sales No.: 51.V.1; vol. V, Sales No.: 52.V.3; vol. VI, Sales No.: 55.V.3; vol. VII, Sales No. 56.V.5; vol. VIII, Sales No.: 58.V.2; vol. IX, Sales No.: 59.V.5; vol. X, Sales No.: 60.V.4.

peut occuper, en usant de la courtoisie requise pour éviter des conflits et prévenir les habitants."[2]

CASE CONCERNING GERMAN REPARATIONS UNDER ARTICLE 260 OF THE TREATY OF VERSAILLES (1924)

Germany v. *Reparations Commission*

Arbitrator (Beichmann) appointed under Protocol of 30 December 1922

Reports of International Arbitral Awards, vol. I, p. 429

5. During this arbitration regarding the interpretation of article 260 of the Treaty of Versailles, which provided for the payment of reparations by Germany, Germany contended that the article could not apply in respect of territory forming part of Czechoslovakia and the Serb-Croat-Slovene State, which had previously belonged to Austro-Hungary, since this territory had not been "ceded" within the meaning of article 260, the Treaties of St. Germain and Trianon referring only to a "revocation" of rights over the territory concerned by Austria and Hungary in favour of Czechoslovakia and the Serb-Croat-Slovene State. The Arbitrator conceded that Czechoslovakia and the Serb-Croat-Slovene State were already in existence and had been exercising authority over the territory in question at the date of the signature of the Peace Treaties, to which they were parties. However, he held that such circumstances did not preclude a cession of territory formerly part of the Austro-Hungarian Monarchy on the part of Austria and Hungary.

" "Cession" d'un territoire veut bien dire renonciation faite par un Etat en faveur d'un autre Etat aux droits et titres que pourrait avoir au territoire en question le premier de ces Etats. Que l'Etat en faveur duquel la renonciation est faite est déjà en possession des territoires en question sans contestation de la part de l'Etat renonçant et que cette possession est le résultat d'un mouvement spontané de la population n'empêche pas que la renonciation ne constitue une "cession"."[3]

6. See also the *Hawaiian Claims*, para. 91 *infra*, in which the Arbitral Tribunal rejected the contention of the British Government that in the case of cession, as opposed to conquest, the successor State was liable for the delicts of the preceding State. See too, *Lighthouses Concession Case, Claim No. 12 A*, paras. 93-94 *infra*.

ILOILO CLAIMS (1925)

Great Britain v. *United States*

Great Britain-United States Arbitral Tribunal established under a Special Agreement of 18 August 1910

Reports of International Arbitral Awards, vol. VI, p. 158

7. In August 1898, after the Spanish-American War, a "Protocol of Agreement" was drawn up between Spain and the United States under which the United States occupied Manila, pending the conclusion of a treaty between the two Governments. Spain ceded the Philippines to the United States by a Treaty signed on 10 December 1898, in which it was provided that Spain should evacuate the islands after the exchange of ratifications. However, before the exchange of ratifications in April 1899, the local Spanish commander at Iloilo announced his intention to withdraw and actually evacuated the town on 24 December 1898, when it was occupied by Filipino insurgents. Although United States forces arrived in the harbour of Iloilo on 28 December in response to requests from local businessmen, including some of the British claimants, they did not occupy the town until 10 February 1899. The insurgents burned down the town on 11 February. The claims presented were on behalf of British subjects whose property had been destroyed. In the course of its decision rejecting the contention of Great Britain that there had been culpable delay on the part of the United States authorities, the Tribunal stated that:

"... there was no duty upon the United States under the terms of the Protocol, or of the then unratified treaty, or otherwise, to assume control at Iloilo. *De jure* there was no sovereignty over the islands until the treaty was ratified. Nor was there any *de facto* control over Iloilo assumed until the taking up of hostilities against the United States on the part of the so-called Filipino Republic required it on February 11, 1899."[4]

LIGHTHOUSES CASE BETWEEN FRANCE AND GREECE (1934)

France v. *Greece*

Permanent Court of International Justice, Series A/B No. 62

8. In this case an express treaty provision, determining the conditions under which the successor State was subrogated to the position of the preceding State as regards concessions, was held to be unaffected in its operation by the fact that, at the date when the concession had been renewed, the territory concerned was already under the *de facto* occupation of the successor State. In April 1913, when the contract renewing a lighthouse concession was concluded between the Ottoman authorities and the French concession holder, some of the territories affected were no longer under Turkish control, having been occupied by troops of the Balkan allies in the course of the Balkan war. Moreover, the legislative decree issued by the Sultan authorizing the renewal was not ratified by the Turkish Parliament until the winter of 1914-1915, when some of the territories concerned had already been ceded to Greece.

9. The Court did not find it necessary to express its opinion on the effect, according to the general rules of international law, of the grant of concessions by the territorial sovereign in occupied territory as regards the successor State, since the matter was covered by the terms of article 9 of Protocol XII of the Treaty of Lausanne, 1923. This provided expressly that successor States of the Ottoman Empire were to be subrogated as regards concession contracts entered into with the Ottoman authorities prior to 29 October 1914, in so far as concerned territories detached from Turkey under the Treaty of Lausanne, and prior to the coming into force of the respective treaties of peace in so far as concerned territories detached from Turkey after the Balkan wars. Since no such territories had been assigned to Greece before the entry into force of the Treaty of London in November 1913, the Court held that Greece was bound to respect the concession, which had been duly entered into in April 1913 according to Ottoman law.

[2] R.I.A.A., vol. I at p. 279.

[3] R.I.A.A., vol. I, at p. 443.

[4] R.I.A.A., vol. VI, at pp. 159-160.

LIGHTHOUSES IN CRETE AND SAMOS (1937)

France v. *Greece*

Permanent Court of International Justice, Series A/B No. 71

10. The Permanent Court of International Justice was asked by France and Greece to decide whether the principle laid down in the Court's earlier Judgment in the *Lighthouses Case*[5] applied as regards lighthouses situated in Crete and Samos. In its earlier Judgment the Court held that the contract entered into in 1913 between the French concession holders and the Ottoman Government "was duly entered into and is accordingly operative as regards the Greek Government in so far as concerns lighthouses situated in the territories assigned to it after the Balkan wars or subsequently."[6] The Greek Government argued that the wide measure of autonomy enjoyed by Crete and Samos had caused Turkey to lose sovereignty over these islands even before 1913. The concessionary contract entered into by the Ottoman authorities in 1913 was not therefore validly concluded in respect of them, nor could they have been detached from Turkey by a transfer of sovereignty to Greece at a subsequent date.

11. The Court held, however, that Crete and Samos could only be regarded as detached if there had been an "entire disappearance of any political link",[7] and that, notwithstanding their practical autonomy, both had remained part of the Ottoman Empire, under the sovereignty of the Sultan, until the treaties of cession had been concluded at a date subsequent to that of the renewal of the concessionary contract. The contract was therefore "duly entered into and ... operative as regards the Greek Government" in so far as it concerned lighthouses situated on Crete and Samos, which territories had been assigned to that Government after the Balkan wars.

See also *Lighthouses Concession Case, Claims Nos. 11 and 4*, paras. 96-100 *infra*.

(B) DATE OF TRANSFER OF SOVEREIGNTY

OTTOMAN PUBLIC DEBT ARBITRATION (1925)

Bulgaria, Iraq, Palestine, Transjordan, Greece, Italy and Turkey

Arbitrator (Borel) appointed under articles 46 and 47 of the Treaty of Lausanne, 1923, by the Council of the League of Nations

Reports of International Arbitral Awards, vol. I, p. 529

12. Amongst the points raised in the course of the arbitration was whether the date of transfer of territorial sovereignty was the actual date of effective transfer or that laid down in the particular treaty of cession. Bulgaria argued that she should not be held responsible for the territories detached from her under the Treaty of Neuilly up to 9 August 1920, the date when the Treaty came into force, but only until October or December 1919, when the territories concerned had been occupied by the Allied Powers in a manner which had amounted to a virtual execution of an anticipated transfer of sovereignty. The Arbitrator held that, although Bulgaria had lost the revenues for the territories during the intervening period, nevertheless the date of *de facto* transfer could not prevail over the clear wording of the Treaty of Lausanne which referred to the date on which the Treaty of Neuilly came into force.

"Dès lors, le transfert de souveraineté ne peut être considéré comme effectué juridiquement que par l'entrée en vigueur du Traité qui le stipule et à dater du jour de cette mise en vigueur. Une dérogation à ce principe ne peut être admise que si elle est nettement convenue dans le Traité en cause."[8]

13. Greece argued that she had only acquired sovereignty over the territories ceded to her by the Allied Powers (to which in turn they had been ceded by Bulgaria under the Treaty of Neuilly in 1920) at the date when the transfer had been ratified in 1924. It was held by the Arbitrator, however, that, having regard to the common intent of the parties, responsibility for the share of the debt of the territories in question between 1920 and 1924 should be borne by Greece, to which the territories had actually passed.

LIGHTHOUSES CONCESSION CASE (1956)

France v. *Greece*

Arbitral Tribunal established under a Special Agreement of 15 July 1931

Award dated 24-27 July 1956

14. After two related decisions of the Permanent Court of International Justice,[9] arbitral proceedings were held in order to settle outstanding differences between the Greek Government and the French Company which held a lighthouse concession from the Ottoman Government operative in territory ceded to Greece. In the course of an introductory historical survey, the Tribunal dealt with the question of the date when certain territorial changes after the Balkan wars and after the First World War should be considered to have taken place. In the *Ottoman Debt Arbitration*[10] it had been held that the date of the transfer to Greece of responsibility for part of the Ottoman debt relating to Western Thrace should not be that of the Treaty of Lausanne in 1924, as Greece asserted, nor October or December, 1919, the date of *de facto* loss of sovereignty by Bulgaria, but August 1920, the date when the Treaty of Neuilly came into force. The Tribunal adopted the decision of the Arbitrator (Borel) in the earlier case, in accordance with the following reasoning:

"Le Tribunal s'est demandé quelles considérations — identiques différentes — doivent présider à la solution de la question parallèle de savoir à quelle date s'est opérée la subrogation des deux Etats successeurs successifs, la Bulgarie et la Grèce, dans les droits et charges découlant de la concession des phares en ce qui concerne la Thrace occidentale. La question n'est pas d'une grande importance pratique parce que le seul phare existant dans cette région paraît être celui de Dédéagatch, mais elle présente un intérêt théorique indéniable. Si la solution de M. Borel, dictée par des considérations propres au passage des dettes publiques, était applicable également à la transition des droits et charges découlant de concessions, la Bulgarie devrait être considérée comme Etat successeur pour la Thrace occidentale du 25 août 1913 (date de l'entrée en vigueur du traité de Bucarest, répartissant les anciens territoires turcs entre les Alliés balkani-

[5] P.C.I.J., Series A/B No. 62, see paras. 8-9 *supra*.
[6] *Ibid.*, at p. 29.
[7] P.C.I.J., Series A/B No. 71, at p. 103.
[8] R.I.A.A., vol. I, at p. 555.
[9] See P.C.I.J., Series A/B Nos. 62 and 71, paras. 8-9 and 10-11 *supra*.
[10] See *Ottoman Public Debt Arbitration*, paras. 12-13 *supra*.

ques) au 9 août (entrée en vigueur du traité de paix de Neuilly), et la Grèce depuis le 9 août 1920. Le Tribunal est d'accord avec M. Borel pour admettre qu'en tout cas le coimperium *des Grandes Puissances sur la Thrace occidentale, qui a duré, au moins* de jure, *du 9 août 1924, ne saurait pas, vu sa nature fiduciaire, être considéré comme ayant comporté leur propre succession aux droits et charges découlant de la concession turque. D'autre part, la date du 30 octobre 1918 mentionnée à la fin de l'article 9 du Protocole XII de Lausanne n'a aucune importance pour la région côtière de la Thrace occidentale, puisqu'elle avait déjà été détachée de la Turquie dès 1913. La date de l'occupation militaire de Dédéagatch par les forces grecques (27 mai 1920) ne saurait non plus être décisive en droit.*

"Le choix doit donc se porter sur l'une des deux dates suivantes: le 9 août ou le 6 août 1924. Etant donné que la Bulgarie n'a plus exercé nulle autorité étatique sur la Thrace occidentale (Dédéagatch) depuis l'entrée en vigueur du Traité de paix de Neuilly le 9 août 1920 et que la Grèce, au contraire, l'a même exercée déjà depuis l'occupation militaire anticipée de la région par ses forces vers la fin de mai 1920, le Tribunal ne voit pas de raison de s'écarter en ce qui concerne le point de départ de la subrogation de la Grèce dans la concession des phares, de la sentence-Borel relative à la date décisive pour le calcul de la répartition de la dette publique ottomane."[11]

15. See also *German Interests in Polish Upper Silesia*, paras. 45-52 *infra*, and *Settlers of German Origin in Territory Ceded by Germany to Poland*, paras. 43-44 *infra*, regarding the transfer of property by Germany following the signature of the Armistice but before the entry into force of the Treaty of Versailles whereby the territory concerned was ceded to Poland.

(C) Identity of States

Administrative decision no. I (1927)

United States, Austria, Hungary

Claims Commissioner (Parker) appointed under Special Agreement of 26 November 1924

Reports of International Arbitral Awards, vol. VI, p. 203

16. In 1921 the United States entered into two Treaties with Austria and Hungary in order to secure certain rights to compensate the United States and its nationals in respect of damage caused by the acts of Austro-Hungary and her allies during the First World War. In 1924 a Tripartite Agreement was signed, providing for the appointment of a Commissioner to settle claims falling under the terms of the two Treaties. In the course of Administrative Decision No. I, laying down certain general principles to govern the detailed awards, the Commissioner stated that:

"The Austria and the Hungary dealt with by the United States in entering into the Treaties of Vienna and of Budapest respectively not only bore little resemblance either to the Government or the territory of the Dual Monarchy with which the United States had been at war but differed essentially from the former Austrian Empire and the former Kingdom of Hungary."[12]

—moreover, he held that the latter two States had had no international status. The Commissioner concluded, however, that under the Treaties of Vienna and of Budapest, Austria and Hungary had agreed to pay compensation in respect of certain of the acts of the former Austro-Hungarian Monarchy.[13]

Case concerning German reparations under article 260 of the Treaty of Versailles (1924)

Germany v. *Reparations Commissions*

Arbitrator (Beichmann) appointed under Protocol of 30 December 1922

Reports of International Arbitral Awards, vol. I, p. 429

17. In the course of this arbitration[14] the Arbitrator found that, although the preamble of the Treaties of St. Germain and Trianon stated that the former Austro-Hungarian Monarchy had ceased to exist, nevertheless, the Treaties were based on the supposition that Austria and Hungary represented the former State, at least as regards the cession of territory.

18. See also the *Ottoman Public Debt Arbitration*,[15] in which the Arbitrator stated that: *"En droit international, la République turque doit être considérée comme continuant la personnalité de l'Empire Ottoman."*

(D) Succession to territorial claims

Case of Clipperton Island (1931)

Mexico v. *France*

Arbitrator (King of Italy) appointed under a Special Agreement of 2 March 1909

Reports of International Arbitral Awards, vol. II, p. 1105

19. In this dispute between France and Mexico regarding their rival claims to sovereignty over the Island of Clipperton, Mexico contended that the Island had been discovered by Spanish sailors in the 16th century and that, by the law then in force, it had been given to Spain from whom it had passed to Mexico, as Spain's successor, in 1836.

20. The Arbitrator held that, even assuming the discovery to have been made by Spain, it would be necessary for Mexico to show that Spain had effectively exercised the right of incorporating the Island in her possessions, but that Spain had not done so. Since Mexico had similarly failed to exercise any right of sovereignty before the arrival of French sailors on the Island, it was therefore a *territorium nullius* at the latter date and the French claim to sovereignty, based on effective occupation, was to be preferred. See also *Island of Palmas Case*, paras. 31-32 *infra*.

(E) Transfer of real rights or international servitudes

Case concerning right of passage over Indian territory (merits) (1960)

Portugal v. *India*

International Court of Justice, I.C.J. Reports, 1960, p. 6

21. Portugal claimed before the International Court that she had a right of passage through intervening Indian territory to the extent necessary for the exercise

[11] Award of 24-27 July 1956, at pp. 67-8.
[12] R.I.A.A., vol. VI, at p. 210.
[13] *Ibid.*, p. 211.
[14] For other aspects of the Award see para. 5 *supra*.
[15] See para. 109 *infra*.

of her sovereignty over two small enclaves and that India had refused to recognize the obligations imposed by this right.

22. In support of her claim Portugal relied in part on certain agreements concluded in the 18th century between Portugal and the local Maratha ruler. Although the Court found that the agreements concerned amounted only to a revenue grant, and not to a grant of sovereignty together with a right of passage, it appears to have assumed that any such rights granted would have been binding on successor States.[16] The Court found, however, that:

> "... the situation underwent a change with the advent of the British as sovereign of that part of the country in place of the Marathas. The British found the Portuguese in occupation of the villages and exercising full and exclusive administrative authority over them. They accepted the situation as they found it and left the Portuguese in occupation of and in exercise of exclusive authority over, the villages. The Portuguese held themselves out as sovereign over the villages. The British did not, as successors of the Marathas, themselves claim sovereignty, nor did they accord express recognition of Portuguese sovereignty, over them. The exclusive authority of the Portuguese over the villages was never brought in question. Thus Portuguese sovereignty over the villages was recognized by the British in fact and by implication and was subsequently recognized by India. As a consequence the villages comprised in the Maratha grant acquired the character of Portuguese enclaves within Indian territory."[17]

23. Concerning the right of passage, the Court reached the conclusion that:

> "... with regard to private persons, civil officials and goods in general there existed during the British and post-British periods a constant and uniform practice allowing free passage between Daman and the enclaves. This practice having continued over a period extending beyond a century and a quarter unaffected by the change of régime in respect of the intervening territory which occurred when India became independent, the Court is, in view of all the circumstances of the case, satisfied that that practice was accepted as law by the Parties and has given rise to a right and a correlative obligation."[18]

In the case of armed forces and armed police, the Court found that their passage had been dependent on the discretionary power of the territorial sovereign and that no right of passage as such existed in favour of Portugal.

> "The course of dealings established between the Portuguese and the British authorities with respect to the passage of these categories excludes the existence of any such right. The practice that was established shows that, with regard to these categories, it was well understood that passage could take place only by permission of the British authorities. This situation continued during the post-British period."[19]

24. The Court held that India had not acted contrary to its obligations regarding the passage of private persons, since such passage was subject at all times to India's power of regulation and control.

25. See also Case of the *Free Zones of Upper Savoy and the District of Gex*, paras. 34-35 *infra*, in which the Permanent Court of International Justice held that obligations in the nature of real rights had been created, which attached to the District of St. Gingolph and remained binding upon the successor State after sovereignty had passed from Sardinia to France.

II. State succession in relation to treaties

(A) Succession to treaty rights and obligations

Case concerning rights of nationals of United States of America in Morocco (1952)

France v. *United States*

International Court of Justice, I.C.J. Reports 1952, p. 176

26. The United States contended that certain enactments made during the French Protectorate over Morocco were inapplicable to United States nationals without its consent, by virtue of the consular jurisdiction granted under Treaties between Morocco and the United States dating from before the establishment of the Protectorate. Both parties assumed that such Treaties subsisted.

27. Regarding the Treaty of Fez under which the Protectorate was established, the International Court stated:

> "Under this Treaty, Morocco remained a sovereign State but it made an arrangement of a contractual character whereby France undertook to exercise certain sovereign powers in the name and in behalf of Morocco, and, in principle, all of the international relations of Morocco. France, in the exercise of this function, is bound not only by the provisions of the Treaty of Fez, but also by all treaty obligations to which Morocco had been subject before the Protectorate and which have not since been terminated or suspended by arrangement with the interested State."[20]

28. The Court also implied that Treaties concluded by France pursuant to the powers which Morocco had conferred on France by the Treaty of Fez would continue to bind Morocco after the Protectorate ended.

Tunis and Morocco nationality decrees (1923)

France, Great Britain

Permanent Court of International Justice, Series B, No. 4

29. In support of its contention that certain Decrees regulating nationality in Tunis and Morocco were not applicable to British subjects, Great Britain relied on certain Treaties concluded with Tunis and Morocco before the establishment of the French Protectorates there. Under these Treaties, of 1825 and 1856 respectively, British subjects enjoyed "a measure of extra-territoriality incompatible with the imposition of another nationality".[21] In reply, France contended that the Treaties concerned had lapsed by virtue of the doctrine *clausula rebus sic stantibus*, the capitulatory régime having lost its reason of existence with the setting up of a judicial system in conformity with French legislation.

[16] I.C.J. Reports, 1960, at pp. 37-39.
[17] *Ibid.*, at p. 39.
[18] *Ibid.*, at p. 40.
[19] *Ibid.*, at p. 43.
[20] I.C.J. Reports, 1952, at p. 188.
[21] P.C.I.J., Series B, No. 4, at p. 29.

30. The Court did not find it necessary to rule upon this point, other than by stating that no pronouncement could be made without recourse to the principles of international law concerning the duration of the validity of treaties. The Court did, however, conclude that the question raised did not "by international law, fall solely within the domestic jurisdiction of a State".[22] The Court also recognized that, so far as Morocco was concerned, Great Britain had continued to exercise capitulatory rights in the French Protectorate of Morocco.[23] See also *Finnish Shipowners Case*, paras. 106-107 *infra*.

(B) Succession to treaty rights and obligations relating to territory

Island of Palmas case (1928)

Netherlands v. *United States*

Arbitrator (Huber) appointed under a Special Agreement of 23 January 1925

Reports of International Arbitral Awards, vol. II, p. 829

31. The Netherlands and the United States both claimed sovereignty over the Island of Palmas, the claim of the United States being based on the Treaty of 1898 in which Spain had ceded her rights of sovereignty over the Philippines and the surrounding area, including the Island of Palmas, to the United States.

32. The Arbitrator agreed that the United States had succeeded to such title as Spain had possessed and could transfer, but held that the Spanish claim based on discovery gave rise only to an inchoate title, which could not prevail over the title founded on the continuous and peaceful display of sovereignty evidenced by the Netherlands.

Case concerning the Temple of Preah Vihear (Cambodia v. Thailand) merits (1962)

Cambodia v. *Thailand*

International Court of Justice, I.C.J. Reports 1962, p. 6

33. This dispute between Cambodia and Thailand regarding sovereignty over the Temple of Preah Vihear turned largely on the interpretation to be given to the proceedings of two frontier commissions established in 1904 and 1907 under treaties between France, on behalf of Indo-China, including Cambodia, and Thailand. The Judgement of the International Court was founded on the succession by Cambodia to the rights granted to France under the treaties in question.

Case of the Free Zones of Upper Savoy and the District of Gex (1932)

France v. *Switzerland*

Permanent Court of International Justice, Series A/B No. 46.

34. By a Treaty of 1816 between Sardinia and Switzerland relating to the delimitation of the political frontier between the two countries, restrictions were placed on the imposition of customs dues by Sardinia in the District of St. Gingolph. The Treaty was followed in 1829 by a manifesto of the Sardinian Court of Accounts which further described the restrictions placed on the District. After 1860, when Sardinia transferred the Free Zone of Upper Savoy, including the District of St. Gingolph, to France, France continued to observe the restrictions. However, in 1919 France suggested to Switzerland that the régime established regarding the Zones should be revised and an indication to that effect incorporated in the Versailles settlement. Accordingly article 435 of the Treaty of Versailles contained a statement that France and Switzerland were to agree to an amendment to the status of the Zones. The question at issue between the parties was whether that status could be abolished, in the light of article 435, without the express consent of Switzerland.

35. The Court's Judgment upholding the need for Switzerland's consent was based on the clear recognition by France of the special status established during the period of Sardinian sovereignty in relation to the District of St. Gingolph and on the nature of the rights created by international agreement, which attached to the territory concerned.

> "With particular regard to the zone of Saint-Gingolph, the Court being of opinion that the Treaty of Turin of March 16th, 1816, has not been abrogated by Article 435, paragraph 2, of the Treaty of Versailles, with its Annexes, the same is true as regards the Manifesto of the Royal Sardinian Court of Accounts of September 9th, 1829. This Manifesto, moreover, which was issued in pursuance of royal orders, following upon the favourable reception by H.M. the King of Sardinia of the request of the Canton of Valais based on Article 3 of the said Treaty of Turin, terminated an international dispute and settled, with binding effect as regards the Kingdom of Sardinia, what was henceforward to be the law between the parties. The concord of wills thus represented by the Manifesto confers on the delimitation of the zone of Saint-Gingolph the character of a treaty stipulation which France must respect as Sardinia's successor in the sovereignty over the territory in question."[24]

(C) Nature of treaty obligation

Case of British interests in Spanish Morocco (1925)

Spain v. *Great Britain*

Arbitrator (Huber) appointed under a Special Agreement of 29 May 1923

Reports of International Arbitral Awards, vol. II, p. 614

36. Great Britain and Spain agreed to arbitrate a number of disputes involving damage to the interests of British nationals which had occurred in the Spanish Zone of Morocco. One of these disputes concerned the British Consul's house at Rio Martin. Under a Treaty concluded in 1783 between Great Britain and the Maghzen of Morocco, the latter undertook to provide a house for the British Consul at Rio Martin. The Consul subsequently occupied the house until 1914, although after 1895 only as a summer residence. In 1896 the British diplomatic agent entered into negotiations for the exchange of the house at Rio Martin for another in Tetuan. The Moroccan authorities agreed to this request, although no site was actually agreed upon by the British and Moroccan authorities until 1907.

37. Great Britain claimed that Spain, which had later obtained a Protectorate over part of Morocco, including Tetuan, had succeeded to the existing obligations of the Moroccan authorities in respect of the house. Spain contended that the agreement reached between

[22] *Ibid.*

[23] *Ibid.*, at p. 30.

[24] P.C.I.J., Series A/B, No. 46, at p. 145.

1896 and 1907 was no more than a declaration and was not binding upon the protecting State in the absence of a Sherifian decree. The Arbitrator held that the exchange of correspondence between the British and Moroccan authorities showed a sufficiently clear agreement between them and that there was no need to inquire into Moroccan constitutional law on the matter.

38. The Arbitrator held that Spain had succeeded, as protecting Power, to the obligations of the Maghzen in respect of the exchange of houses. The obligation had been perfected inasmuch as it constituted a *pactum de contrahendo* and its executory nature did not render it binding solely on the Maghzen, as Spain contended.

III. State succession in relation to private rights and concessions

(A) Principle of respect for private rights

Settlers of German origin in territory ceded by Germany to Poland (1923)

Germany, Poland

Permanent Court of International Justice, Series B, No. 6

39. The Council of the League of Nations requested the Permanent Court of International Justice to give an advisory opinion on the question whether or not the Polish Government had acted in conformity with its international obligations in seeking to cancel, or in refusing to recognize, certain contracts for the occupation of land held by settlers of German origin who had acquired Polish nationality in consequence of the transfer of territory from Germany to Poland.

40. The contracts, under which the settlers held land from the State, were of two kinds, both offering considerable security of tenure. The first, the *Rentengutsverträge,* were special amortization contracts between the Prussian Government and the tenant-purchaser which were concluded by an *Auflassung,* or formal declaration of the transfer of ownership. The Polish Government refused to recognize any *Rentengutsverträge* which had not been concluded by *Auflassung* before the Armistice with Germany on 11 November 1918.

41. Upon examination of the provisions of German law, the Court determined that the *Rentengutsverträge* gave rise to vested rights enforceable against the vendor even before the conclusion of an *Auflassung.* As regards the question of State succession, the Court rejected the view that the contracts were of a "personal" nature, binding only on the original parties, and that the *Rentengutsverträge* were curtailed by the cession of territory.

> "Private rights acquired under existing law do not cease on a change of sovereignty. No one denies that the German Civil Law, both substantive and adjective, has continued without interruption to operate in the territory in question. It can hardly be maintained that, although the law survives, private rights acquired under it have perished. Such a contention is based on no principle and would be contrary to an almost universal opinion and practice."[25]

42. The Court stated firmly that the new territorial sovereign was bound to respect private rights.

> "The Court is here dealing with private rights under specific provisions of law and of treaty, and it suffices for the purposes of the present opinion to say that even those who contest the existence in international law of a general principle of State succession do not go so far as to maintain that private rights including those acquired from the State as the owner of the property are invalid as against a successor in sovereignty."[26]

43. Upon examination of the pertinent provisions of the Minorities Treaty and of the Treaty of Versailles, the Court held that Poland's actions were unjustified. Whilst the Peace Treaty did not "in terms formally announce the principle that, in the case of a change of sovereignty, private rights are to be respected ... this principle is clearly recognized by the Treaty".[27] The position was not affected in the opinion of the Court by the political motive originally connected with the *Rentengutsverträge*; they remained contracts under civil law. As regards the formal transfer of ownership by *Auflassung* between 11 November 1918 and the entry into force of the Treaty of Peace under which the territory was ceded, the Court held as follows:

> "The settlers were already in legal possession of the lands in which they had invested their money, and to which they had already acquired rights enforceable at law; and the Prussian State was not forbidden to perform the usual administrative acts under its pre-existing contracts with private individuals, especially where the delay in the performance of such acts had been due to the disturbed conditions arising from the war."[28]

44. The second class of contracts were leases (*Pachtverträge*) concluded prior to 11 November 1918 and converted before the entry into force of the Treaty of Versailles into *Rentengutsverträge* by the German Government. The Court held that this exchange of contracts ". . . was a reasonable and proper operation in the ordinary course of management of land".[29] Accordingly, the Court held that the refusal of the Polish Government to recognize the transfer by the Prussian State could not be justified:

> "As the Prussian State retained and continued to exercise its administrative and proprietary rights in the ceded territory until this territory passed to Poland under the Treaty of Peace, the only ground on which the position of Poland could be justified is, in the opinion of the Court, the contention that the granting of the *Rentengutsverträge* was prohibited by the provision in the Spa Protocol, by which the German Government engaged, while the Armistice lasted, not to take any measure that could diminish the value of its domain, public or private, as a common pledge to the Allies for the recovery of reparations. The Court thinks that in view of the connexion which has been shown to exist between the *Pachtverträge* and the *Rentengutsverträge*, it would be an unreasonable straining of the prohibition in the Protocol to hold that it precluded the Prussian State from granting, prior to the passing of the territory to Poland, a *Rentengutsvertrag* to the holder of a *Pachtvertrag* granted prior to the Armistice."[30]

[25] P.C.I.J., Series B, No. 6, at p. 36.

[26] *Ibid.*

[27] *Ibid.*, at p. 38.

[28] *Ibid.*, at p. 40.

[29] *Ibid.*, at p. 42.

[30] *Ibid.*, at pp. 42-43.

GERMAN INTERESTS IN POLISH UPPER SILESIA (1926)

Germany v. *Poland*

Permanent Court of International Justice, Series A, No. 7.

45. Germany presented a claim before the Permanent Court of International Justice regarding certain German interests in the part of Upper Silesia ceded to Poland by Germany after the First World War. The interests included a factory at Chorzow which had been operated by a German company under a contract concluded with the German Government in 1915, under which the latter had retained ownership of the land, buildings and installations. In December 1919 the German Government sold its interests to a second, newly established company, the shares of which were held by a third company of which the German Reich was the creditor. The second company was entered as owner in the local land registry in January 1920. The territory having then been transferred to Poland, a Polish court held in July 1922, in reliance on article 256 of the Treaty of Versailles and the provisions of a Polish law passed in 1920 and extended to Polish Upper Silesia in 1922, that the registration was null and void. The property rights were then registered in the name of the Polish Treasury and an agent of the Polish Government took over the operation of the factory.

46. Germany contended that the relevant provisions of the 1920 Polish law, which declared void interests acquired from the German Government after the date of the Armistice, were contrary to the German-Polish Convention concerning Upper Silesia concluded at Geneva in 1922. The major part of the case was therefore concerned with determining the compatibility of these two instruments. Article 1 of the Geneva Convention stated that the law in force in Upper Silesia was to be maintained, subject to consequences arising out of the transfer of sovereignty and modifications thereby involved. Whilst Poland was accordingly permitted to make certain changes in existing legislation, a special procedure was laid down for settling disputes as to the suitability of a particular enactment. The Court held that:

> "The reservation ... in regard to consequences arising out of the transfer of sovereignty and modifications thereby involved, cannot, in the Court's opinion, relate to laws such as that of July 14th, 1920, but rather to constitution and public law provisions the maintenance of which would have been incompatible with the transfer of sovereignty."[31]

47. The first section of the Geneva Convention was divided into three headings of which the third, entitled "Expropriation" set out the express conditions under which Poland might expropriate German-owned "undertakings belonging to the category of major interests including mineral deposits and rural estates" (article 6). Regarding this section the Court held that:

> "... there can be no doubt that the expropriation allowed under Head III of the Convention is a derogation from the rule generally applied in regard to the treatment of foreigners and the principle of respect for vested rights. As this derogation itself is strictly in the nature of an exception, it is permissible to conclude that no further derogation is allowed. Any measure affecting the property, rights and interests of German subjects covered by Head III of the Convention, which is not justified on special grounds taking precedence over the Convention, and which oversteps the limits set by the generally accepted principles of international law, is therefore incompatible with the régime established under the Convention ... It follows from these same principles that the only measures prohibited are those which generally accepted international law does not sanction in respect of foreigners; expropriation for reasons of public utility, judicial liquidation and similar measures are not affected by the Convention."[32]

48. In the opinion of the Court the Treaty of Versailles had clearly recognized "the principle that, in the event of a change of sovereignty, private rights must be respected".[33]

49. As regards the sale of the interests of the German Reich in 1919, after the Armistice Agreement and the Treaty of Versailles, the Court held that:

> "Germany undoubtedly retained until the actual transfer of sovereignty the right to dispose of its property, and only a misuse of this right could endow an act of alienation with the character of a breach of the Treaty."[34]

50. Having determined that the sale by Germany of her immediate interests in the factory was a genuine and *bona fide* transaction involving public property, the Court then held that the application to the German company set up in 1919 of article 256 of the Treaty of Versailles[35] (as Poland contended)

> "... must, in accordance with the principles governing State succession—principles maintained in the Treaty of Versailles and based on considerations of stability of legal rights—be construed in the light of the law in force at the time when the transfer of sovereignty took place."[36]

51. Since Germany had not owned the factory when sovereignty had been transferred, the company had therefore already acquired a right of ownership which Poland was bound to respect, in accordance with the principle of respect for vested rights—

> "a principle which, as the Court has already had occasion to observe, forms part of generally accepted international law, [and] which, as regards this point, amongst others, constitutes the basis of the Geneva Convention".[37]

52. The Court also held that the operation of the factory by the Polish Government was contrary to the provisions of the Geneva Convention as regards the company which had previously run the factory.

(B) PRIVATE RIGHTS OVER LAND ACQUIRED FROM NATIVE RULERS

G. R. BURT (FIJIAN LAND CLAIMS) (1923)

United States v. *Great Britain*

Great Britain-United States Arbitral Tribunal established under a Special Agreement of 18 August 1910

[31] P.C.I.J., Series A, No. 7, at p. 22.

[32] *Ibid.*

[33] *Ibid.*, at p. 31.

[34] *Ibid.*, at p. 30.

[35] This article provided for the transfer of public property to the successor State.

[36] P.C.I.J., Series A, No. 7, at p. 41.

[37] *Ibid.*, at p. 42.

Reports of International Arbitral Awards, vol. VI, p. 93.

53. In 1868 G. R. Burt, a United States citizen, purchased a tract of land in the Fiji Islands from the local paramount chief and from certain other subordinate chiefs. The transaction was executed by means of three deeds and a certificate. The following year the land was laid waste by an unruly tribe and Burt was forced to evacuate the property. In 1874 the Fiji Islands were ceded to Great Britain by Treaty. Article 4 of the Treaty provided that in cases where land was not occupied or required by the native tribes or had not become the *bona fide* property of a foreigner, title was to vest in the British Crown. After the cession Great Britain set up a board of land commissioners to determine the validity of titles to land. Burt's claim before the board having failed, the claim was brought before the British-American Arbitral Tribunal.

54. The Tribunal found that:

> "... the precise question before this Tribunal is whether Great Britain, as the succeeding Power in the islands under the deed of cession of 1874, failed in any respect to observe and carry out any obligation toward Burt which it may be properly said, from the point of view of international law, to have assumed. If Burt had at the time a valid title to the lands, it is plain that under all the circumstances the Government was bound to recognize and respect it."[38]

55. Great Britain argued that Burt had not acquired a valid title since the grant of land by the chiefs alone was ineffective unless the express consent of a special class of *"taukeis"*, defined as occupiers of the soil, was obtained.

56. Since the chiefs had certainly assumed the right to dispose of land as they chose and Great Britain herself, in accepting the deed of cession, had acted on the theory that they were competent to convey title, the Tribunal held that Burt had obtained a valid title which Great Britain, as the succeeding Power, was bound to recognize.

ISAAC M. BROWER (FIJIAN LAND CLAIMS) (1923)

United States v. *Great Britain*

Great Britain-United States Arbitral Tribunal established under a Special Agreement of 18 August 1910

Reports of International Arbitral Awards, vol. VI, p. 109

57. The Tribunal held that although the claimant had gained a valid title from the local chief in accordance with the principles laid down in the *Burt* case,[39] the islands which formed the subject of the claim had only a speculative value. Only nominal damages were awarded therefore against Great Britain, which had refused to recognize the claimant's title.

WEBSTER CLAIM (1925)

United States v. *Great Britain*

Great Britain-United States Arbitral Tribunal established under a Special Agreement of 18 August 1910

Reports of International Arbitral Awards, vol. VI, p. 166

58. Between 1836 and 1839 William Webster, a United States citizen, purchased large tracts of land in New Zealand from native chiefs and tribes. In 1839 the British Government appointed a Lieutenant-Governor of New Zealand and directed him to proclaim that Great Britain would "not acknowledge as valid any title to land, which either has been or shall hereafter be acquired in that country", unless derived from and confirmed by the British Crown. Great Britain entered into a treaty of cession with the native chiefs and tribes in 1840.

59. Land commissions were appointed to examine titles derived from the natives and to recommend Crown grants in lieu thereof, up to a maximum of 2,500 acres, unless more was specially authorized. Webster submitted a claim and was allowed 42,000 acres. The contention before the British-American Arbitral Tribunal was that the various native grants should have been given effect as regards their entire extent, over and above the 42,000 acres granted by the Crown.

60. The Tribunal found that the system of native land tenure in New Zealand prior to 1840 had no clear concept regarding conveyance of title to land and was therefore to be distinguished from the situation in the Fiji Islands dealt with in the *Burt* case.[40] No "specific customary law as to the manner or effect of... wholesale alienations of communal property"[41] had grown up. Thus although the chiefs, representing the political organization of the natives, were capable of conveying sovereignty to Great Britain, something less than dominium, as understood in developed law, had been conveyed to Webster as regards his land. Having regard also to the indeterminate boundaries of the land forming part of the native grant and the exchange of Webster's title in respect of 42,000 acres, under native customary law, for a Crown grant, the Tribunal therefore rejected Webster's claim.

ADOLPH G. STUDER CLAIM (1925)

United States v. *Great Britain*

Great Britain-United States Arbitral Tribunal established under a Special Agreement of 18 August 1910

Reports of International Arbitral Awards, vol. VI, p. 149.

61. Between 1875 and 1877 Adolph G. Studer, a United States citizen, secured a cession of land from the Sultan of Muar in Malaya, under an instrument executed in accordance with the common law system of tenure. The Sultan died in 1877 and his dominions were annexed by the Sultan of Johore. In 1885 Great Britain assumed international responsibility for the Government of Johore.

62. The claim on behalf of Studer was that he had been deprived of the benefits of his concessions owing to its non-recognition by the Sultan of Johore. The Tribunal found that the evidence presented did not suffice to enable it to proceed to a decision and recommended that the case be referred to the local courts in Johore. Regarding the construction of the deed of cession, however, the Tribunal stated as follows:

[38] R.I.A.A., vol. VI, at p. 98.

[39] See *G. R. Burt (Fijian Land Claims)*, paras. 53-56 *supra*.

[40] *Loc. cit.*

[41] R.I.A.A., vol. VI, at p. 168.

"The construction to be placed upon the grant itself has been debated at great length. On the one hand, we are asked to hold that the deed must be construed at its face value, in accordance with the principles of western systems of land tenure, as a conveyance of title in fee simple; on the other, it is argued that the instrument must be interpreted in the light of the Malay customary law, and that so construed it has the effect of a mere permit to enter and cultivate, such permit being personal to the grantor and lapsing with his death. The Tribunal has not before it any authoritative statement of the Malay customary law applicable to the State of Muar in 1876 and 1877. The situation in this respect offers serious complications. We are dealing with a transition period; and while it is plain that the native customary law, whatever it may have been, ultimately gave way to the white man's law, the point of time at which it can fairly be said that the process had advanced far enough to embrace the possibility of a grant of this form and character is, in our opinion, hardly susceptible of determination on the record before us. The evidence of actual practice at the period under consideration is fragmentary and inconclusive."[42]

(C) Principle of respect for concessions granted by preceding State

Case of the Zeltweg-Wolfsberg and Unterdrauburg-Woellan Railway (1933, 1934, 1938)

Austria, Yugoslavia, Railway Company Zeltweg-Wolfsberg and Unterdrauburg-Woellan

Arbitrators (Guerrero, Mayer and Politis) appointed under resolutions of the Council of the League of Nations of 26 and 30 May 1933

Reports of International Arbitral Awards, vol. III, p. 1795

63. Arbitrators were appointed to settle a dispute between the Railway Company and the States territorially concerned in order that agreements could be entered into regarding the future operation of the railway, in accordance with the Treaty of St. Germain. The Company had been given a ninety-year concession in 1897 by the Austro-Hungarian Government; as a result of the territorial changes brought about by the 1919 Peace Settlement, the Zeltweg-Wolfsberg portion of the railway remained in Austria and the Unterdrauburg-Woellan portion came under Yugoslav sovereignty.

64. The case turned chiefly on the application to the particular facts of the case of the provisions of article 320 of the Treaty of St. Germain, providing for the administrative and technical reorganization of railway lines situated in the territory of more than one State as a result of the dismemberment of the former Austro-Hungarian Monarchy, by means of an agreement between the owning company and the States concerned. As regards this reorganization, the Arbitrators were of the opinion that:

"L'article 320 se borne à confirmer, ainsi que l'a reconnu la jurisprudence antérieure, ce principe du droit public international que les droits tenus par une compagnie privée, d'un acte de concession, ne sauraient être mis à néant ou lésés du seul fait que le territoire sur lequel est assis le service public concédé a changé de nationalité . . ."[43]

Case of the Sopron-Köszeg Railway (1929)

Sopron-Köszeg Railway Company v. *Austria and Hungary*

Arbitrators (Guerrero, Kalff and Mayer) appointed by decision of the Council of the League of Nations of 8 and 26 September 1928, under article 320 of the Treaty of St. Germain and article 304 of the Treaty of Trianon

Reports of International Arbitral Awards, vol. II, p. 961

65. In 1907 the Sopron-Köszeg Railway Company was granted a ninety-year railway concession by the Royal Hungarian Government. Under an agreement between the Government and the Company in 1909, the Government took over the operation of the railway, subject to paying to the Company an agreed share of the receipts. As a result of the territorial changes brought about by the Treaties of St. Germain and Trianon, the middle section of the railway passed through Austria and the two ends remained in Hungary.

66. Article 320 of the Treaty of St. Germain and article 304 of the Treaty of Trianon provided that the railways of the former Austro-Hungarian Monarchy which passed through several States were to be subject to administrative and technical reorganization by agreement between the Company owning the railway and the States concerned. Having reached agreement with Hungary but having failed to reach agreement with Austria, the Company brought the dispute before the Council of the League of Nations which appointed three Arbitrators to determine the case.

67. As regards the validity vis-à-vis Austria of the concession contract and the operating contract of 1909, the Arbitrators held that:

". . . en principe, les droits tenus par une compagnie privée, d'un acte de concession, ne sauraient être mis à néant ou lésés du seul fait que le territoire sur lequel est assis le service public concédé a changé de nationalité; . . . la majorité des auteurs et les solutions de la pratique internationale les plus conformes à la conception moderne du droit des gens sont en ce sens."[44]

68. However, in view of the events which had occurred since 1907 and 1909, and the provisions of the Treaties providing for reorganization of the Austro-Hungarian railways, the Arbitrators concluded that:

". . . les dispositions contractuelles qui régissaient la Compagnie . . . avant la guerre ne peuvent être déclarées ni totalement invalidées par l'effet des changements de souveraineté qui ont affecté les territoires sièges de son entreprise, ni davantage totalement valides et exécutoires dans leur lettre et teneur jusqu'à la fin de la concession."[45]

69. Under the wide powers granted to them the Arbitrators proceeded to lay down the details of the reorganization of the railway, including the purchase of the entire line by Austria.

See also "Barcs-Pakrac Railway Case", *Reports of International Arbitral Awards*, vol. III, p. 1569.

[42] *Ibid.*, at p. 152.

[43] R.I.A.A., vol. III, at p. 1803.

[44] R.I.A.A., vol. II, at p. 967.

[45] *Ibid.*, at p. 969.

CENTRAL RHODOPE FORESTS CASE (1931; 1933)

Greece v. *Bulgaria*

Arbitrator (Undén) appointed by the Council of the League of Nations under article 181 of the Treaty of Neuilly

Reports of International Arbitral Awards, vol. III, p. 1389 and p. 1405

70. Article 181 of the Treaty of Neuilly of 1919 provided that private rights guaranteed in earlier Treaties between Turkey and Bulgaria, Greece and Serbia, respectively, in 1913-1914, should not be affected by transfers of territory made in execution of the later Treaty. A dispute arose between Bulgaria and Greece regarding the application of the article to certain forests situated in territory ceded to Bulgaria by Turkey in 1913.

71. Before the transfer, the Ottoman Government had granted a concession for the exploitation of the forests to a certain company, the owners of which became Greek nationals after the First World War. Bulgaria refused to recognize the concession, however, and granted a fresh concession to another company.

72. During preliminary hearings to determine whether article 181 was applicable to the dispute, the Arbitrator stated that:

"Un principe général du droit commun international, celui du respect, sur un territoire annexé, des droits privés regulièrement acquis sous le régime antérieur, se trouve expressément sanctionné par le Traité de Neuilly, suivant l'exemple des traités de paix de 1913-1914."[46]

He also declared that article 181 contained:

"... une consécration expresse du principe bien connu du respect des droits acquis dans des territoires cédés, c'est-à-dire le renouvellement à la charge de l'Etat cessionnaire, d'une obligation incombant à l'Etat cédant."[47]

73. During the hearings on the merits it was argued on behalf of Bulgaria that the concessionary rights were merely personal obligations, giving cutting rights in the forests, and that Greece could not therefore bring an international claim in respect of them. The Arbitrator stated his opinion as follows:

"Dans le cas présent il est question de l'interprétation de l'article 181 du Traité de Neuilly et de l'article 10 du Traité de Constantinople. Le premier de ces deux articles parle de "droits privés" et le second de "droits acquis". L'article 11 du Traité de Constantinople énonce, en outre, une règle spéciale concernant les "droits de propriété foncière". Il paraît nécessaire, en raison du contexte, d'interpréter les deux premières expressions comme n'étant pas limitées aux droits réels. Or, si, après l'annexion du territoire dont il s'agit, le Gouvernement bulgare avait promulgué une loi annulant par exemple toutes les créances acquises, avant l'annexion, sur les habitants du territoire, cette loi aurait dû être considérée comme incompatible avec l'article 10 du Traité de Constantinople.

"En ce qui concerne les droits de coupe, on peut dire que ceux-ci ne sont pas entièrement annulés puisque le droit subsidiaire à une indemnité, accordé aux ayants droit par les cédants en vertu des contrats de coupe, n'a pas, à ce que l'on sache, été abrogé. Des doutes peuvent donc surgir au sujet de la compétence du Gouvernement hellénique pour intervenir en faveur des personnes possédant les droits de coupe. Il est aussi bien possible que, d'après le droit ottoman, les droits de coupe fussent si précaires qu'une cession régulière de l'immeuble à un nouveau propriétaire aurait eu pour effet l'impossibilité de faire valoir le droit de coupe envers ce dernier, en le transformant en un droit d'indemnité à l'égard du cédant. Ce point n'a pas été entièrement éclairci au cours du procès. Mais, dans le cas présent, le Ministre bulgare de l'Agriculture a interdit, en pleine connaissance des prétentions des réclamants, toute coupe ultérieure, en invoquant pour seule raison le fait que les forêts seraient propriété d'Etat conformément à la loi forestière bulgare de 1904. Le Gouvernement bulgare a donc pris une mesure directement dirigée contre les droits de coupe aussi et basée sur la thèse — non légitime — que la cession de ce genre de droits aurait été inadmissible parce que les forêts étaient propriété d'Etat. Dans ces conditions, il n'est guère douteux que l'attitude du Gouvernement bulgare à l'égard des droits de coupe ne fût incompatible avec le respect des "droits acquis", imposé à la Bulgarie par l'article 10 du Traité de Constantinople."[48]

74. Having determined that the actions of Bulgaria were not in full accordance with the obligations imposed by the Treaty of Neuilly and that restitution to the original position would not be possible, the Arbitrator ordered that Bulgaria should pay damages based on the value of the exploitation contracts at the date of actual dispossession in 1918, together with an equitable rate of interest from that date.

(D) SUBROGATION OF SUCCESSOR STATE TO CONCESSIONARY RIGHTS AND OBLIGATIONS OF PRECEDING STATE

THE MAVROMMATIS PALESTINE CONCESSIONS (1924)

Greece v. *Great Britain*

Permanent Court of International Justice, Series A, No. 2

75. Greece brought a claim against Great Britain before the Permanent Court of International Justice on the ground that the Government of Palestine, and consequently the British Government, had wrongfully refused to give full recognition to a number of concessionary contracts entered into by Mavrommatis, a Greek national, with the Ottoman authorities in Palestine, before Great Britain became the Mandatory on behalf of the League of Nations. Article 26 of the Mandate provided that disputes between the Mandatory and another Member of the League of Nations regarding the "interpretation or the application" of the provisions of the Mandate should be submitted to the Permanent Court of International Justice if settlement could not be reached by negotiation.

76. In determining whether or not it had jurisdiction the Court considered the interpretation to be given to article 11 of the Mandate, which provided that "subject to any international obligations accepted by the Mandatory", the Administration of Palestine should have full powers to assume public ownership or control over public works, services or utilities. The Court held that the "international obligations accepted by the Mandatory" included in this instance those contained in

[46] R.I.A.A., vol. III, at p. 1396.
[47] *Ibid.*, at p. 1401.
[48] *Ibid.*, at p. 1426.

Protocol XII of the Treaty of Lausanne. This stated that concessions granted by the Turkish Government or by any Turkish local authority before 29 October 1914 were to be maintained by the Mandatory, subject to a right, within a limited period, to purchase the concessions or to permit their readaptation to the change in circumstances. The case (and the Court's subsequent Judgment, *The Mavrommatis Jerusalem Concessions*)[49] was therefore largely concerned with the application of the provisions of Protocol XII to the group of concessions held by Mavrommatis which had been concluded before 29 October 1914 and the acts taken by the Mandatory which affected those concessions.

77. Another group of concessions held by Mavrommatis, however, were not duly signed by the Ottoman authorities until 1916 and were never confirmed by imperial *Firman*, as Ottoman law required. Before concluding that it lacked jurisdiction under article 26 of the Mandate to consider these concessions, since they did not satisfy the time limit specified in the Protocol, the Court stated that:

> "It will suffice to observe that if on the one hand, Protocol XII being silent regarding concessions subsequent to October 29th, 1914, leaves intact the general principle of subrogation, it is, on the other hand, impossible to maintain that this principle falls within the international obligations contemplated in Article II of the Mandate as interpreted in this judgment. The Administration of Palestine would be bound to recognise the Jaffa concessions, not in consequence of an obligation undertaken by the Mandatory, but in virtue of a general principle of international law to the application of which the obligations entered into by the Mandatory created no exception."[50]

LIGHTHOUSES CONCESSIONS CASE (1956)

France v. *Greece*

Arbitral Tribunal established under a Special Agreement of 15 July 1931

Award dated 24-27 July 1956

Claim No. 8

78. This claim concerned the seizure by the Greek Government of the lighthouse receipts collected by the concession holders, a French firm, and otherwise due to the Ottoman Treasury, when Greek forces seized Salonica in 1912. The initial measures of seizure were modified by a provisional *modus vivendi* under which the Greek Treasury received the proceeds subject to a deduction by the firm of its operating costs. This arrangement, which was to be followed by a final settlement, continued after Greece acquired sovereignty over Salonica. So far as concerned acts during the period of belligerent occupation, the Tribunal held that the claim on behalf of the firm succeeded on the ground that the lighthouse dues were not public enemy property but the property of the concessionnaires and therefore protected by the Hague Regulations of 1907. The position was different as regards the period after sovereignty had passed to Greece on 25 August 1913.

> *"... A partir de cette date, la Grèce fut subrogée, par l'effet rétroactif retardé de l'article 9 du Protocole XII du Traité de paix de Lausanne de 1923, à l'Empire ottoman dans tous les droits et charges de ce dernier par rapport à la concession."*[51]

79. Greece was therefore held to be entitled to the share of the lighthouse receipts formerly payable to the Ottoman Government, subject, however, to a previous assignment of those revenues which had been made by the Ottoman Government to its creditors. This assignment operated to confer a private right which Greece was bound to respect.

Claim No. 26

80. The French firm Collas and Michel presented a claim on the ground that, between 1919 and 1929, they had only been able to collect dues expressed in drachmas, the value of which was falling, whilst the original concession granted by Turkey in 1860 had been based on gold values. The Tribunal held that the claim should succeed, at least to the extent that the Greek Government was bound by the principle of good faith to take the necessary steps to enable the firm to continue to operate the concessions on an equitable basis.

> *"... En effet, le principe de la bonne foi dans l'interprétation de la concession commandait qu'à raison de la dévaluation de la drachme et des perturbations qui en résultaient pour l'équilibre financier de la concession, l'Etat successeur procédât aux mesures nécessaires pour assurer la continuation de l'exploitation de la concession à des conditions équitables."*[52]

Counterclaim No. 1

81. Greece submitted a counterclaim for its share of the lighthouse dues collected by Collas and Michel between 1913 and 1928. It was held that the plea must fail on the ground that, although Greece had succeeded to Turkey's position as the grantor State in respect of the lighthouse concession, her right to receive the share of the lighthouse receipts formerly going to Turkey was subject to the latter's prior assignment of that share to certain creditors, as guarantee for State loans raised in 1904, 1907 and 1913.[53]

Counterclaims Nos. 3-6

82. These counterclaims covered the period from 1915 to 1929 when Collas and Michel had collected lighthouse dues although the Greek Government was actually operating the lighthouses. It was held that the counterclaim of the Greek Government should succeed to the extent that the firm had been relieved of operating costs.

Claim No. 27

83. The concession contracts entered into between Turkey and Collas and Michel provided that Turkey might take over the lighthouse administration, subject to the payment of compensation as agreed beforehand by the parties or as determined by arbitration. In 1929 the Greek Government seized the lighthouse administration, without however paying compensation to the firm.

84. The Tribunal held that the claim of Collas and Michel to compensation should succeed on the ground that Greece had been subrogated to the position of Turkey under the concession contracts and could there-

[49] P.C.I.J., Series A, No. 5; see paras. 120-121 *infra*.

[50] P.C.I.J., Series A, No. 2, at p. 28.

[51] Award dated 24-27 July 1956, at p. 96.

[52] *Ibid.*, at pp. 111 and 112.

[53] See also *Lighthouses Concessions Case, Counterclaim No. 1*, paras. 110-111 *infra*.

fore only take over the lighthouse administration under the same conditions.

"Par sa mainmise sur le service des phares de la Société à partir du 1er janvier 1929 sans paiement — ou garantie de paiement — préalable d'une indemnité, arrêtée dans des conditions qui en assurent l'équité, le Gouvernement hellénique, en tant que successeur dans la concession par subrogation, a accompli un acte d'autorité directement contraire à une de ses clauses essentielles."[54]

IV. State succession in relation to responsibility for delicts and breach of contract

Robert E. Brown Case (1923)

UNITED STATES *v.* GREAT BRITAIN

Great Britain-United States Arbitral Tribunal established under a Special Agreement of 18 August 1910

Reports of International Arbitral Awards, vol. VI, p. 120

85. Robert E. Brown, a United States citizen, applied in 1895 for a number of licences to prospect on a Transvaal gold field which had been made available to the public by official proclamation. His application was refused on the opening day on the ground that the Government had withdrawn the proclamation in pursuance of a resolution of the Executive Council. Brown nevertheless pegged out 1,200 claims and began an action in the High Court of the Transvaal demanding the grant of a licence for the claims or, alternatively, £372,400 damages. The Court gave judgment in Brown's favour on the ground that the original proclamation could not be withdrawn or set aside except by another duly published proclamation and ordered that Brown should be granted the licences. The licences then issued, however, were for one month only and were without the usual privilege of renewal. Brown therefore fell back on his claim for damages. His claim came before the High Court which had been reorganized by the Executive after the earlier judgment, in the course of a dispute between the Judiciary and the Executive which had culminated in the dismissal of the Chief Justice who had delivered the major opinion and in the curtailment of the Court's powers to review the constitutionality of official acts. The New Court held that Brown's claim for damages must be dismissed and that he should bring a fresh claim. Brown was thereupon advised that, as a result of the changes in the powers of the Judiciary, any fresh claim for relief before the Transvaal courts would be fruitless.

86. After the annexation of the South African Republic by Great Britain, Brown submitted his claim to the British authorities, which refused to acknowledge it on the ground that Brown had not exhausted all local remedies. The claim was subsequently presented before the British-American Arbitral Tribunal.

87. The Tribunal found that "Brown had substantial rights of a character entitling him to an interest in real property or to damages for the deprivation thereof",[55] and that he had been deprived of those rights by the Government of the South African Republic in a manner amounting to a denial of justice under international law.

88. Dealing with the question whether a claim for damages based on this denial of justice lay against the British Government, the Tribunal continued:

"... we are equally clear that this liability never passed to or was assumed by the British Government. Neither in the terms of peace granted at the time of the surrender of the Boer Forces, nor in the Proclamation of Annexation, can there be found any provision referring to the assumption of liabilities of this nature. It should be borne in mind that this was simply a pending claim for damages against certain officials and had never become a liquidated debt of the former State. Nor is there, properly speaking, any question of State succession here involved. The United States plants itself squarely on two propositions: first, that the British Government, by the acts of its own officials with respect to Brown's case, had become liable to him; and, secondly, that in some way a liability was imposed upon the British Government by reason of the peculiar relation of suzerainty which is maintained with respect to the South African Republic."[56]

89. Having examined these contentions, the Tribunal concluded:

"... We have searched the record for any indication that the British authorities did more than leave this matter exactly where it stood when annexation took place. They did not redress the wrong which had been committed nor did they place any obstacles in Brown's path; they took no action one way or the other. No British official nor any British court undertook to deny Brown justice or perpetuate the wrong. The Attorney General of the Colony, in his opinion, declared that the courts were still open to the claimant. The contention of the American Agent amounts to an assertion that a succeeding State acquiring a territory by conquest without any undertaking to assume such liabilities is bound to take affirmative steps to right the wrongs done by the former State. We cannot endorse this doctrine."[57]

90. The Tribunal also dismissed the claim based on the suzerainty of the British Government over the South African Republic prior to annexation, on the ground that the authority possessed by Great Britain at the time of the occurrences under consideration "fell far short of what would be required to make her responsible for the wrong inflicted upon Brown",[58] and did not entitle that country to interfere in the internal affairs of the Republic.

Hawaiian Claims (1925)

Great Britain v. *United States*

Great Britain-United States Arbitral Tribunal established under a Special Agreement of 18 August 1910

Reports of International Arbitral Awards, vol. VI, p. 157

91. These claims were presented by Great Britain on behalf of a number of British subjects who had been wrongfully imprisoned or forced to leave Hawaii by the local authorities prior to the cession of the Hawaiian Republic to the United States in 1898. Al-

[54] Award dated 24-27 July 1956, at p. 133.

[55] R.I.A.A., vol. VI, at p. 128.

[56] *Ibid.*, at p. 129.

[57] *Ibid.*, at p. 130.

[58] *Ibid.*

though Great Britain tried to distinguish the *Robert E. Brown* case,[59] on the ground that in cases of cession, as opposed to conquest, the succeeding State was liable for its predecessor's international delicts, the Tribunal refused to accept the distinction and held that the claims failed in accordance with the Tribunal's ruling in the *Robert E. Brown* case:

"'It is contended on behalf of Great Britain that the Brown Case is to be distinguished because in that case the South African Republic had come to an end through conquest, while in these cases there was a voluntary cession by the Hawaiian Republic as shown (so it is said) by the recitals of the Joint Resolution of Annexation. We are unable to accept the distinction contended for. In the first place, it assumes a general principle of succession to liability for delict, to which the case of succession of one State to another through conquest would be an exception. We think there is no such principle. It was denied in the Brown Case and has never been contended for to any such extent. The general statements of writers, with respect to succession to obligations, have reference to changes of form of government, where the identity of the legal unit remains, to liability to observe treaties of the extinct State, to contractual liabilities, or at most to quasi-contractual liabilities. Even here, there is much controversy. The analogy of universal succession in private law, which is much relied on by those who argue for a large measure of succession to liability for obligations of the extinct State, even if admitted (and the aptness of the analogy is disputed), would make against succession to liability for delicts. Nor do we see any valid reason for distinguishing termination of a legal unit of international law through conquest from termination by any other mode of merging in, or swallowing up by, some other legal unit. In either case the legal unit which did the wrong no longer exists, and legal liability for the wrong has been extinguished with it."[60]

ADMINISTRATIVE DECISION NO. 1 (1927)

United States, Austria, Hungary

Claims Commissioner (Parker) appointed under Special Agreement of 26 November 1924

Reports of International Arbitral Awards, vol VI, p. 203

92. In the course of this arbitration regarding the responsibility of Austria and Hungary for the acts of the former Austro-Hungarian Monarchy, the Commissioner stated that, having regard to the pertinent Treaties,

"It will not be profitable to examine the divergent views maintained by European continental writers on international law as compared with those of Great Britain and the United States with respect to liability of a successor State for the obligations either *ex contractu* or *ex delicto* of a dismembered State. It is, however, interesting to note in passing that while one group maintains that such obligations pass with succession and are apportioned between the successor States, and while the other group maintains that the obligations do not pass with succession, neither group maintains that a *joint* liability rests upon two or more successor States where the Territory of a dismembered State has been divided between them."[61]

The Commissioner concluded that there was no obligation on Austria and Hungary to pay double compensation, nor were they jointly liable.

LIGHTHOUSES CONCESSION CASE (1956)

France v. *Greece*

Arbitral Tribunal established under a Special Agreement of 15 July 1931

Award dated 24-27 July 1956
Claim 12 a

93. In 1911 a local Turkish naval commandant removed, without prior notification, a buoy belonging to the French lighthouse concession holders. The Company protested to the Turkish Admiralty, which apparently admitted its responsibility but did not discharge the debt. The French Government claimed that Greece had succeeded to Turkey's obligations in the matter, relying in support of its contention on certain international precedents, including the conditions under which France ceded the territory of Chandernagore to India in 1951. Referring to this precedent, the Tribunal stated:

"On comprend que, dans un tel cas de cession gratuite et gracieuse d'un territoire à un autre Etat, l'Etat cédant tienne à être libéré des obligations qui peuvent encore lui incomber du chef de travaux de construction, d'amélioration, de réparation et autres ordonnés pour des objets d'utilité publique et qui ne profiteront dorénavant qu'à l'Etat concessionnaire."[62]

94. The Tribunal continued that, in the case of this cession by France and in that of the cession of the Sulu Islands by Great Britain to the United States in 1930,

"... il s'agit ... de situations toutes spéciales, régies par des stipulations conventionnelles particulières dont il n'est pas loisible de tirer des conclusions en faveur de l'existence d'un principe général de droit coutumier devant régir également d'autres hypothèses relevant d'une solution conventionnelle propre."[63]

95. The Arbitrators therefore held the precedents inapplicable to the claim relating to the buoy. On the merits, they found that the removal of the buoy was a normal measure of national security taken by the Turkish authorities, whose duty to pay compensation depended on the terms of the concession in the light of international administrative law. The Arbitrators continued:

"... Même à supposer que ladite obligation fût hors de doute, elle comptait parmi les charges de la Turquie vis-à-vis "... des sociétés dans lesquelles les capitaux des autres Puissances contractantes sont prépondérants", visées à l'article 9 du Protocole XII du Traité de paix de Lausanne du 24 juillet 1923. Or la subrogation des Etats successeurs dans de telles charges stipulée pour les territoires détachés de la Turquie en vertu dudit traité de paix n'aurait effet, selon le même article 9, qu'à dater de la mise

[59] See paras. 85-90 *supra*.
[60] R.I.A.A., vol. VI, at p. 158.
[61] *Ibid.*, at p. 210.
[62] Award of 24-27 July 1956, at p. 74.
[63] *Ibid.*, at p. 74.

en vigueur du traité par lequel le transfert du territoire a été stipulé. Au point de vue purement grammatical il serait possible d'interpréter cette stipulation comme comportant l'obligation pour l'État successeur, in casu *la Grèce, de prendre à son compte, dès la date visée audit article 9, toutes les charges de la Turquie vis-à-vis de la Société, même celles qui auraient leur origine dans des faits antérieurs à cette date, mais ce n'est certes pas dans ce sens que la stipulation en question puisse être interprétée. La date critique sert évidemment de terme à la responsabilité turque et de point de départ à la responsabilité hellénique en ce sens que tout ce qui s'est passé avant la date critique et qui peut avoir engendré des charges vis-à-vis de la Société concessionnaire continue à donner lieu à la responsabilité de l'Etat turc. On ne peut admettre que, en marge de cette distribution conventionnelle des responsabilités selon le temps, quelque autre principe autonome et complémentaire, emprunté à la doctrine générale relative à la succession d'Etats, puisse être invoqué pour renverser les effets juridiques de ladite distribution des responsabilités selon le Protocole.*

"La Grèce ne saurait, dès lors, être réputée responsable des dommages causés par l'enlèvement de la bouée du Vardar effectué en 1911 par les autorités navales ottomanes."[64]

Claims Nos. 11 and 4

96. These claims, both involving the responsibility of Greece as successor State to the autonomous State of Crete, were dealt with together, although the Tribunal recognized that they required separate juridical analysis. Claim No. 11 arose out of the request of the Cretan authorities in 1903 that the French Company holding the concession should set up two new lighthouses. Having obtained the approval of the Turkish Admiralty the Company undertook a number of surveys. When the Ottoman Government finally agreed, after appreciable delay, to grant the necessary credits for the construction of the lighthouses, the Cretan Government had changed its attitude and requested the Company to substitute it for the Turkish Government and to pay to it the share of the lighthouse revenues otherwise going to the latter Government. The Company was unable to agree to these conditions, but failed to recover the cost of the expenditure it had undertaken, either from the Cretan authorities or from Greece, after the latter had acquired sovereignty over Crete.

97. Claim No. 4 derived from a Cretan law of 1908, ratifying an agreement whereby the Cretan Government had granted a monopoly of *cabotage* to a Greek shipping company, with express exemption from payment of lighthouse dues under the concession. The Greek Government failed to stop this practice, and even continued it after Greece had itself succeeded to supreme power on the island.

98. In both cases the Tribunal found it necessary to consider the two Judgments given by the International Court of Justice in 1934 and 1937 respectively,[65] in order to determine the extent to which those Judgments dealt with the present claims and were binding on the Tribunal as *res judicata*. In the course of an elaborate decision, the Tribunal distinguished the two Judgments and held them not binding upon it. The Tribunal concluded as follows regarding the Judgment given in 1937:

"Dans son exposé des motifs la Cour fait expressément coïncider la date de la disparition des derniers liens politiques turco-crétois avec celle de l'attribution de l'île à la Grèce, mais elle se refuse nettement à entrer dans un examen de la portée du régime de large autonomie octroyé à l'île antérieurement à 1913, sauf au point de vue de son importance pour le problème spécifique de "détachement" final.[66] *Par conséquent, les effets internationaux dudit régime de large autonomie à tous autres points de vue ont été écartés par la Cour en termes exprès, et c'est précisément ce régime d'autonomie qui joue un rôle important dans la solution des controverses soulevées par les réclamations Nos 11 et 4."*[67]

99. The Tribunal then gave its decision on the merits of the two claims. As regards Claim No. 11, the Arbitrators held that responsibility was divided between the Firm, the Cretan Government and the Turkish Government, and continued:

"Partant de cette répartition de la responsabilité pour les événements de 1903 à 1908 entre les trois parties intéressées d'alors, le Tribunal ne voit aucun motif raisonnable pour charger après coup de cette responsabilité, entière ou même partielle, la Grèce, qui n'avait absolument rien à voir avec les agissements desdites parties. Pas même la part de la responsabilité collective à impartir à l'Etat autonome de Crète pour les événements de 1903 à 1908 ne saurait être considérée comme étant dévolue à la Grèce. Une telle transmission de responsabilité ne se justifie dans l'espèce ni au point de vue spécial de la succession finale de la Grèce aux droits et charges de la concession en 1923/1924, ne fût-ce que pour le motif que lesdits événements se sont déroulés en dehors du jeu de la concession, ni au point de vue plus général de sa succession à la souveraineté territoriale sur la Crète en 1913.

"Les rapports entre cette succession territoriale, d'une part, et l'ordre et le contre-ordre du Gouvernement crétois de 1903 et de 1908, de l'autre, sont trop éloignés pour justifier une décision qui fasse retomber sur la Grèce et sur la seule Grèce la responsabilité collective d'actes et d'omissions d'autrui qui lui sont complètement étrangers.

"Au surplus, il s'agit ici d'une réclamation qui n'était ni reconnue, quant à son bien-fondé, par l'Empire ottoman ou par la Crète, ni fixée par une instance compétente quelconque, ni liquide ou aisément liquidable sur la base des faits ayant donné lieu à sa naissance."[68]

100. The Tribunal found that there were other considerations present in the case of Claim No. 4. In the first place, the action of Crete in granting exemption from lighthouse dues was in direct violation of the concession which was binding on her, either as an autonomous State or as a territorial subdivision of the Ottoman Empire. Secondly, since the shipping company concerned was registered in Greece, which had close relations with Crete, the former must have been aware of what was being done. Lastly, the Greek

[64] *Ibid.*, at pp. 74-75.
[65] See at paras. 8-9 and 10-11 *supra.*
[66] P.C.I.J., Series A/B, No. 71, p. 103.
[67] Award of 24-27 July 1956, at p. 80.
[68] *Ibid.*, at p. 81.

Government had itself continued the practice after acquiring territorial sovereignty. The pertinent section of the Award, which has not yet been published in the Reports of International Arbitral Awards, is set out at length below.

"Les considérations ci-dessus exposées sont-elles également concluantes pour tenir la Grèce responsable de la violation de la concession commise antérieurement à ladite date et dont l'une de ses compagnies de navigation a indûment profité?

"Pour les raisons indiquées ci-dessus, sub A, à propos de la réclamation No. 12 une telle responsabilité ne saurait se fonder sur la succession de la Grèce à la concession en vertu de la clause spéciale contenue dans l'article 9 du Protocole XII, annexé au Traité de paix de Lausanne. Elle ne pourrait résulter que d'une transmission de responsabilité en vertu des règles de droit coutumier ou des principes généraux de droit régissant la succession des Etats en général. Le fait que la stipulation spéciale dudit Protocole XII a défini l'étendue et le point de départ de la succession de la Grèce dans les droits et charges concessionnels de la Turquie n'empêche pas, par lui-même, que la Grèce puisse être considérée comme ayant succédé également, mais à un autre titre, aux droits et charges correspondants de l'Etat autonome de Crète.

"Envisagée de ce point de vue, la question de la transmission de responsabilité en cas de changement territorial présente toutes les difficultés d'une matière qui n'a pas encore suffisamment mûri pour permettre des solutions certaines et également applicables à tous les cas possibles. Il n'est pas moins injustifié d'admettre le principe de la transmission comme une règle générale que de le dénier. C'est plutôt et essentiellement une question d'espèce dont la solution dépend de multiples facteurs concrets.

"S'agit-il d'obligations contractuelles ou délictuelles — de droit privé ou de droit public — reconnues ou non reconnues — liquides ou non liquides — odieuses ou non odieuses? S'agit-il d'un cas de démembrement total d'un Etat préexistant, de la sécession d'une colonie ou d'une partie d'un Etat, ou s'agit-il plutôt de la fusion de deux Etats précédemment indépendants, de l'incorporation d'un Etat dans un autre? Jusqu'à quel point y a-t-il lieu, dans cette dernière hypothèse, en vue de résoudre le problème, de tenir compte des relations plus ou moins étroites entre l'Etat incorporant et l'Etat incorporé, du caractère volontaire ou non volontaire de leur réunion?

"Il se peut qu'une solution parfaitement adéquate aux éléments essentiels d'une hypothèse déterminée se révèle tout à fait inadéquate à ceux d'une autre. Il est impossible de formuler une solution générale et identique pour toutes les hypothèses imaginables de succession territoriale et toute tentative de formuler une telle solution identique doit nécessairement échouer sur l'extrême diversité des cas d'espèce. C'est pourquoi le Tribunal n'attache pas d'importance décisive aux rares précédents disparates de la jurisprudence internationale ou nationale et n'accepte comme concluants, en leur généralité, ni le jugement de la Cour hellénique pour les îles de la Mer Egée de 1924 (No 27) [Themis, vol. 35, p. 294], cité dans l'Annual Digest of Public International Law Cases 1923/1924, No 36, reconnaissant la transmission de responsabilité à la Grèce même en matière de dettes purement délictuelles, ni ceux de l'American and British Claims Arbitration Tribunal des 23 novembre 1923 et 10 novembre 1925, la déniant dans les cas comparables de l'annexion à la Grande-Bretagne par la force des armes de l'Etat du Transvaal et de l'incorporation aux Etats-Unis de l'archipel de Hawaii. La diversité des hypothèses possibles de succession territoriale, les considérations politiques qui souvent président à la solution des problèmes juridiques y relatifs et la rareté des décisions arbitrales ou judiciaires qui résolvent le problème d'une manière vraiment nette et sans équivoque à la suite d'une argumentation convaincante expliquent tant les flottements de la pratique internationale que l'état chaotique de la doctrine.

"Dans le cas d'espèce, il s'agit de la violation d'une clause contractuelle par le pouvoir législatif d'un Etat insulaire autonome dont la population avait durant des dizaines d'années passionnément aspiré, même par la force des armes, à s'unir à la Grèce, considérée comme mère patrie, violation reconnue par ledit Etat lui-même comme constituant une infraction au contrat de concession, réalisée en faveur d'une compagnie de navigation ressortissant à ladite mère patrie, endossée par cette dernière comme si cette infraction était régulière et finalement maintenue par elle, même après l'acquisition de la souveraineté territoriale sur l'île en question.

"Dans de telles conditions, le Tribunal ne peut arriver qu'à la conclusion que la Grèce, ayant fait sienne la conduite illégale de la Crète dans son passé récent d'Etat autonome, est tenue, en qualité d'Etat successeur, de prendre à la charge les conséquences financières de l'infraction au contrat de concession. Sinon, la violation avouée d'un contrat commise par l'un des deux Etats liés par un passé et un destin communs, de l'assentiment de l'autre, aurait, au cas de leur fusion, comme conséquence foncièrement injuste d'anéantir une responsabilité financière certaine et de sacrifier les droits incontestables d'une société privée concessionnaire à un soi-disant principe général de non-transmission de dettes en cas de succession territoriale, qui en réalité n'existe pas comme principe général et absolu. Dans ce cas-ci, le Gouvernement hellénique a à bon droit commencé par reconnaître lui-même sa responsabilité.

"Dans les développements qui précèdent, le Tribunal est parti de la prémisse que les actes des autorités crétoises de 1908 constituent la violation d'une clause contractuelle. Le Tribunal tient à ajouter à ces développements argumenti causa *que même si l'on considérait la dette ainsi créée par la violation d'une clause contractuelle comme une dette délictuelle ou quasi délictuelle à raison de son origine dans un acte illicite de l'Etat, la conclusion n'en serait pas différente. La thèse, plutôt doctrinale que jurisprudentielle, selon laquelle il ne saurait jamais être question de transmission — ou plus correctement: de transition, puisqu'il ne s'agit pas ici d'effets d'actes de volonté humaine, mais plutôt de conséquences automatiques et de plein droit de changements territoriaux — d'obligations délictuelles à l'Etat successeur n'est pas, dans sa généralité, bien fondée. Ici encore la solution devra dépendre des traits particuliers à chaque cas d'espèce. Une obligation créée par un délit international proprement dit, commis en violation directe du droit des gens, tel que l'envahissement d'un territoire neutre ou la destruction arbi-*

traire d'un navire exempt du droit de prise, est de toute autre nature qu'une obligation qui prend son origine dans le domaine du droit privé ou du droit administratif et qui ne donne naissance à une réclamation internationale qu'à la suite d'un déni de justice. L'hypothèse de l'union volontaire de deux Etats indépendants en un Etat unitaire ou fédératif diffère essentiellement de celle de l'annexion d'un Etat à un autre par la force des armes. Le démembrement d'un Etat unitaire en deux ou plusieurs Etats nouveaux présente des traits caractéristiques qui diffèrent de ceux inhérents à la sécession d'une colonie de la mère patrie comme un nouvel Etat indépendant. Toutes ces différences ne peuvent pas ne pas exercer une influence décisive sur la solution du problème de la succession d'Etats même en obligations délictuelles. Quelle justice, ou même quelle logique juridique y aurait-il, par exemple dans l'hypothèse d'un délit international commis contre une autre Puissance par un Etat qui ultérieurement se scinde en deux Etats nouveaux indépendants, à considérer ces derniers comme déliés d'une obligation internationale de réparation qui aurait sans aucun doute possible pesé sur l'Etat ancien prédécesseur, auteur du délit? Certaines tendances dans la doctrine nécessitent donc clairement une reconsidération à raison de la nature différente des obligations délictuelles possibles et de la diversité des hypothèses possibles de succession territoriale.

"L'argument doctrinal qui est quelquefois invoqué à l'appui de la théorie de la non-transmission de dettes délictuelles ou quasi délictuelles par certains auteurs de langue allemande, à savoir que ces dettes présenteraient un caractère "au plus haut degré personnel" (höchstpersönlich) n'a aucune force convaincante. Si cet argument formulait en vérité un principe général de droit, il devrait également jouer et au même titre dans le droit civil, mais il est loin d'en être ainsi. Bien au contraire, les dettes délictuelles de personnes privées, qui présenteraient exactement le même caractère "hautement personnel", passent généralement aux héritiers. Ce n'est pas à dire que les principes de droit privé soient applicables comme tels en matière de succession d'Etats, mais seulement que le seul argument qui soit quelquefois invoqué pour nier la transmission de dettes délictuelles n'a pas de valeur.

"Le Tribunal estime par conséquent que, contrairement à la réclamation No 11, la réclamation No 4, qui au surplus n'a rien d'odieux pour la Grèce et est susceptible de liquidation aisée, doit être admise."[69]

Claim No. 1

101. The Tribunal upheld this claim presented by Collas and Michel in respect of the non-payment of the lighthouse dues by ships which had been requisitioned by Greece during the occupation of Turkish territory and which had continued not to pay even after the territory concerned had passed to Greece. Greece argued that no dues were required under the concession under a clause exempting warships "properly so called." It was held that this provision did not apply to requisitioned ships and that Greece was therefore liable for having acted in violation of the concession. See also *Lighthouses Concession Case, Claim No. 27,* paras 83-84, *supra.*

[69] *Ibid.*, at pp. 82-4.

V. State succession in relation to public property and public debts, including apportionment of debts and revenue

(A) State succession in relation to public property

APPEAL FROM A JUDGMENT OF THE HUNGARO-CZECHOSLOVAK MIXED ARBITRAL TRIBUNAL (THE PETER PÁZMÁNY UNIVERSITY *v.* THE STATE OF CZECHOSLOVAKIA) (1933), HUNGARY *v.* CZECHOSLOVAKIA

Permanent Court of International Justice, Series A/B No. 61

102. Czechoslovakia appealed to the Permanent Court of International Justice against a judgment given by the Hungaro-Czechoslovak Mixed Arbitral Tribunal, in which it had been held that Czechoslovakia should return certain landed property, situated in territory transferred from the former Austro-Hungarian Monarchy in Czechoslovakia, to the Peter Pázmány University of Budapest.

103. The Government of Czechoslovakia argued before the Permanent Court that the University of Budapest lacked legal capacity to pursue its claim, its personality having been merged with that of the Hungarian State; such property as it might own was therefore public in character and could be retained by Czechoslovakia as the successor State. The Permanent Court, however, whilst stating that article 191, paragraph 1, of the Treaty of Trianon,[70] which provided for the transfer of public property to the successor State, "applies the principle of the generally accepted law of State succession",[71] found that the University had a juridical personality independent of that of the Hungarian State and accordingly upheld its claim for the restoration of its properties as a private body.

CESSION OF VESSELS AND TUGS FOR NAVIGATION ON THE DANUBE (1921)

Allied Powers (Czechoslovakia, Greece, Rumania, Serb-Croat-Slovene Kingdom); Germany, Austria-Hungary and Bulgaria.

Arbitrator (Hines) appointed under Treaty of Versailles, article 339; article 300 of Treaty of St. Germain; article 284 of Treaty of Trianon and article 228 of Treaty of Neuilly-sur-Seine

Reports of International Arbitral Awards, vol. I, p. 97

104. The above-mentioned articles provided for the cession of vessels and tugs by Germany, Austria, Hungary and Bulgaria to the Allied Powers, according to the amounts and specifications determined by an Arbitrator designated by the United States. The Arbitrator was also empowered to decide questions relating to vessels whose ownership or nationality was in dispute. The Award given dealt largely with the application of the laws of war and of the particular articles of the Peace Treaties relating to shipping seized by the Allied Powers during October and November 1918.

105. In the course of the proceedings Czechoslovakia presented a claim to a proportion of the property of

[70] "States to which territory of the former Austro-Hungarian Monarchy is transferred and States arising from the dismemberment of that Monarchy shall acquire all property and possessions situated within their territories belonging to the former or existing Hungarian Government."

[71] P.C.I.J., Series A/B, No. 61, at p. 237.

certain shipping companies which the former Austrian Empire and Hungarian Monarchy had either owned, in whole or in part, or subsidized, on the ground that "these interests were bought with money obtained from all the countries forming parts of the former Austrian Empire and of the former Hungarian Monarchy, and that such countries contributed thereto in proportion to the taxes paid by them, and therefore, are to the same proportionate extent the owners of the property".[72] Austria and Hungary argued that Czechoslovakia had no rights to succeed to property except those granted under the Treaties of St. Germain and Trianon, which confined Czechoslovakia's rights of succession to State property situated in Czechoslovakia. The Arbitrator held that he lacked jurisdiction under the treaty provisions to consider Czechoslovakia's claim.

CLAIM OF FINNISH SHIPOWNERS AGAINST GREAT BRITAIN IN RESPECT OF THE USE OF CERTAIN FINNISH VESSELS DURING THE WAR (1934)

Finland v. *Great Britain*

Arbitrator (Bagge) appointed under a Special Agreement of 30 September 1932

Reports of International Arbitral Awards, vol. III, p. 1479

106. During 1916 and 1917 thirteen ships belonging to Finnish shipowners were used by the British Government, having been handed over to the British authorities by the Russian Government under wartime agreements entered into between the two States. After the war, when Finland became independent, the shipowners claimed payment for the ships used, including compensation for three ships which had been sunk. The British Board set up to deal with such claims dismissed the application on the ground that the requisition had been carried out by Russia and not by Great Britain. The Finnish Government referred the matter to the Council of the League of Nations, which recommended that the preliminary question of whether or not the municipal remedies available under English law had been exhausted should be submitted to arbitration.

107. In the course of the arbitral proceedings it was argued that the Finnish Government had succeeded to the position of the Russian Government under the wartime agreements with Great Britain, under which Great Britain had agreed to pay Russia at official charter rates, as regards ships over which the Finnish State had become sovereign and which belonged to persons who had become Finnish nationals. This argument was apparently accepted by the Arbitrator, although he did not find it necessary to give an express ruling on this aspect in reaching the conclusion that the Finnish shipowners had in fact exhausted the means of recourse available to them under English law.

(B) STATE SUCCESSION IN RELATION TO THE PUBLIC DEBT

OTTOMAN PUBLIC DEBT ARBITRATION (1925)

Bulgaria, Iraq, Palestine, Transjordan, Greece, Italy and Turkey

Arbitrator (Borel) appointed under articles 46 and 47 of the Treaty of Lausanne, 1923, by the Council of the League of Nations

Reports of International Arbitral Awards, vol. I, p. 529

108. The Treaty of Lausanne of 1923 provided for the partition of the Ottoman public debt between Turkey, the newly created States which had formed part of the Ottoman Empire, and the States which had received territory, formerly within the Ottoman Empire, either after the Balkan Wars or after the First World War, according to the proportion of the total revenue of each of the ceded territories to the average total revenue of the Ottoman Empire during the financial years 1910-1912.

109. In the course of the arbitration regarding the application of the provisions of the Treaty, Iraq, Palestine and Transjordan argued that there was no principle of international law requiring States acquiring territory to take over a share of the public debt; the Treaty of Lausanne had therefore defined the proportion to be borne by such States as a treaty obligation, and any excess was to be met by Turkey. The Arbitrator stated his opinion as follows:

"... il n'est pas possible, malgré les précédents déjà existants, de dire que la Puissance cessionnaire d'un territoire est, de plein droit, tenue d'une part correspondante de la dette publique de l'Etat dont il faisait partie jusqu'alors. La solution du problème ici soulevé est à chercher dans le Traité même, et, à l'égard de la D.P.O., la situation juridique de la Turquie n'est nullement identique à celle des autres Etats intéressés. En droit international, la République turque doit être considérée comme continuant la personnalité de l'Empire ottoman. C'est à ce point de vue qu'évidemment le Traité se place, preuve en soient les articles 15, 16, 17, 18 et 20, qui n'auraient guère de sens si, aux yeux des Hautes Parties contractantes, la Turquie était un Etat nouveau, au même titre que l'Irak ou la Syrie. La raison d'être de l'article 99 du Traité n'est pas celle qu'a indiquée, lors des débats, le Représentant du Gouvernement turc. Elle réside dans le fait que la guerre a été considérée comme ayant mis fin, entre Puissances belligérantes, à toutes conventions autres que celles dont le trait particulier est de déployer leurs effets précisément au cours des hostilités; et la déclaration formelle faite à Lausanne par M. Bompard (Actes de la Conférence de Lausanne, 1ère série, Tome III, p. 221) prouve que le point de vue auquel se place la Turquie n'a pas été admis par les autres Puissances signataires du Traité. La D.P.O. est sa dette, dont elle n'est libérée que dans la mesure où le Traité l'en décharge pour en grever d'autres Etats (article 46, alinéa 2)."[73]

LIGHTHOUSES CONCESSION CASE (1956)

France v. *Greece*

Arbitral Tribunal established under a Special Agreement of 15 July 1931

Award dated 24-27 July 1956

Counterclaim No. 1[74]

110. Greece submitted a counterclaim for its share of the lighthouse dues collected by the French concession holders, Collas and Michel, between 1913 and

[72] R.I.A.A., vol. I, at p. 120.

[73] R.I.A.A., vol. I, at p. 573.

[74] See also *Lighthouses Concession Case, Counterclaim No. 1*, para. 81, *supra*.

1928. It was held that the plea must fail on the ground that, although Greece had succeeded to Turkey's position as the grantor State in respect of the lighthouse concession, her right to receive the share of the lighthouse receipts formerly going to Turkey was subject to the latter's prior assignment of that share to certain creditors, as guarantee for State loans raised in 1904, 1907 and 1913. The loans in question had been maintained by the Treaty of Lausanne, and Greece was amongst the successor States called upon to repay them.

"Le maintien des avances et leur répartition entre la Turquie et les Etats successeurs étaient en accord complet avec les principes généraux du droit international public commun, prescrivant le respect des droits patrimoniaux acquis en cas de changements territoriaux. La seule question douteuse dans ce domaine est celle de savoir si un droit patrimonial particulier compte parmi ces droits acquis. Le Tribunal n'hésite pas, toutefois, à considérer comme tels des droits découlant d'un contrat d'emprunt, tel que les contrats précités, conclus entre un Etat et une ou plusieurs personnes privées."[75]

111. The Treaty of Lausanne had made certain changes in the method and rate of repayment of the loans, but in all other respects *"les contrats continuent d'être régis par leur propre loi"*.[76] Default on the part of a successor State in making repayment in accordance with the Treaty provisions (as had occurred in the case of Greece) "... *quelle qu'en puisse avoir été la raison, n'a eu d'autre effet que de maintenir les droits et obligations préexistants dans leur teneur primitive.*"[76]

(C) Apportionment of the public debt and revenue

LIGHTHOUSES CONCESSION CASE (1956)

France v. *Greece*

Arbitral Tribunal established under a Special Agreement of 15 July 1931

Award dated 24-27 July 1956

Claim No. 8[77]

112. During its decision relating to this Claim the Tribunal considered the question of the basis for the division of lighthouse receipts between Greece and Turkey according either to the proportion of the former Ottoman coastline held by Greece, or according to the place of collection.

"... Le Tribunal adopte la dernière solution. Rien ne suggère en effet que l'article 9 du Protocole XII de Lausanne ait envisagé une méthode de répartition des droits et charges de la concession parmi les Etats successeurs autre que celle qui consiste à s'adapter à la division nouvelle des territoires turcs en unités géographiques nationales distinctes. On peut constater ainsi que la répartition des droits et charges résultant de la concession obéit à d'autres principes qu'à ceux qui ont été appliqués à la répartition des dettes."[78]

ADMINISTRATIVE DECISION NO. I (1927)

United States, Austria, Hungary

Claims Commissioner (Parker) appointed under Special Agreement of 26 November 1924

Reports of International Arbitral Awards, vol. VI, p. 203

113. In the course of this arbitration[79] regarding the payment of compensation by Austria and Hungary for the damage caused to United States property by the former Austro-Hungarian Dual Monarchy during the First World War, the Commissioner held that compensation should be borne as to 63.6 per cent by Austria and as to 34.6 per cent by Hungary. It was upon this basis that the former Austrian Empire and the former Kingdom of Hungary had apportioned the joint expenditures of the Austro-Hungarian Dual Monarchy. This ratio of apportionment was also that provisionally adopted by the Reparations Commission set up under the Treaties of St. Germain and Trianon. See also *Cession of Vessels and Tugs for Navigation on the Danube*, paras. 104-105. *supra.*

VI. State succession in relation to the legal system of the preceding State

CENTRAL RHODOPE FORESTS CASE (1931 : 1933)

GREECE *v.* BULGARIA

Arbitrator (Undén) appointed by the Council of the League of Nations under article 181 of the Treaty of Neuilly

Reports of International Arbitral Awards, vol. III, p. 1389 and p. 1405

114. In the course of this arbitration[80] Bulgaria contended that the official certificates issued by the Turkish authorities to Greek concession holders in 1913 were invalid as the Ottoman Empire no longer exercised authority over the territory in question at that date. The arbitrator held that:

"L'engagement assumé par la Bulgarie de respecter les titres officiels émanant des autorités ottomanes implique l'obligation de reconnaître les certificats de propriété dûment émis par l'autorité ottomane compétente sur la base du registre foncier turc dans lequel les immeubles étaient inscrits."[81]

GERMAN INTERESTS IN POLISH UPPER SILESIA (1926)

Germany v. *Poland*

Permanent Court of International Justice, Series A, No. 7

115. In the course of this case between Germany and Poland[82] the Permanent Court held that restrictions imposed by treaty on Poland's legislative authority in the ceded territory could not apply to "constitutional and public law provisions the maintenance of which would have been incompatible with the transfer of sovereignty".[83] See also *Settlers of German Origin in Territory Ceded by Germany to Poland*, paras. 39-44, *supra.*

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75 Award dated 24-27 July 1956, at p. 122.

76 *Ibid.*, at p. 123.

77 See also *Lighthouses Concession Case, Claim No. 8*, paras. 78-79, *supra.*

78 Award dated 24-27 July 1956, at p. 96.

79 See also para. 16, *supra.*

80 See also paras. 70-74, *supra.*

81 R.I.A.A., vol. III, at p. 1427.

82 See also paras. 45-52, *supra.*

83 P.C.I.J., Series A, No. 7, at p. 22.

VII. State succession in relation to nationality

Acquisition of Polish Nationality Case (1924)

GERMANY *v.* POLAND

Arbitrator (Kaeckenbeeck) appointed under a Protocol of 15 April 1934

Reports of International Arbitral Awards, vol. I, p. 401

116. The Treaty of 1919 between the Allied Powers and Poland and article 91 of the Treaty of Versailles provided for the acquisition of Polish nationality by German nationals "habitually resident" in Poland after the cession of territory which followed the First World War. After a dispute had arisen as to the interpretation of the term "habitually resident", the Permanent Court of International Justice stated in an Advisory Opinion[84] that the phrase "habitually resident" (or residence) was to be interpreted by reference to the habitual residence of the parents at the date of birth of the person concerned, and not by reference to the habitual residence of the parents at the date when the Treaty with Poland came into effect. Further difficulties arose, however, as to the practical application of the principle laid down by the Permanent Court and the Council of the League of Nations invited the parties to place their disputes as to questions of interpretation before the President of the Upper Silesian Arbitral Tribunal, to whom full arbitral powers were given.

117. Amongst the various points of detail raised for decision was whether the term "habitual residence" (*domicile*) was to be defined by reference to the whole of Poland or only by reference to the territory ceded by Germany to Poland. The Arbitrator found that, in the absence of any treaty stipulation based on the latter interpretation, the requirement was to be determined by reference to the full extent of Polish territory.

118. The Treaties concerned provided that persons who would otherwise have become Polish nationals might opt for another nationality. Germany contended that those who opted for German nationality might retain their residence in Poland.

"Il faut admettre . . . qu'un Etat cessionnaire a normalement le droit d'exiger l'émigration des habitants du territoire cédé qui ont opté en faveur du pays cédant. Ce principe, consacré par la pratique internationale, et expressément admis par les meilleurs auteurs; se trouve à la base même des dispositions concernant l'option insérées dans les récents Traités de Paix."[85]

119. It was therefore held that the suppression of Poland's right to require the emigration of those opting for another nationality would have been so exceptional as to require an express treaty provision. Since the Treaties concerned contained no strict stipulation but only, at most, a temporary suspension of Poland's right to demand emigration, Poland was entitled to order the optants to leave at the end of the specified period.

The Mavrommatis Jerusalem Concessions (1925)

GREECE *v.* GREAT BRITAIN

Permanent Court of International Justice, Series A, No. 5

120. After its decision in 1924[86] regarding the concessions granted to Mavrommatis by the Ottoman authorities before Great Britain became the Mandatory in Palestine, the Permanent Court of International Justice was asked to consider an objection raised by Great Britain to the effect that, since Mavrommatis was described in the concession as an Ottoman subject, he could not claim the right to benefit by the terms of Article 9 of Protocol XII of the Treaty of Lausanne. This provided for the subrogation of the successor State to the rights and obligations of Turkey "towards the nationals of the other contracting Powers" under concessionary contracts concluded with Ottoman authorities before 29 October 1914. The Court held, however, that Article 9 of Protocol XII "contemplates the real nationality of the beneficiaries" and that it was:

> ". . . on the nationality of the real beneficiaries and not on the mere legal national status of the concessionnaire that the question of subrogation depends."[87]

121. Since the real nationality of Mavrommatis was Greek, Great Britain was held to be under an obligation to respect his concession in accordance with the provisions of the Protocol.

[84] P.C.I.J., Series B, No. 7.

[85] R.I.A.A., vol. I, at p. 427.

[86] P.C.I.J., Series A, No. 2; see paras. 75-77, *supra*.

[87] P.C.I.J., Series A, No. 5, at p. 31.