The Advisory Opinion of the Permanent Court on the Customs Régime between Germany and Austria.

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On May 19th. 1931, the Council of the League requested the Permanent Court to give an advisory opinion on the question whether a régime established between Germany and Austria on the basis and within the limits of the principles laid down by a Protocol of March 19th., 1931, would be compatible with Article 88 of the Treaty of St. Germain and with Protocol No. 1 signed at Geneva on October 4th 1922.

Article 88 of the Treaty of St. Germain is in these terms:

> "The independence of Austria is inalienable otherwise than with the consent of the Council of the League of Nations. Consequently, Austria undertakes in the absence of the consent of the said Council to abstain from any act which might directly or indirectly or by a any means whatever compromise her independence, particularly, and until her admission to membership of the League of Nations, by participation in the affaires of another Power."

The Geneva Protocol of 1922, entered into at the time when Austria was about to be assisted in her work of economic and financial reconstruction, contained declarations by Great Britain, France, Italy, and Czecho-slovakia on the one part, and by Austria on the other part. In the latter Austria

> "undertakes, in accordance with the terms of Article 88 of the Treaty of St. Germain, not to alienate its independence; it will abstain from any negotiations or from any economic or financial engagement calculated directly or indirectly to compromise this independence.
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> This undertaking shall not prevent Austria from maintaining, subject to the provisions of the Treaty of St. Germain, her freedom in the matter of customs tariffs and commercial or financial agreements, and, in general, in all matters relating to her economic régime or her commercial relations, provided always that she shall

not violate her economic independence by granting to any State a special régime of exclusive advantages calculated to threaten this independence."

The more important provisions of the Protocol of March 19th. 1931 whereby the German and Austrian Governments agreed to enter into negotiations for a treaty "to assimilate the tariff and economic policies of their respective countries", were the following. It professed, while maintaining the independence of both states, to be intended to initiate a reorganisation of European economic conditions by regional agreements. Germany and Austria were to agree on a tariff law and a customs tariff to be put into force in both concurrently with the treaty and for the period of its validity. Amendments might be made only by agreement between the parties. There were (unless otherwise agreed) to be no import or export duties between the two countries. The customs administrations were to be independent of one another, but the technical execution of the tariff was to be uniform. Receipts were to be apportioned according to an agreed quota. Each State retained the right to conclude commercial treaties with other States, but the negotiations for such treaties were in general to be conducted jointly; when concluded, separate treaties were to be signed and ratified, but the exchange of ratifications was to be simultaneous. Differences as to the interpretation and application of the treaty were to be settled by an arbitral tribunal composed of German and Austrian nationals in equal numbers, and the tribunal was also to be empowered, in certain cases of failure to reach agreement, to impose a settlement on the parties. If either party should consider that a decision of the tribunal infringed its vital economic interests, it might terminate the treaty by six months' notice. After three years the treaty was to be determinable in any case by one year's notice.

The question for the Court was therefore whether the régime thus proposed to be established was compatible with the obligations of Austria above set out. In their answer to this question the members of the Permanent Court were divided in opinion. Eight judges, (Guerrero, Rostworowski, Fromageot, Altamira, Urrutia, Nejulesco, Anzilotti, and de Bustamante) held that the customs régime would not be compatible with the Protocol of 1922. Of these all except Judge de Bustamante held that it would also not be compatible with the Treaty of St. Germain. Judge Anzilotti, while concurring in the result, disagreed with the reasons on which his colleagues based their conclusions, and expressed his own in a separate opinion. On the other hand seven judges, (Adatci, Kellog, Rolin-Jacquemyns, Hurst, Schücking, van Eysinga, and Wang) thought

that the customs régime was not incompatible either with the Protocol or with the Treaty. It may be of interest to examine the reasoning on which these divergent opinions were severally based.

There is a startling omission in the opinion of the majority of the Court, for it does not, as their colleagues in the minority point out, contain any explanation as to how or why the régime to be set up under the Protocol of March, 1931, would threaten or imperil Austria's independence. The argument in fact stops short at the most critical point and the final conclusion ist bluntly stated *ex cathedra*. It is therefore not easy to discuss the validity of the reasoning on which it is based.

The majority opinion deals with Article 88 of the Treaty of St. Germain, somewhat as follows: Austria has undertaken by this Article not to alienate her independence. She has further undertaken by it to abstain from any act which might directly or indirectly compromise her independence, and this second part of her undertaking is distinct from and goes beyond the first. It means not only that she may not actually alienate her independence, but also that she may not do anything which, so far as can reasonably be foreseen, would be "calculated to endanger" it.

Now on this point it is no doubt possible to argue from the use of the word "consequently" (and the German and Austrian counsel before the Court did argue), that the second sentence of the article illustrates, without adding a further obligation to, the obligation contained in the first sentence. But the Court held rightly, as I think, that the Article imposed two distinct obligations, namely, that Austria would not alienate her independence, and that she would not do any act calculated to endanger it. That being the construction which the Court placed upon the article, one would have expected to find the opinion going on to state the reasons which led seven judges to conclude that one or other of these obligations would be violated by the proposed customs régime. There is no such statement in their opinion as recorded. What the opinion does say on this point is curious; it states definitely that the establishment of the régime would not be an act alienating Austrian independence, (that is to say, it would not violate the first obligation) and it even suggests, though not quite so definitely, that it would not even be an act endangering her independence, (that is, it would not violate the second obligation). ("It may even be maintained, if regard be had to the terms of Article 88 of the Treaty of Peace, that since Austria's independence is not strictly speaking endangered, within the meaning of that article, there would not be, from the point of view of law, any inconsistency with that article.") Yet almost immediately after concurring in this statement of the legal

effect af Article 88, and without a single word to explain the apparent change of view, the seven judges append a note in which they declare that the customs union "would be calculated to threaten the independence of Austria in the economic sphere", and is therefore incompatible with Article 88 of the Treaty.

There is an equally serious hiatus in the Court's reasoning with regard to the Protocol of 1922. They held as a matter of construction that the Protocol created obligations for Austria, which, though closely related to those created by the Treaty, possessed an independent binding force. These obligations constituted "special undertakings from the economic standpoint, i. e. undertakings not only not to alienate her independence, but, from the special economic standpoint, undertakings to abstain from any negotiations or from any economic or financial engagement calculated directly or indirectly to compromise that independence, and still more precisely and definitely, undertakings not to violate her economic independence by granting to any State a special régime or exclusive advantages calculated to threaten this independence." But again the argument, instead of proceeding to show why or in what respect the customs régime would violate these special undertakings, breaks off so abruptly that the reader is almost left to wonder whether by a printer's error something may not have fallen out from the record of the opinion. He is simply told that "if the régime be considered as a whole from the economic standpoint," it is difficult to maintain that it is not calculated to threaten the economic independence of Austria; and consequently that it would not be compatible with the Protocol of 1922.

It is perhaps not surprising that Judge Anzilotti, if he felt himself bound, as he did, to concur in the result at which his colleagues had arrived, should have preferred to state his reasons in a separate opinion. He did so in a closely-reasoned statement which even those to whose minds it may not carry complete conviction must acknowledge to be a contribution of permanent value to international jurisprudence. Judge Anzilotti regards the second sentence of Article 88 as the central point in the whole case, and he points out that the meaning of this sentence depends on the meaning to be given to the word „consequently", which connects it with the first sentence of the Article. The German and Austrian governments had argued that the second sentence merely draws out the consequences of the first; Austria being forbidden by the first sentence to alienate her independence, the acts which the second sentence forbids can, they maintained, only be acts of alienation or acts amounting to alienation; and, since it could hardly be argued that there had been an act of actual alienation, the adoption

of this construction would have been decisive in their favour of the whole case. In a masterly passage Judge Anzilotti decisively rejects this construction. He admits that grammatically the word "consequently" may imply one of two things: either that the second sentence merely draws out the logical consequences of the principle laid down in the first, or that the second sentence lays down rules the purpose of which is to ensure effect being given to that principle. In choosing between these two equally possible interpretations we must therefore look at the natural meaning of the words used in the second sentence; and if we do that, we shall have to admit, he thinks, that the acts which it forbids are something other than acts of actual alienation, are in fact acts calculated to expose Austria's independence to danger. Since this, the natural interpretation of the words used gives a perfectly reasonable meaning to the sentence, it must be adopted; it is in fact the only interpretation which does give a reasonable meaning, since on the other interpretation the second sentence would be superfluous. Finally, this interpretation is confirmed by the fact that the last clause in the sentence cites, as an example of the acts from which Austria is to abstain, an act which is clearly not an act of actual alienation, but merely one that might expose her independence to danger.

Up to this point Judge Anzilotti's argument, of which the above is a very imperfect summary, carries, to the mind of the present writer at least, complete conviction. It establishes that in order to be compatible with Article 88 of the Treaty the customs régime must be neither an act of alienation, nor an act susceptible of exposing Austrian independence to danger.

As to the Protocol of 1922, Judge Anzilotti emphatically dissented from the view of the majority that the customs régime might be incompatible with the Protocol, without being at the same time incompatible with the Treaty. On the contrary in his view the Protocol added nothing to Austria's obligations under the Treaty.

Everything then turns, he says, on the question whether the customs régime must be regarded as an act susceptible of endangering Austria's independence. This is a question not of law, but of fact, in which the respective positions of Austria and Germany are an important element. The answer therefore will depend on considerations largely of a political or economic kind, amongst which are the existence of a movement aiming at the political union of the two countries, the difficulties in maintaining her separate existence created for Austria by the Peace Treaties, and the great disproportion in economic strength between Germany and Austria. An economic union would not necessarily lead to, but it would certainly, he thinks, render more probable the political union towards which a tendency already exists. It is

therefore an act falling within the scope of the second sentence of Article 88.

It is, I submit, at this part of his argument, if at any, that Judge Anzilotti's opinion is vulnerable. The question which he describes as one of fact is so no doubt in the sense in which any question in a court of justice which is not a question of law must be one of fact; but this particular question of fact was unfortunately a question of opinion the answer to which could hardly be based on anything more solid than a personal estimate of future political probabilities. One may doubt whether it was really the duty of the court to engage in speculations of this kind. Judge Anzilotti appears to have thougt that otherwise the question put by the Council could not have been answered, or at any rate could have been answered only in part. The minority judges, at any rate, thought otherwise.

> "The Court", they say, "is not concerned with political considerations nor with political consequences. These lie outside its competence. The Council has asked for the opinion of the Court on a legal question ... The decision must necessarily be based upon the material submitted for its consideration. Unless the material submitted to and passed upon by the Court justifies the conclusions reached, these conclusions cannot amount to more than mere speculations."

The minority appear, as already stated, to have been in some doubt as to the precise respect in which the majority regarded the customs régime as incompatible with the Austrian obligations, but they conjectured from the language of the opinion that it was on the final sentence of the Austrian undertaking in the Protocol of 1922 that the incompatibility was based; that is to say, they believed that the majority had held the régime to be forbidden because it would be a special régime *calculated to threaten* Austrian independence. On this assumption their answer appears to me to be conclusive:

> "No material", they say, "has been placed before the Court in the course of the present proceedings fort he purpose of showing that States which have concluded customs unions have thereby endangered their future existence as States. In the absence of any evidence to that effect, it is not for the Court to assume that the conclusion of a customs union on a basis of complete equality between the two States is calculated to endanger or threaten the future existence of one of them. Still less can the Court assume that loss of independence is a result which either of the States might foresee as the consequence of its acts."

They point out that the régime as a whole cannot constitute a menace

to the independence of Austria, so long as no provision in the Protocol taken by itself, (and none had been indicated by the majority) can be singled out as being incompatible with Austria's obligations. On the contrary the Protocol provided, not for a *fusion* of the two customs territories, but for an *assimilation* of the policies of the two countries on customs matters, so that it would actually become impossible to carry its terms into effect at all if Austria should cease to exist as a separate State. Finally if the establishment of the régime is considered to be a danger to Austria's independence, it can be so only in the sense that its future consequences may lead to that result, but Austria would always be able to avoid such a consequence by excercising her right to denounce the treaty.

The fundamental difference which seems to lie at the reste of the divergent opinions of the majority and of the minority of the Court may perhaps be stated as follows. The majority were prepared to speculate on the possible political sequel of such an event as the customs union. Judge Anzilotti expressly discussed the propriety of such speculation on the part of the Court, and he admitted it because he thought that on no other basis could the Council's question be answered. Whether the other members of the majority felt any hesitation on this ground or not, we have no means of knowing, for there is, as pointed out above, a remarkable hiatus between their reasoning and their conclusion. But is seems almost necessary to assume that this hiatus was bridged in the minds of the majority by a process of political conjecture similar to that which Judge Anzilotti expressly defended. The minority on the other hand regarded this method of reasoning as inadmissible.

Before the opinion of the Court was published, the project of a customs union had, as is well known, been abandoned by Germany and Austria for reasons unconnected with the legal aspect of the case. The importance of the case lies therefore, not in any influence it will have on the course of politics, for it will have no such influence, but in its possible effects on the position of the Court itself. From that point of view it is probably unfortunate that the question was ever remitted to the Court. No doubt it was politically convenient to the Council that it should be remitted, if for no other reason because of the mere delay that this course would entail, a delay which was likely, and indeed proved to be, of the greatest political value. But there is a real danger to the prestige of the Court as a truly judicial tribunal if it should come to be regarded as a useful device for interposing a delay in the development of a critical international situation. That should be the function not of a judicial body, but of the Council itself.

Once however the question had been refered to the Court, the latters position was certainly a difficult one, for the second of the two questions into which the question put by the Council was necessarily subdivided is one that, in the present writers' view at least a court of law ought not to be required to answer. The opinion of a court on the probable course of future political events cannot, from the nature of the case, be of any higher value than would be the opinion of any other body of equally wellinformed persons.

There were however two alternatives, either of which would have been more satisfactory than the present confused result. One was the course taken by the minority, or refusing to say that the customs régime was incompatible with Austria's obligations because, in effect, the Court had no evidence that it was so. The other was suggested, but not adopted, by Judge Anzilotti: the Court might have replied that the Protocol did not constitute an alienation of Austria's independence (a question of pure law), but that the further question whether it was or was not *calculated to endanger* that independence was a matter of political conjecture which the Court could not properly undertake.